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An Examination of the Impact of the Climate of Religious Freedom during the Civil Rights  
Movement on the Pursuit of Civil Rights and Religious Liberty

By

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Doctor of Philosophy

Graduate Division of Religion  
Ethics and Society

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B.A., Grinnell College, 1994  
M.Div., University of Chicago, 2001  
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An abstract of  
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## Abstract

An Examination of the Impact of the Climate of Religious Freedom during the Civil Rights Movement on the Pursuit of Civil Rights and Religious Liberty  
By Darryl D. Roberts

This work builds upon and enriches historical, ethical, and political analyses of the Civil Rights Movement (CRM), by examining how Court battles, fought in secular terms, and spirit-filled ecclesial activism together helped the CRM succeed. It examines three principles that grounded the moral vision and inspired the social action of the CRM: ecclesial (roots of Black Church activism), legal (litigation aimed at purifying the system of unjust laws and racial discrimination), and ethical (Christian calls to love and justice). While other writers have examined the theological and civil rights dimensions of the movement, a distinctive contribution of this work is its attention to a climate of religious freedom that served to fertilize the soil for the spirited activism of the movement. In the decades preceding the CRM, the Court expanded the rights of religious groups to practice their faith without State interference, thus fostering a climate of religious freedom. This climate supported Black Church leaders and congregants in taking their faith to the streets for a cause that had legal and, at least for them, divine significance, and that ultimately yielded broader civil and human rights for all American citizens. Whereas efforts to enforce the Constitution through Court action served the CRM in certain ways, the movement's legacy shows the need for nonviolent protest, rooted in human rights norms, and grounded in Christian values, traditions, and beliefs that spring from the struggles of different communities. Framed in religious, ethical, and legal terms, prayerful protests and Court cases worked together to advance the cause of human rights and constitutional improvement.

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doubt, I am blessed to have each of you in my life, as you have strengthened my faith in the importance of family.

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## **Introduction**

### **I. Examining the interplay of Religion and the State during the Civil Rights**

#### **Movement**

The Civil Rights Movement (hereinafter CRM), which occurred roughly between 1955 and 1968, marked an era of radical social change for the United States of America. The onset of the CRM occurred almost a century after slavery had been legally abolished. Despite the dismantling of slavery, Blacks still faced the painful reality of unfulfilled promises, persistent discrimination, and injustice. The system of Jim and Jane Crow had oppressed black men, and women and inflamed the animus and fears of white men and women, through intimidation, violent force, threats, and reprisals. Prior to the CRM, Blacks had protested occasionally to expand their civil and human rights, but these acts were short-lived, sporadic, and isolated. Slowly, court decisions began to chip away at the foundation of the system of segregation until it began to crack. Finally, a spirited community of blacks, inspired by their faith, encouraged by their leaders, and guided by their Christian principles, rose up to challenge Jim Crow in the “Cradle of the Confederacy.” These activists were emboldened by their belief that persons who denied them their rights should be brought to justice.<sup>1</sup> Activists embraced nonviolence as a way of life for the purpose of expanding civil and human rights. As a method of last resort, civil rights activists violated unjust laws, that were out of harmony with God’s law, to fight social injustice. The CRM grew to include a diverse group of activists of all races and faith traditions, who used a wide range of tactics in pursuit of liberty and justice. The CRM is hailed as one of the greatest demonstrations of massive

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<sup>1</sup> Stewart Burns, *Daybreak of Freedom: The Montgomery Bus Boycott* (Chapel Hill: The University of North Carolina Press, 1997), xii.

civil disobedience in world history.

The goal of this dissertation is to extend and integrate existing scholarship on the CRM and Religion & State by examining the connections between Christian ethics, religious rights, civil rights, and human rights. First, I will articulate how court victories in Religion & State jurisprudence helped to create an environment that led to expansive civil and human rights before and during the CRM. I will show how court rulings fostered a climate of religious freedom, through interactions between the Religion & State, which benefited the CRM. Second, this project flows from an effort to highlight a neglected and important model of religious protest activism during the CRM in Religion & State scholarship. I will explain how select members of the Black church applied their faith to justify the pursuit of justice and equality, in spite of their status as second-class citizens. I will discuss how the Black church and religious leaders invoked divine rights within a zone of religious freedom, inspiring activists to resist institutional evils for the cause of constitutional and cultural improvement.

This dissertation will feature the love ethic and nonviolent civil disobedience, as espoused by Martin Luther King Jr., and others, as key tenets of the relationship between religious freedom, civil rights and human rights. This research presents the CRM as a model of creative and justly threatening religious activism, based upon a vision that was informed by shared American values and religious convictions. Religious activists helped to promote the common good and strengthen democracy, and inspired the masses to dream of an even better world. I conclude with the proposition that, in this post-civil rights era, we should embrace the forms of church-led activism that were grounded in a Christian moral vision of

love and humanity, and that expanded civil and human rights for all.<sup>2</sup>

The implications of this study for the church, the court and civil rights activism are threefold. One aim of this project is to encourage the church to be more intentional about the various ways it lives out its mission in the larger society. This study may lend greater understanding of how the church can leverage its collective resources, in concert with others (including the un-churched and non-believers), to advance civil and human rights. The church often presumes incorrectly that secular institutions and agents understand its purpose and mission. The study of the CRM illustrates how the church might communicate more clearly its core values and social mission to courts and civil and human rights activists. This study also raises awareness regarding the ways in which advances in religious freedom can help and/or hinder the church's effectiveness in promoting the cause of constitutional improvement, particularly with respect to civil and human rights.

A second aim of this dissertation is to encourage the Court to appreciate the indispensable role that social action plays in strengthening the tenets of religious faith and displays of religious expression for many people. Interpretations of the Constitution that privatize religion, and exclude social action, minimize religion and its role in the lives of individuals and of society writ large. The Court should acknowledge that, when a religious litigant defines his/her conduct as an expression of religious faith, the activity is religious, regardless of whether the litigant has made a free exercise claim before the court as First

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<sup>2</sup> I acknowledge throughout the dissertation that not all Black Churches participated in the CRM or see the need to fight for civil and human rights today. I am talking about a particular subset of the African American Black Church tradition that offered a prophetic vision of social protest that saw spiritual and social salvation as two sides of the same coin. Many Black evangelical and conservative churches saw themselves as a sect apart from society, much like the Witnesses, and subordinated the moral goods of agape love, communal responsibility and equality, while at the same time elevated other moral goods such as individual piety, personal salvation, materialism and self-love. The purpose of this project is not to disparage those Black Church traditions that did not participate in the movement for civil and human rights, but to avoid an overly romanticized view of the past so that we can better understand what it took to build a transformational CRM that saw itself as involved and apart of society.

Amendment and Fourth Amendment rights are interconnected. As in the case of the CRM, many religious litigants appealed to alternative legal remedies, rather than religious protections because of the narrow way the free exercise clause has been construed. This legal strategy might point to a limitation of existing legal frameworks, in providing remedies that are inconsistent with how religious individuals or institutions define themselves. This dissertation raises the broader question of how the Court might serve as protector of religion from the tyrannical influences of the State, recognizing that the State often seeks to silence religious voices that challenge its policies and vision of “a more perfect union.” The proposed reading of the Clause as principally protecting religion from State oppression, which is aligned with the intent of most Founders, stands in stark contrast to the Court’s current application of the Clause as protecting the State from the tyranny of the Church, and its recent inclination toward the privatization of religion.<sup>3</sup>

Third, in a contemporary environment that seeks to secularize the CRM, civil rights activists will better understand the important ways that the Church served as an anchor and stabilizing force in the movement. Current attempts by extremist religious groups to offer one vision of morality, and to Christianize the State, undermine general acceptance of religious activism. The CRM provided a model of religious activism that sought to promote social change, not by Christianizing the State, but by offering up alternative visions of American democracy for the good of the whole of American society.

#### *The Role of the Black Church and Religious Protest in the Civil Rights Movement*

Efforts by the Black Church to press the State to expand legal protections have been widely documented and acknowledged by different scholars from various perspectives.

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<sup>3</sup> Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic, 1993), 115-116.

Certain scholars have discussed how the Black church tradition has fueled a legacy of protest.<sup>4</sup> They have highlighted the historical moments of the CRM (e.g., the 1954 *Brown v. Board of Education* decision, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Independence and Liberation Movements in Africa, 1945-1994). Prior published research has not, however, addressed how Religion & State relations were a critical element of the social/political context that shaped the freedom struggles. Despite acknowledging the powerful role of the Black Church (its theology, tactics, and community), scholars have not fully analyzed the climate of religious freedom that gave the Black Church opportunities and incentives to lead the CRM.<sup>5</sup> The tactics that were employed in the Black church tradition during the CRM, including nonviolent civil disobedience, had been implemented decades prior to the CRM. Yet, this dissertation will showcase the unique historical period from the 1940s through the 1960s when both religious freedom and civil rights were actively protected by the federal courts and the nation as a whole, due to the intersection of nonviolent civil disobedience and litigation strategies, which helped the CRM to gain traction, public attention and momentum.

While the history of Black Church & State cooperation is extensive, there is by no means universal agreement that such interaction benefits the public. The CRM activists' reliance on God's sovereignty above the law of the land, and God's timing for social change, was interpreted by some politicians, religious followers, and civil rights advocates as a form of anarchy and a direct challenge to the courts and the legislators. Street protests during the

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<sup>4</sup> Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic, 1993); David Tracy, *The Analogical Imagination: Christian Theology and the Culture of Pluralism* (New York: Crossroad, 1986).

<sup>5</sup> Charles Marsh, *The Beloved Community: How Faith Shapes Social Justice, From the Civil Rights Movement to Today* (New York: Basic Books, 2005). My view of the role of religious discourse in the Civil Rights Movement is consistent with Marsh's; however, I look at how nonviolent protest interacted with the church, politics, and the law to advance cultural and constitutional rights.

CRM often involved Christian worship, prayers, and sermons. Scholars such as Burns<sup>6</sup> assert that, in the eyes of the public in the South these protests posed great danger to the rule of law and public order.

Critics of nonviolent protests argued that religious expression ought to be relegated to the private sphere rather than the public space.<sup>7</sup> These admonitions emphasized the importance of holding in delicate balance the role of religion in the public space. Notably, such critiques were often grounded in fear, which motivated associations between religion and tyranny. Critics failed to appreciate the deeply democratic origins of the CRM. By standing up against unjust laws, movement participants were pushing the nation to live out its parchment principles. Further, many critics mistook nonviolent force as an invitation to anarchy and rebellion. The fact that movement participants nonviolently used their bodies to directly confront the evil of segregation meant that they put their faith not in themselves, but in God, who was the only one able to slay the goliath of Jim Crow and clear the way for racial reconciliation. In this way, they demonstrated their fidelity to a higher law, a divine law, which guaranteed civil and human rights to all.

### *The Contested Role of Religion in Politics*

The current study of the religious elements of the CRM is situated within a broader discussion of the role of religion in politics. The debate over the role of the church in relation to the State is ongoing; spirited disagreement exists among religious scholars and legal professors over whether, and to what degree, the church should be involved in politics.

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<sup>6</sup> Stewart Burns, *To The Mountaintop: Martin Luther King Jr.'s Mission to Save America 1955–1968* (New York: Harper, 2004), 167.

<sup>7</sup> John Rawls, *Political Liberalism*, 2nd ed. (New York: Columbia, 1993), 216–22. John Rawls wants to exclude religion from political reasoning based upon the duty of civility, which contends that religion is too dogmatic and a threat to public justice to shape public reasoning. Rawls wants to exclude religious doctrine from the public sphere and subject religious views to secular reasoning mostly because of the religious wars of the sixteenth and seventeenth centuries, reminiscent of Rousseau's Social Contract.



There are a number of perspectives on the relationship between the church and the State, but two emphasize that the church and State have fundamentally competing interests.<sup>8</sup> In the following section, I present both perspectives. Then, based upon the example of the CRM, I propose a plausible middle way between these two implausible positions, wherein the Church & State hold mutual interests.

### *The Tyranny of Religion*

One common view of the Church & State is that religion is inherently dogmatic, tyrannical, and the root of polarization. Proponents of this position believe that religious views hamper political deliberation, as they inevitably become coercive and arrogant.<sup>9</sup> The concern is that grounding arguments in revealed truth typically leads to conflict and incivility, when advocates of competing worldviews fail to reach agreement. This logic suggests the State and the non-religious must be protected from religion. In the 1960s, these fears surfaced in the so-called “protest decisions,” in which judges warned advocates that, no

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<sup>8</sup>A number of scholars argue that religiously grounded public reason is unhealthy for the healthy functioning of democracy, e.g., Kent Greenawalt, *Religious Convictions and Political Choice* (Cambridge: Oxford, 1988), 6–7, in which the author concludes that ordinary citizens should not base political views on convictions influenced by religious and other “comprehensive views” except when they consider difficult political issues; Richard Rorty, *Philosophy and Social Hope* (London: Penguin, 1999), 168–75. Rorty argues that it is “bad taste” to bring religion into conversations about public policy. Although Rorty holds this view, he does change his mind in later work, where he says that any claim to special religious and metaphysical authority is a stumbling block to settling moral questions, and advocates instead addressing moral questions based on moral autonomy and philosophical contingency, see Richard Rorty, *An Ethics for Today* (New York: Columbia University Press, 2011). In Rorty’s final writings he talks about a place for religious sentiment that is not dogmatic, see Richard Rorty, “Deconstruction, Pragmatism, and the Politics of Democracy,” in *Deconstruction and Pragmatism*, ed. Chantal Mouffe (New York: Routledge, 1996.), 1–12. Jean Elshtain, *Democracy on Trial* (New York: Basic, 1995). Elshtain contends that it is necessary to maintain a distinction between public and private for the healthy functioning of democracy. See also Michael Walzer, *Thinking Politically: Essays in Political Theory* (New Haven: Yale, 2007), 147–167. Others have argued that religiously grounded public reasoning is a sign of a healthy polis: Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic, 1993). Carter demands that secular moral judgments of the state should direct the public practices of all religions and thus essentially trivializes the importance of religion to many people. See also Jeremy Waldron, “Religious Contributions in Public Deliberation,” *San Diego Law Review* 30 (1993): 817, 841–42; John Rawls, *Political Liberalism*, 216–222.

<sup>9</sup> Gianni V. Rorty and Santiago Zabala. *The Future of Religion*, ed. Santiago Zabala (New York: Columbia, 2001.), 29–42.

matter how righteous their cause, all must submit to the civilizing hand of the law.<sup>10</sup> In recent times, these fears have emerged in controversies over posting the Ten Commandments in a courthouse and the display of religious symbols on public land, where the mere presence of religious symbols in a prime public space sparks a controversy.<sup>11</sup> As a result of fears over the coercive influence of religion in government affairs, advocates of the tyranny of religion thesis have argued that religious expression should be relegated to the private sphere rather than the public space, and a wall of separation should be maintained between Church & State.

A legal principle that is closely associated with the “tyranny of religion” doctrine is the separationist principle that seeks to protect the Church from the State, by prohibiting government officials from coercing religious actors to engage in certain activities.<sup>12</sup> This principle bars the State from passing discriminatory laws aimed at silencing dissenting religious speech.<sup>13</sup> It has also been employed to protect the State from the Church. The theory seeks to preclude a State-sponsored White-Anglo-Saxon-Protestant-Christian majority religion from excluding minority religious groups (e.g., Jehovah’s Witnesses, Sabbatarians) from the State by banning residential solicitation, passing discriminatory rules, and regulations that would require religious minorities to defy their beliefs (e.g., taking an oath to the flag, working on the Sabbath). This principle also appeals to those who seek to shield personal liberty of conscience from the intervention of Church and/or State. This principle was expressed by Thomas Jefferson, who did not seek total separation of Church and State. Instead, he sought the protection of free exercise rights and the disestablishment of religion.

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<sup>10</sup> *Walker v. City of Birmingham*, 388 US 307, 321 (1967).

<sup>11</sup> *Stone v. Graham*, 449 US 39, 42–43 (1980); *Van Orden v. Perry*, 545 US 677 (2005).

<sup>12</sup> John Witte Jr., “Facts and Fictions About the History of Separation of Church and State,” *Journal of Church and State* 48 (Winter 2006): 30–34.

<sup>13</sup> *Ibid.*

In short, the logic of separationism was called upon to advance a federalist reading of the Free Exercise and Establishment Clause.<sup>14</sup> Nevertheless, separationism has been applied in a way that over-interprets the meaning of separation of Religion & State; however, those who drafted the Constitution did not expect the “wall of separation” to be a wall of steel.

As John Witte noted, despite these attempts to protect liberty of conscience, promote free exercise rights, and prevent State coercion of religion, separationism did not accomplish its stated goals.<sup>15</sup> Post-Lemon v. Kurtzman (1971),<sup>16</sup> while certain cases expanded religious liberty, others weakened it by empowering atheists and the nonreligious with veto power to limit the public expression and free exercise rights of religious persons.<sup>17</sup> The separationist argument also underestimates the benefit of the interaction of Church & State. As this dissertation will show, a religious, legal, and moral confluence made the CRM possible.

Interestingly, based upon separationist concerns, the Black church removes itself from the public sphere and divorces Gospel preaching from social activism too often, to the detriment of religious freedom and civil and human rights. This was the case during the CRM when a minority of churches supported the civil rights struggle, and it is the case today where the movement has splintered and lost momentum and traction. The foundation for these separationist concerns was three-fold: a failure to see a link between the gospel message and a commitment to social justice, a fear that religious involvement in politics would encroach upon the freedom of the nonreligious minority to speak freely, and a mistaken view that a commitment to nonviolent force was the same as advocating violent

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<sup>14</sup> Ibid., 33.

<sup>15</sup> Ibid., 30-34.

<sup>16</sup> 411 US 192 (1971).

<sup>17</sup> Ibid.

force and anarchy. These underlying justifications for secularization theories may overlook the historical evidence of twentieth-century legal history that shows the great benefits that religious activism brings to all of society.

*Religion as a Potentially Unifying Force*

In contrast to the separationist view, an alternative view is that religion is preeminently, if not uniquely, the antidote to hate and the pathway to peace.<sup>18</sup> One of the great proponents of this view during the CRM was the African American mystic Howard Thurman. He maintained that the Christian ethic of love, grounded in forgiveness and geared toward reconciliation,<sup>19</sup> offers transformative possibilities for the whole of society.<sup>20</sup>

This unifying view argues that excluding religion from politics, based on concerns about coercion, dogmatism, and incivility, misunderstands an underlying source of opposition to religious public involvement. By priming the moral conscience, religion, at its best, helps all persons to work toward the common betterment of society. This is what made the spirit-filled CRM so threatening. Religion was used to unite, reconcile, and challenge discriminatory State laws at a time when America was largely divided along racial and economic lines, and many were working to keep society that way. Consequently, religion should be welcomed in the public space since, as the CRM reminds us, the church, i.e.

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<sup>18</sup> Carter, *Culture of Disbelief*, 80. Carter argues that, while religions may use their First Amendment privileges to be an oppressive force, what is needed is a vision of the public sphere where religious individuals have equal access as groups that speak the same secular language because religions possess transformative elements that are for the good of society. Robert Bellah, “The Kingdom of God in America: Language of Faith, Language of Nation, Language of Empire” in *The Robert Bellah Reader* (Durham, NC: Duke, 2006), 285–302. Bellah discusses how the employment of religious language in non-coercive deliberation among members of society is safeguarded by the Constitution and expresses a core meaning of the Free Exercise Clause of the First Amendment.

<sup>19</sup> Howard Thurman, *Jesus and the Disinherited* (Boston: Beacon, 1976), 100.

<sup>20</sup> Martin Luther King Jr., *Strength to Love* (New York: Fortress, 1963), 49–57; see Carter who claims that the purpose of religion is not merely to understand oneself or to make sense of the rest of the world, “but to act, and to act at times without regard to what others consider the settled facts.” This makes religion a destabilizing and transformative force. *Culture of Disbelief*, 41.

religion, can potentially overcome barriers and restore fractured relationships. This perspective concedes that certain religious views might polarize the electorate, and that religious believers sometimes embrace a fanaticism that makes them closed to civil discourse. However, the experience of the CRM shows that religion can be a positive force in society.

I propose a view of the role of religion in the public sphere that seeks to combine the best insights of both perspectives. The separationist view too readily vilifies religion, while the unification view overly valorizes religion and makes it vulnerable to becoming the likely handmaiden of the State. The unification view too readily assumes that the church might have all the answers, and overlooks the real possibility that certain government officials, feeling their authority threatened, might be motivated to co-opt religious expression. It is true that religion can be divisive. Religion can be used unjustly—for example, to promote a narrow or biased political agenda—but this does not necessarily imply a deep flaw with religion itself.<sup>21</sup> It is also true that religion can be utilized as a positive force to resist injustice, including racism.

### *Religion as Creative and Justly Threatening*

In this work, I argue for a third alternative to the two major schools of thought on religion and public life, using a thorough examination of the legal, religious and social movement environments that gave rise to and were produced by the CRM. Religion is not just the handmaiden of the secular State; it can and often does offer a radical critique of the

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<sup>21</sup> Nicholas Wolterstorff, “The Role of Religion in Decision and Discussion of Political Issues” in *Religion and the Public Square* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 1996). Wolterstorff argues that we do not really know whether persons who reason from religion on political issues lack the intellectual imagination to “reason to the same position from premises derived from an independent source.” Instead of requiring individuals to reason from secular sources, he argues that persons should be free to reason from whatever sources they find appropriate with the exception that we show respect for others; debates on thorny issues ought to be conducted based upon the rule of law and the Constitution, and the goal ought to be political justice.

socio-political order by appealing to sacred principles. Religion need not be dogmatic or destructively threatening, but rather creative and justly threatening through nonviolent means. The CRM shows how a religious movement can contribute robustly to the public good, where prophetic ministers, committed to democratic principles, built democratic coalitions with persons driven by religious and secular ideals in a highly contentious environment.<sup>22</sup> The CRM also shows how religious and moral principles can inspire persons to work toward a better society for all individuals and institutions—believers and skeptics, Church & State alike.

I will further examine how the legal climate of religious freedom leading up to the actual CRM, sparked by Supreme Court cases that protected the free exercise of religion - even of culturally vilified minorities in the day (e.g., Jehovah's Witnesses, Seventh Day Adventists, Jews, and others) - helped to foster the success of the prayer-filled and church-backed witness of the movement. While scholars have examined the role of traditions of black protest, grassroots leadership, the personality of Martin Luther King Jr., and the power of the 1954 *Brown v. Board* decision in the CRM, they have not focused on the importance of America's commitment to religious freedom in the mid-twentieth century as an important catalyst to the efficacy of the movement. This new climate of religious freedom fertilized the soil for Black Church congregants to take their faith to the streets for a cause that had legal and, at least for them, divine significance, and that ultimately yielded broader civil rights, not just for African Americans, but for all citizens and subjects of America. This confluence of factors makes the CRM an interesting case study in the intersecting relationships between

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<sup>22</sup> Charles Marsh, *The Beloved Community*, 2-3. Marsh argues that "there were many SNCC activists whose moral energies were driven by secular ideals, as there were those who considered the faith of black people altogether quaint. Nevertheless, student-based organizations like SNCC and COFO, as well as the larger movement itself, were initially anchored in the language, imagery, and energies of the church, in search of a 'circle of trust, a band of sisters and brothers gathered around the possibilities of agapeic love, the beloved community.'" Ibid., 3.

religion and human rights, and between religious freedom and civil freedom. The religious inspiration and message of the CRM helped drive its effective advocacy for broader civil and human rights for all. And, in turn, the religious freedom that the State provided through developments in Establishment Clause law enabled this movement to pursue its civil rights agenda, without unduly bracketing its religious convictions.

## II. Method and Approach

In this project, I will first establish that several important religious freedom rulings by the federal courts, starting in 1940, fostered a climate of religious freedom that was critical to the growth of the CRM, both as a civil rights and a religious movement. These cases broadened the representation of religious groups (e.g., Jehovah's Witnesses, Sabbath Observers, the Amish, and the non-religious) in the public sphere.<sup>23</sup>

Second, I will analyze the intersecting Christian, legal, and ethical principles that grounded the moral vision of the CRM. While noting the role of other key actors in the CRM—the NAACP, the Nation of Islam, and the Student Nonviolent Coordinating Committee—my main focus is on the Christian social teaching and legal tactics that formed the spirit of it all. In order to investigate the role of the church, I will focus primarily on the social activism of Black churches and actors that were critical to the success of the CRM. As Black church studies reveals, religious ideals that helped to fuel the CRM were critical to the development of ideals and principles that expanded civil and human rights. In the midst of this climate, prayer-filled protestors engaged in nonviolent acts of civil disobedience for the purpose of: (1) appealing to a higher authority than the law in question, (2) purifying civil society of unjust laws and practices, and (3) bearing witness to a new reality that advanced

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<sup>23</sup> *Cantwell v. Connecticut*, 310 US 296 (1940); *Murdock v. Pennsylvania*, 319 US 105 (1943); *Torcaso v. Watkins*, 367 US 488 (1961); *Sherbert v. Verner*, 374 US 398 (1963); *Wisconsin v. Yoder*, 406 US 205 (1972).

the cause of freedom, expanded democracy, and promoted cooperation among equals.<sup>24</sup>

I will examine, in depth, the impact of the legal climate of religious freedom on the CRM. Some legal scholars portray the federal courts, including the United States Supreme Court, as the central force in the movement<sup>25</sup> –by overturning discriminatory laws, safeguarding protest as an exercise of First Amendment free speech rights, and expanding the ambit of civil rights.<sup>26</sup> Even legal scholarship that recognizes religious civil disobedience as an active force considers it to be tangential to the success of the movement.<sup>27</sup> Many religious scholars, by contrast, emphasize the central role of prayer-filled nonviolent resistance in sparking judicial and legislative victories.<sup>28</sup> Religious scholars tend to downplay the role of court battles in the success of the movement,<sup>29</sup> and focus on the protestors, who, armed with a clear understanding of their religious beliefs and political rights, resisted discriminatory State and local laws based upon an appeal to a higher authority. In religious scholarly accounts, courts are viewed as only marginal to the success of the CRM.

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<sup>24</sup>Garner v. State of Louisiana, 368 US 157, 162–63 (1961); Shuttlesworth v. City of Birmingham, 373 US 262 (1963); Bell v. State of Maryland, 378 US 226 (1964); Lupper v. Arkansas, 379 US 306 (1964); Walker, 307.

<sup>25</sup> Derrick Bell, *And We Are Not Saved: the Elusive Quest for Racial Justice* (New York: Basic Books, 1987); Kimberlé Crenshaw, “Race, Reform, And Retrenchment: Transformation and Legitimization in Antidiscrimination Law,” *Harvard Law Review* 101 (1988): 1331, 1351, in which the author asserts that the passage of the Civil Rights Act fostered the impression that the US took decisive action to stop Black subjugation; Alan Freeman, “Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay,” *Harvard Civil Rights-Civil Liberties Review* 23 (1988): 295-297, in which the author argues that a key assumption of legal theory in the 60s was a belief in legal institutions, where practically every Supreme Court decision created a new right for black people.

<sup>26</sup> Walker, 335.

<sup>27</sup> Thurgood Marshall, “The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws,” in *His Speeches, Writings, Arguments, Opinions and Reminiscences*, ed. Mark Tushnet (Chicago: Lawrence Hill Books, 2001), 223-225. Marshall contends that, while King and the protests came at the right time, the decisive factor in civil rights advancements was the battle waged through the courts. Roy Wilkins. *Standing Fast: The Autobiography of Roy Wilkins* (New York: Da Capo Press, 1994). Wilkins points out that the legal battles would have been won without nonviolent direct action, however, the marches put to bed the white Southern lie that “everything would be all right if outside agitators would just mind their business.” *Ibid.*, 237.

<sup>28</sup> James Cone, *A Black Theology of Liberation* (New York: Orbis, 1999), 1–16; Luther Ivory, “Towards a Theology of Radical Involvement: The Continuing Legacy of Dr. Martin Luther King, Jr.” (PhD diss., Emory University, 1994); Noel Erskin, *King among Theologians* (Cleveland, OH: Pilgrim, 1994), 141.

<sup>29</sup> Cone, *Black Theology*, 1–16.



I will try to overcome this dichotomy between legal scholarship and religious scholarship on the CRM by showing how the courts and churches, together, were catalysts in advancing civil and human rights. In particular, I will show that Thurgood Marshall, the Legal Defense Fund of the NAACP, and other civil rights attorneys did not rely solely on the courts for the expansion of civil rights. In fact, Marshall and others reluctantly admitted that legal strategy alone did not account for the CRM's success because "the courts could not solve the problem, because the courts just don't have the authority. It's the public, the minds, the souls of the people that have to do it, and you do that with protest."<sup>30</sup> Neither the marches nor the courtroom battles could have succeeded in expanding constitutional rights without the other; they interplayed and interrelated. The central point of this dissertation is that, crucial to the movement's success is an interplay between American law, the Black church, and the politics they both reflected and transformed. This interrelation is the distinctive focus of this project.

Despite the CRM's place in the pantheon of great Christian activist movements, the literature on this movement, extensive as it is, does not provide an adequate account of the intersecting ecclesial, legal, and political themes that grounded the moral vision of this social and religious phenomenon. To date, scholars have not considered how the expansion of religious freedom in Religion & State law directly and indirectly created the climate for the CRM, and how advancements in civil rights brought about by the CRM impacted the broader movement for human rights in beneficial ways.

In sum, this study is designed to help fill a gap in legal and theological studies on the CRM. What is distinctive about this legal, ethical and historical approach is that (1) I find a plausible middle-way between an account that overly valorizes religion and an approach that

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<sup>30</sup> Marshall, "Supreme Court," 479.

overly vilifies religion as a threat to public justice because it is conceived to be too dogmatic and violent; and (2) I explore the synergistic interaction of religion, church, politics, and law in terms of their combined effects on social reform. This work also contends that the CRM is a critical historical moment that shaped the law and Church/State legislation more broadly. Religion operated as a creative and justly threatening force during the CRM, that employed nonviolent direct action to expand civil and human rights, and that was grounded in Christian, legal, and moral principles.

### **III. Argument and Chapter Outlines**

In order to show the intersection between American law, ethics, and the Black Church, I have organized the dissertation in the following chapters. Chapter 1, “Free Exercise and Establishment Clause: Fertile Soil for Civil and Human Rights Revolution,” explores how the legal climate of religious freedom enabled the CRM to promote social change more effectively. The climate of religious freedom included: court support for evangelizing in residentially exclusive areas, exemptions for conscientious parties of participation in oath swearing and other ceremonies, and exemptions from other general laws that unduly burden individual consciences. It is, thus, the First Amendment’s protections that provided a gateway to all other constitutional protections. In other words, there would be no civil/human rights without religious freedom; the freedom to worship and the freedom of religious expression provided a zone of liberty wherein religious groups and individuals could press for democratic reform. Chapter one also addresses the ways in which religious liberty court rulings did not gain sufficient legal traction, given limitations to the scope and application of the law.

Chapter 2, “The Christian Dimensions of the Nonviolent Struggle for Civil and Human Rights during the Civil Rights Movement,” explicates the Christian foundations of

nonviolent civil disobedience, and discusses the distinctive character of civil disobedience in the development of ethical leadership and moral action in the movement. The Christian faith of civil rights protestors affirmed the sanctity of human life, justice, equality and individual worth. Protestors, in turn, believed that the laws of the State should protect these human rights norms. Chapter two places specific emphasis on the leadership of Martin Luther King Jr., and his role in promoting nonviolent civil disobedience as a key tenet of the CRM. Prompted by Mordecai Johnson, King's graduate school mentor, King had studied the teachings of Gandhi in order to find a social ethic to respond to social evil. In the (Bible) Gospel text, King had found evidence for the importance of loving one's enemy, but he sought to understand how to love in the face of social evil. Gandhi's *satyagraha*—"truth force" or "soul force" — had been employed in India to protest against British colonialism. King realized that the Christian doctrine of love, coupled with Gandhi's method of nonviolent direct action, was the most potent tool available to oppressed persons in their struggle against social injustice. According to King, "Christ furnished the spirit and motivation while Gandhi furnished the method."<sup>31</sup> Chapter 2 explains how King weaved together the love ethic of Jesus with Gandhian nonviolence to create "a synthesis" of visionary and socially relevant nonviolent philosophy.<sup>32</sup>

Chapter 3, "Political Expediency or Misguided Legal Strategy?: Rediscovering the Religious and Political Character of the Civil Rights Movement in Protest Cases," explores how the CRM depended on a new wave of religious freedom, which had been sparked by changes in First Amendment Free Exercise and Establishment Clause law during the opening years of the movement. While these changes were not front-and-center of the

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<sup>31</sup> Ibid., 38.

<sup>32</sup> Burns, *Mountaintop*, 92.

protest strategy, they provided fertile ground for the expansion of civil and human rights. The view of separationism that was designed to protect religious minorities had a parallel in protecting racial minorities. Just as religious minorities argued for protection from the establishment of religious majorities that were prejudicial to their interests, racial minorities argued for protection against the established racial majorities, who acted in ways prejudicial to their interests.

Protest cases generally appealed to First Amendment free speech and freedom of assembly claims and the Fourteenth Amendment, rather than free exercise, in order to receive heightened legal protection. This legal strategy was due to the fact that, during this period, religious minorities used free exercise to secure freedom to be excluded from general laws. Civil Rights protestors during the CRM were not seeking a religious exemption; they were seeking to apply their faith to offer an alternative view of inclusion than that of the majority. Black Church activists during the CRM rejected the view that religion did not have a place in public life, or that the Church had no role to play in the State. To the contrary, Black Churches (and Black preachers like MLK) offered the public and the State a model of liberty and equality that ultimately transformed American society and brought greater equality and liberty to all, including African-Americans.

The climate of religious freedom impacted the CRM because protestors considered religious views and political views two sides of the same coin. When spirited activists defended their right to protest laws that perpetuated racial discrimination, they were making a statement about the relationship between religious liberty and human freedom. As Jehovah's Witnesses affirmed their right to proselytize their faith, they were defending freedom of expression. In the same way, Black Churches that protested against laws that limited civil rights were claiming their right to practice their faith freely. These churches

rejected the view that religion did not have a place in public life and that the church did not have a role to play in the State. Black churches (and black preachers like Martin Luther King Jr.) offered the public and the State a model of liberation and equality that ultimately transformed American society, and brought greater equality and liberty to all, including African Americans. As Stewart Burns points out:

Their Bibles and preachers taught them that they were God's chosen people like the children of Israel. The [Montgomery] bus boycott consummated this faith, made it surge above in mass meetings, carpools, and weary soulful walking. Every day they were moving toward the Promised Land. The mass church-based protest exalted them as makers of history, bearers of God's will. The sense of divine mission catapulted their self-esteem, their dignity, their collective confidence. They believed that they were building, through toil, sacrifice, and sharing, a 'new Jerusalem' in Montgomery and "a new heaven and a new earth" in the dispirited South. In this land of fulfilled promise, justice would 'roll down like waters and righteousness like a mighty stream.' Every person would be revealed as a child of God.<sup>33</sup>

In other words, in defending freedom of expression, protestors were working to expand religious liberty -- the right of persons to practice their religion as they saw fit.<sup>34</sup> As groups like the Jehovah's Witnesses thought they were doing God's work by proselytizing their faith publicly, Black church activists believed that they were "building a new heaven and a new earth" by resisting discriminatory laws that denied God-given rights.

This thesis is related to a central point of this work: based upon Court cases that expanded the scope of protected religious conduct to entail exclusions to safeguard a petitioner's way of life (i.e., business practices, school choice, and public witness), civil rights

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<sup>33</sup> Burns, *Daybreak of Freedom*, xiii.

<sup>34</sup> Martin Luther King Jr., "Holt Street Speech," in *The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts From the Black Freedom Struggle*, eds. Clayborne Carson et al. (New York: Penguin, 1991). In Martin Luther King, Jr.'s speech at Holt Street Baptist Church during the Montgomery Bus Boycott on the evening of December 5, 1955, he draws a distinction between love and justice in order to show the protection of religious expression and a concern for social justice were both essential to protecting constitutional rights: "In all of our doings, in all of our deliberations...whatever we do, we must keep God in the forefront. Let us be Christian in all of our action. And I want to tell you this evening that it is not enough for us to talk about love. Love is one of the pinnacle parts of the Christian faith. There is another side called justice. And justice is really love in [application]. Justice is love correcting that which would work against love... Standing beside love is always justice." Ibid., 50.

advocates took religious freedom and freedom of expression one step further to include the right of persons (the non-religious as well) to resist laws that denied religious freedom and personal worth.

In Chapter 4, “The Ethic of the Black Church Civil Rights Movement: The Accent on Christian Love and the Journey Toward Justice,” I point out that what is distinctive about the CRM is its commitment to ground ethical action in democratic values and the Christian principle of Christian love. Love, as the central ethical/theological trope, provided the catalyst for activism for racial justice in the larger society. The chapter critically explores King's commitment to agape love in light of Anders Nygren and Reinhold Niebuhr. This discussion is important because it shows that the church-led CRM, far from provoking violence and hatred, was rooted in Christian love and affirmed the worth and equality of all people. For example, King understood his role to include the fight against all forces of social evil that promote racial and social injustice. While reading Walter Rauschenbusch's *Christianity and the Social Crisis*, King found a theological framework that reinforced the traditions of black social protest he was exposed to in the church and black civil life. For King,

[T]he gospel at its best deals with the whole man, not only his soul but his body, not only his spiritual being, but his material well-being. Any religion that professes to be concerned about the souls of men and is not concerned about the slums that damn them, the economic conditions that strangle them, the social conditions that cripple them is a spiritually moribund religion awaiting burial.<sup>35</sup>

Many (but not all) other CRM activists shared King's perspective. As such, the CRM expanded to include advocating for human rights in the United States, namely through anti-poverty, fair employment, and anti-war protests.

Chapter 5, “From Civil Rights to Human Rights: Lessons Learned in the Enduring

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<sup>35</sup> Ibid., 38.

Struggle for Human Rights,” reflects on the current relationship between Church & State law and the quest for human rights in the United States. What is the impact of the climate of religious privatization and the post-CRM era on the quest for civil and human rights? In a time of widespread reduction in civil liberties, increasing State regulation of religious freedom, and growing religious polarization, I will discuss lessons from the CRM, viewing it through the lens of the contemporary context that presents a somewhat different set of human rights concerns. I argue that a synergistic examination of American law, Black churches, and the politics they both reflected and transformed is critical to understanding the success of the CRM. Attempts to enforce the constitution through court action served the CRM in important ways. But the CRM’s legacy shows the need for nonviolent protest that pursues legal reform, and applies Christian principles that take into account the civil and human rights struggles of different communities. I will focus on a few examples from the international context to show how Christianity provides an important foundation for current efforts to advance civil and human rights.

Throughout the dissertation, I note that the conditions that led to the eventual expansion of civil rights were not without legal consequence. While the legal climate of religious freedom helped to create the ripe conditions for an historic moment of civil rights expansion, the Court also imposed limitations on free expression. The baseline trajectory of expanding religious choice, that characterized Religion Clause jurisprudence post-*Sherbert* and post-*Cantwell*, shifted during early 1970s. The trajectory of Church & State jurisprudence at present conflicts with the meaning and purpose of the Religion Clauses because: (1) courts provide hardly any religious exemptions under the Free Exercise Clause;<sup>36</sup> and (2) religious

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<sup>36</sup> *Heffron v. International Society of Krishna Consciousness, Inc.*, 452 US 640 (1981); *Lyng v. Northwest Indian Cemetery Protection Association*, 485 US 439 (1988); *Employment Division of Oregon v. Smith*, 494 US 872 (1990); *City of*

individuals and groups are frequently excluded from public services and benefits, for the purpose of steering clear of establishment concerns.<sup>37</sup> In conclusion, I argue that the Court should expand religious freedom by returning to a post-*Sherbert* judicial tact. In this way, the law will support churches in fulfilling their gospel mission of advancing the cause of constitutional improvement and expanding human rights.

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*Boerne v. Flores*, 521 US 507 (1997).

<sup>37</sup> *Lemon v. Kurtzman*, 411 US 192 (1971); *County of Allegheny v. ACLU*, 492 US 573 (1995); *Lee v. Weisman*, 505 US 577 (1992); *Santa Fe Independent School District v. Doe*, 530 US 98 (2001).



## Chapter 1: The Free Exercise and Establishment Clause: Fertile Soil for a Civil and Human Rights Revolution

### I. Court Protection of Religious Diversity's Impact on the Climate of Religious Freedom Prior to the Civil Rights Movement

The writers of the U.S. Constitution advanced the claim that free expression is foundational to the establishment of “a more perfect union.” The First Amendment to the Constitution guarantees the right to freedom of religion, religious disestablishment, freedom of speech, freedom of the press, and the rights of assembly and petition.<sup>38</sup> The Supreme Court has repeatedly interpreted the Free Exercise Clause of the First Amendment to mean that the State cannot compel or penalize religious beliefs.<sup>39</sup> The Court has consistently held that persons may think and believe whatever they desire; however, the Free Exercise Clause does not provide complete protection of religiously inspired actions.<sup>40</sup> The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting the establishment of religion,” and there are at least three approaches to the Clause: strict separation, neutrality and accommodation.<sup>41</sup> Both the Free Exercise and Establishment

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<sup>38</sup> US Constitution amend. 1. For a reading of the purpose of the First Amendment as rejecting the view that the Original Clause is to privilege religious exemptions, see Gregory Warren, “No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Courts Establishment Clause Jurisprudence,” *Mercer Law Review* 54 (2003). Warren argues that the First Amendment’s core purpose is to promote “the democratic ideal of a vigorous public discourse on all issues of public concern in the belief that in this way a cohesive political community can be forged from a culture of dissidence.” *Ibid.*, 669-70.

<sup>39</sup> *Reynolds v. United States*, 98 US 145, 164 (1878) (in which the Court concluded that Congress was deprived of all legislative power over mere opinion, but was left free to reach actions.). See also *Braunfeld v. Brown*, 366 US 599, 603 (1961).

<sup>40</sup> *Cantwell v. Connecticut*, 310 US 296, 303—304 (1940) (in which the court reasoned that the first [freedom to believe] is absolute, but in the nature of things, the second [freedom to act] is not).

<sup>41</sup> Erwin Chemerinsky, *Constitutional Law Principles and Policies*, 2nd ed. (New York: Aspen Law & Business, 2002). Erin Chemerinsky discusses three competing approaches to establishment clause jurisprudence that have been employed by Justices and commentators, although he emphasizes that there are variations of these theories. The first theory, strict separation, requires that the Church & State should be kept separate whenever possible. The second approach, neutrality, provides that the government cannot favor religion over

Clauses affirm that the public expression of religion can edify the State and secular society more generally.<sup>42</sup>

This chapter builds upon Church & State scholarship to advance an integrative understanding of religious rights and human rights, the First Amendment's protection of religious liberty, and the role of religious groups in public life. Three decades of United States Supreme Court rulings protected freedom of religion, under both the First Amendment Free Exercise and Establishment Clauses. The Supreme Court ruled in favor of protecting expanded religious diversity in these cases, and in so doing, fostered a climate of religious freedom. The climate of religious freedom encouraged religious believers, especially religious minorities,<sup>43</sup> to express their religious beliefs publicly and press for the expansion of constitutional rights.<sup>44</sup>

Modern First Amendment scholars pay relatively little attention to the historic

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irreligion or favor one religion over others. The third principle, accommodation/equality, says that the Court should interpret the constitution in ways that appreciates the vital role that religion plays in society and should accommodate its existence in government. *Ibid.*, 1149-1155.

<sup>42</sup> Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," *University of Chicago Law Review* 61 (1994). "We need to abandon the idea that it is the unique value of religious practices sometimes entitles them to constitutional attention. What properly motivates constitutional solitude for religious practices is their distinct vulnerability to discrimination, not their distinct value." *Ibid.*, 1248-49.

<sup>43</sup> Stephen Carter, "The Black Church and Religious Freedom," in *Black Faith and Public Talk*, ed. Dwight N. Hopkins (Waco, TX: Baylor University Press, 2007). This is the thesis of Stephen Carter who argues that the current "law of religious freedom, in America, often falls on the religions not only of the black community, but also of people of color generally, with a harshness, with a force, and with an edge which often does not strike communities of other kinds." *Ibid.*, 21-22.

<sup>44</sup> Let me point out that I am not saying that the climate of religious freedom was the sole factor that contributed to the success of the CRM, merely that it is an important and, heretofore, largely unnoticed factor. I certainly agree with others that important factors that enhanced the success of the civil rights movement include black civil religion, black protest traditions, civil rights litigation, slave religion, labor movement advances, American democratic theory, etc. For an article that traces the first wave of the expansion of religious freedom to the abolitionist critique of slavery, see Kurt L. Lash, "The Second Adoption of the Free Exercise Clause: Religious Exemptions under The Fourteenth Amendment," *Northwestern University Law Review* 88 (1994): 1137-38, in which the author claims that, while the Original Free Exercise Clause "was intended to prohibit nothing more than laws that targeted religion qua religion, the abolitionists challenged the adequacy of that protection: by demanding "a broader interpretation of the original Bill of Rights, one that emphasized the rights of the individual over the prerogatives of state majorities."

connection between religious freedom and racial justice.<sup>45</sup> This dissertation contributes to Church & State scholarship by focusing on this connection. In this chapter, I review First Amendment religious freedom cases that illuminate how the activism of religious groups and individuals during the 1930's, 1940's and 1950's led to the expansion of religious and civil rights before the emergence of the CRM.<sup>46</sup> I discuss how the First Amendment religious freedom movement, led largely by the Jehovah's Witnesses, helped create a climate for religious freedom. This same climate of religious freedom later benefitted the religiously inspired CRM, as civil rights protestors took advantage of the fertile soil that these First Amendment cases presented for them to "create a new sense of dignity and personal worth, to secure equal opportunity."<sup>47</sup>

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<sup>45</sup> With the exception of Stephen Carter, no other legal scholars have explored this important connection in their work.

<sup>46</sup> See Leah Weinryb Grohsgal, "Reinventing Civil Liberties: Religious Groups, Organized Litigation, and the Rights of Revolution" (PhD diss., Emory University, 2011). Grohsgal's dissertation builds a persuasive case for the attention and credit due to the Witnesses for advancing First Amendment rights. While other religious and nonreligious groups had previously challenged State and Federal laws, the Witnesses' complex legal strategy and broad understanding of First and Fourteenth Amendment protections placed them squarely within the train of the CRM's press for civil and human rights expansion. As Grohsgal argues, the activity of the Witnesses was critical to helping to create a climate of religious freedom that benefited those who came in the next wave of the CRM's spirit-led social activism. This dissertation builds upon and goes beyond Grohsgal's work in the following ways: first, I examine Free Exercise cases from the late 1930s to the mid 1960s covering the litigation tactics of a broad range of religious groups, not just the Witnesses; second, I provide historical data to show how the CRM was preeminently a religious movement, similar to the Witnesses, that had slightly different goals: namely, while the primary aim of the Witnesses was to gain an exemption to practice their religion freely (and secondarily protect the rights of all minorities), the primary goal of CRM activists was to press for civil and human rights; third, I demonstrate how the litigation strategy of the NAACP and court victories leading up to *Brown* were also important catalysts for successful civil disobedience efforts that, in turn, assisted legal strategists in achieving democratic reform.

<sup>47</sup> Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994). Jack Greenberg, former director-counsel of the NAACP Legal Defense Fund and Educational Fund, points out that *Marsh v. Alabama* (326 US 501 [1946]) provided the ideal case for challenging the State enforcement of racial segregation. Using *Marsh* as a launching point, legal counsel decided to "take to the Supreme Court a case in which demonstrators were arrested for trespass in a commercial establishment the size of Chickasaw." *Ibid.*, 276. Roy Wilkins, *Standing Fast: The Autobiography of Roy Wilkins* (New York: De Capo Press, 1994). While the climate of religious freedom supported litigation efforts to protect protestor's First Amendment rights, civil rights attorneys did not claim that arrests for trespassing violated protestor's free exercise rights because they were not seeking an exemption from laws that infringed upon their beliefs; rather, "the goal had always been to include the Negro in that mainstream, to create a new sense of dignity and personal worth, to secure equal opportunity." *Ibid.*, 321.

## II. Religious Freedom Expanded Through Free Exercise Cases and Important Principles

Religious freedoms were safeguarded by a mix of free exercise principles in the Constitution that helped to expand religious rights—religious pluralism, religious equality, freedom of conscience and exercise, separation of Church & State and disestablishment of religion.<sup>48</sup> During the 1940s and 50s, the U.S. Supreme Court addressed a broad range of cases that covered diverse religious controversies. This section will show that these broad principles provided strong protection for religious conduct and clarified the diverse roles that religion plays in all areas of society.

The early cases provided exclusions from general laws for claimants and offered comprehensive principles to protect religious rights.<sup>49</sup> The dominant legal principles concerned the impact of free exercise protections on States' rights and property rights, as well as the importance of safeguarding freedom of conscience and religious liberty. Important secondary principles that emerged during this era concerned religious discrimination, respect for judicial process, and reasonable accommodation. While the Court championed protecting the religious beliefs and activities of all people, it was honest about the challenges of protecting religious pluralism in an increasingly religious diverse society with many people holding beliefs “alien to the majority.”<sup>50</sup>

The Court vigorously protected the right to believe and worship according to the tenets of one's faith.<sup>51</sup> At the same time, the Court's concerns about the impact of unfettered religious pluralism to law and order and national unity often undermined its ability to apply

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<sup>48</sup> John Witte Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties*, 3<sup>rd</sup> ed. (Boulder: Westview Press, 2000), 41-63.

<sup>49</sup> *Ibid.*; *Cantwell v. Connecticut*, 310 US 296 (1940).

<sup>50</sup> *Cantwell*, 310; *Sherbert v. Verner*, 374 US 398, 411 (1963) (Douglas, J., concurring).

<sup>51</sup> Witte, *Religion and the American Constitutional Experiment*, 145-48; *Reynolds v. United States*, 98 US 145, 164 (1878); *Braunfeld, v. Brown*, 366 US 599, 603 (1961).

consistently the constitutional principle of religious plurality. That is, the boundaries of religious freedom became less permeable, as concerns about maintaining national unity and law and order gained precedence in judicial reasoning.<sup>52</sup> Nevertheless, these early free exercise decisions established a climate of religious freedom—by protecting religious dissent, privileging free exercise rights over property rights, expanding States' rights, and safeguarding free speech—that extended well into the CRM.

### *Religious Liberty and Freedom of Expression*

Freedom or liberty of conscience (LOC) is an important principle, with roots in the early American experiment in democracy that emerged from early Free Exercise Clause cases.<sup>53</sup> Liberty of conscience, as practiced in American law today, supports individual choice regarding religious beliefs or practices, including school choice.<sup>54</sup> It shuns coercion or control by government, and discourages laws or policies that impose discriminatory prohibitions for exercising freedom of religious choice, while requests for religious exemptions are matters for legislatures, not the courts<sup>55</sup>

Beginning in the 1930s, the Witnesses emerged as a strong advocate of religious freedom as they challenged States, traditional religious groups and businesses alike who were disturbed by their form of religion and sought to limit their freedom to preach, proselytize and solicit.<sup>56</sup> Determined to defend their freedom to believe and worship, the Witnesses took to their grievances to the courts and, in a watershed case that reached the Supreme Court in 1940, the Court was receptive to their free speech appeals. The Court in *Cantwell* (1940)

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<sup>52</sup> *Braunfeld*, 603. See also *McGowan v. Maryland*, 366 US 420 (1961); *Gallagher v. Crown Kosher Super Market*, 366 US 617 (1961).

<sup>53</sup> Witte, *Religion and the American Constitutional Experiment*, 41.

<sup>54</sup> *Ibid.*, 155.

<sup>55</sup> *Ibid.*, 155-160.

<sup>56</sup> *Ibid.*, 146.

introduced this principle as part of the heightened scrutiny test that was to be applied to cases arising under the First Amendment Free Exercise Clause.<sup>57</sup> This case involved religious solicitation by Jehovah's Witnesses in a residential neighborhood. The Jehovah's Witnesses carried religious materials and played a portable phonograph as a means of introducing religious materials that they had available for sale. People were asked to either buy the book or contribute toward the publication of pamphlets. Mr. Cantwell played a phonograph that attacked the Catholic religion for two listeners who were outraged. Cantwell was arrested for breaching the peace, and for soliciting without a license approved by the secretary of the public welfare council.<sup>58</sup> He appealed, ultimately to the Supreme Court.

*Cantwell* provided straightforward direction.<sup>59</sup> Regulation of religious conduct was permissible so long as the laws were “general and nondiscriminatory” and in service of a significant or important public interest such as public safety and security. In this case, however, the laws were discriminatorily applied—both in arresting a Jehovah's Witness merely for playing a phonograph, and for imposing licensing requirements on religious proselytizers while not imposing them on anyone else. Moreover, the Court held that freedom of conscience and attendant rights to peaceable religious worship were absolutely protected. They could be subject to general time, place, and manner regulations.<sup>60</sup> The Court expanded upon these metrics in subsequent cases.<sup>61</sup>

The significance of *Cantwell* to the expansion of free exercise law cannot be overstated. *Cantwell* expanded the Free Exercise protections beyond federal laws to include State laws by making the Due Process Clause applicable to the State under the Fourteenth

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<sup>57</sup> *Ibid.*, 137.

<sup>58</sup> *Cantwell*, 302.

<sup>59</sup> *Ibid.*, 303–04.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

Amendment.<sup>62</sup> The Court ruled that the statute was unconstitutional because it discriminatorily deprived the claimants of their First Amendment freedoms of religious expression, applied to the States through the Due Process Clause of the Fourteenth Amendment. While acknowledging the State's rights to pass general legislation that regulates "the times, the places, and the manner of soliciting upon its streets, of holding meetings thereon" and that protects the "peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment," the means adopted by Connecticut to protect the State's interest exceeded acceptable bounds.<sup>63</sup> The State law required an application to the secretary of the public welfare council of the State, the secretary had the discretion to determine whether a matter was religious, and the conferral of a certificate was based upon his approval. Such a "censorship of religion" and prior constraint denies the liberty protected by the First Amendment.<sup>64</sup> Even though the State is free to abridge constitutional rights to protect its interest, there was no evidence in *Cantwell* of "assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse."<sup>65</sup> The plaintiff was merely trying to persuade a listener to purchase religious materials and support "true religion."

*Cantwell's* significance for the expansion of freedom of expression lies principally in tempering the belief-action distinction, which the Court had historically used to limit the reach of the First Amendment.<sup>66</sup> In cases from 1879-1939, the Court claimed the Free

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<sup>62</sup> *Cantwell*, 303. See, e.g., Michael D. Currie, "Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject *Employment Division v. Smith* and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution," *Iowa Law Review* 99 (2014): 1368-1370.

<sup>63</sup> *Cantwell*, 304.

<sup>64</sup> *Cantwell*, 305.

<sup>65</sup> *Ibid.*

<sup>66</sup> Paul C. Fricke, "The Associational Thesis: A New Logic for Free Exercise Jurisprudence," *Hastings Women's Law Journal* 55 (2009): 137-138; Frederick Mark Gedicks, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States," *Emory International Law Review* 19: (2005): 1200-01.

Exercise Clause protects religious beliefs, not religious acts.<sup>67</sup> In *Cantwell*, the Court ruled that both religious beliefs and religious acts deserve constitutional protection:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.<sup>68</sup>

Thus, while the Court blurred the belief/action distinction in *Cantwell* to a degree, the State maintained its power to regulate religious action by general and nondiscriminatory legislation, without denying one the opportunity to proselytize or share one's faith.

Moreover, *Cantwell's* significance for the religious and civil rights revolution was to soften the free speech and free exercise distinction.<sup>69</sup> Thus, a claimant engaged in religious expression could raise appropriately both free exercise and free speech grievances. While sharp disagreement arose over religious beliefs and political views, the Court's ruling was straightforward in asserting that, "in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened public opinion and right conduct on the part of the citizens of a democracy."<sup>70</sup> Thus, the Court spotlighted religious views, no matter how offensive or politicized, as highly protected speech that is important to the development of philosophical thinking, scientific progress, and the moral character of

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<sup>67</sup> *Reynolds v. United States*, 98 US 145 (1879); Kent Greenawalt, *Religion and the Constitution*, vol. 1, *Free Exercise and Fairness* (Princeton: Princeton University Press, 2009), 29.

<sup>68</sup> Witte, *Religion and the American Constitutional Experiment*, 146-47; *Cantwell*, 303-04.

<sup>69</sup> Witte, *Religion and the American Constitutional Experiment*, 146; "The Best of Bad Lot: Compromise and Hybrid Religious Exemptions," *Harvard Law Review* 123 (April, 2010): 1496-97. Ira C. Lupa and Robert W. Tuttle, "Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders," *Georgetown Journal of Law and Public Policy* 7 (2009). Ira Lupa and Robert Tuttle argue that *Cantwell* is an example of a case that can be understood through a theory of hybrid rights as suggested by the Court in *Smith* "in which free exercise interests combined favorably with other constitutional claims." *Ibid.*, 131.

<sup>70</sup> *Cantwell*, 310.



citizens within a democracy.<sup>71</sup>

An examination of free exercise cases in the lower courts following *Cantwell* shows their importance in shaping the climate for the public demonstrations that occurred during the CRM. The Court ruled that a charge of disorderly conduct could not stand where the defendant's conduct did not disturb or annoy anyone and was not performed with intent to disturb the peace.<sup>72</sup> In *People v. Douglas*, the defendant, a divorced Jehovah's Witness, was convicted and charged with disturbing and annoying the complainant, her ex-husband and others, including his servants. The Court ruled that the defendant's conduct did not violate Section 720 of the Penal Law because the defendant's conduct took place in a private home, she was formerly married to the complainant, she did not use physical force to enter the home, complainant was not even home and there was "no violence or attempted violence at any time and no boisterous language."<sup>73</sup> The Court was not willing to allow ill-will, animus or bad feelings toward someone for whatever reason to be used as a cover for a finding of breach of peace or disorderly conduct.

Post-*Cantwell*, the lower court held that freedom of religious, political speech and

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<sup>71</sup> While the Court lifted religious speech to the level of most protected First Amendment rights, all political speech was not highly protected in the time of *Cantwell*. The majority of political speech cases used an approach much like rational basis review. See *Fiske v. Kansas*, 274 US 380 (1927) (in which the Court concluded that there was no evidence of criminal syndicalism because there was no speech by the defendant or members of his organization urging people to engage in unlawful activity); *Herndon v. Lowry*, 301 US 242 (1937) (in which the Court overruled a conviction of a person who was paid staff of the Communist Party because there was no evidence that he engaged in or encouraged others to engage in illegal acts); *DeJonge v. Oregon*, 299 US 353 (1937) (in which the Court overturned a conviction for attending a Communist Party meeting because no one advocated illegal acts). These cases did not apply a clear and present danger test or heighten scrutiny. However, where political speech cases did not involve advocating illegal activity, the Court, during the 1930s and 1940s, used a "clear and present danger test." See *Bridges v. California*, 314 US 252 (1941) (in which the Court ruled that speech that is critical of the courts can be held in contempt if there is a clear and present danger); *Cantwell*, 296 (in which the Court ruled that speech that provokes a hostile response can be reprovved if there is a clear and present danger). Chemerinsky, *Constitutional Law*, 959–960.

<sup>72</sup> *People v. Douglas*, 29 N. Y. S. 2d 206, 208 (1941).

<sup>73</sup> *Ibid.*

freedom of press encompasses newspapers, periodicals, leaflets and pamphlets.<sup>74</sup> Most of the cases in this early period involved defendants who were Jehovah's Witnesses canvassing the community for the purpose of distributing literature about their faith. While seeking to distribute materials about their faith, Jehovah's Witnesses were arrested in the Village of London and charged with violating the trespass ordinance. The Court ruled that the restriction the ordinance placed upon plaintiffs had the practical effect of censoring free speech because it denied the Jehovah's Witnesses the right of free speech and freedom of the press, rights protected by the Constitution and protected against State infringement by the Fourteenth Amendment.<sup>75</sup> The Court concluded that plaintiffs are constitutionally permitted to distribute their literature door to door without State interference.

Post-*Cantwell*, the Court also interpreted that ordinances against distributing or selling religious literature were unconstitutional interferences with the freedom of speech and press.<sup>76</sup> In *Commonwealth v. Pascone*, the defendant, a Jehovah's Witness, was charged with public nuisance for carrying pamphlets and a placard without a permit and selling a religious pamphlet without a license from the commissioner of public works. The Court reasoned that the ordinance was unconstitutional because it was too broad in its application; it was not limited to obstructions to traffic, or dangers or annoyances to travelers. Instead, the ordinance encompassed any show card, placard or sign, despite the nonthreatening nature of the image or message. State courts invalidated ordinances requiring permits to engage in free

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<sup>74</sup> *Zimmerman v. Village of London*, 38 F. Supp. 582, 583 (1941); *Commonwealth v. Anderson*, 308 Mass. 370, 373 (1941); *People v. Northum*, 41 Cal. App. 2d 284, 289 (1940). See also *Lovell v. City of Griffin*, 303 US 444 (1938); *Gitlow v. People of State of New York*, 268 US 652 (1925).

<sup>75</sup> See also *State v. Chaplinsky*, 18 A. 2d 754, 759-760 (N.H. 1941) in which the court ruled that utterances such as face-to-face reviling are not protected by freedom of speech because its purpose is to create disorder and "endanger that calm and useful consideration of public problems which is the protection of free government."

<sup>76</sup> *Commonwealth v. Pascone*, 38 Mass. 591 (1941); *Anderson*, 370; *State ex rel. Hough v. Woodruff*, 147 Fla. 299 (1941).

speech as unnecessary interferences with first amendment rights. Yet, they ruled that statutes placing reasonable restrictions on the time, manner and place of the sale and distribution of materials are not unconstitutional.<sup>77</sup>

These proselytism cases laid the groundwork for the CRM by reaffirming freedom of speech and freedom of the press as fundamental rights, protected by the First Amendment and guaranteed against State invasion by the Fourteenth Amendment. These cases also endorsed that freedom of the press includes newspapers, periodicals, leaflets and pamphlets, and encompasses the right to print and distribute materials. Had the Court not protected the right of Jehovah's Witnesses to print and distribute their unpopular views, detractors of the CRM may have crippled its means of communicating similarly unpopular ideas, viewpoints and dissent. The Court's protection of the First Amendment in proselytism cases laid the groundwork for the CRM to mobilize support through the distribution of materials containing its then controversial messages of racial equality and human rights for all.

The Court was even less willing to infringe on First Amendment rights when students declined to participate in legislatively prescribed ceremonial exercises, designed to promote patriotism based upon good faith religious scruples.<sup>78</sup> In *State v. Lefebvre*, a group of students who asked to be excused from participation in the flag ceremony were suspended because they asserted that their faith as Jehovah's Witnesses forbade such action as a form of idolatry. The students' request was denied and suspensions ensued. The economically challenged parents tried to provide home-based schooling, but this approach did not meet the approval of the school board and the parents lost custody of their children because the

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<sup>77</sup> *Pascone*, 594. See also *Hannan v. City of Haverhill*, 38 F. Supp. 234 (1941).

<sup>78</sup> *State v. Lefebvre*, 20 A. 2d 185 (1941).

standards of the home were not “the highest.”<sup>79</sup> Given the sacredness attached to freedom of religious conscience and the important role of parents in raising children, the Court ruled in favor of the Jehovah’s Witnesses. The Court concluded that it could not have been the intent of the legislature to break up the family, just because a religious minority holds religious views that are not shared by the majority.

Moreover, the lower court Post-Cantwell has ruled that State actors cannot limit the free speech rights of Jehovah’s Witnesses by requiring them to salute the flag as a prerequisite for obtaining a license.<sup>80</sup> In *Reid v. Borough of Brookville* (1941), Jehovah’s Witnesses were arrested for selling literature about their faith and proselytizing their religious views in violation of an ordinance requiring a license before distributing materials. The Court ruled that the ordinance deprived plaintiffs of their constitutional rights, because it placed a prior constraint on their religious freedom by requiring them to salute the flag and obtain a license before periodicals and pamphlets could be distributed in the boroughs.

The flag salute cases established that the right to advocate religious views by means of selling, distributing and posting views cannot be infringed by State regulations that are disguised as general State laws, but have the effect of discriminating against groups because of their minority views. Further, the Court rulings in favor of religious freedom during this era challenged State laws that forced religious groups to engage in practices that conflicted with their good faith religious beliefs as a prerequisite to exercising their constitutional rights. The Jehovah’s Witnesses cases prepared the soil for the CRM to gain momentum, by petitioning the Court to protect minorities’ freedom of speech, press and religion. In chapters two and three, this dissertation will articulate how religious liberty and freedom of

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<sup>79</sup> *Ibid.*, 187.

<sup>80</sup> *Reid v. Borough of Brookville*, 39 F. Supp. 30 (1941).

expression, as protected in the aforementioned Court rulings, were germane to the philosophical tenets and the mobilizing tactics of the CRM. The next section of the current chapter will explain how free exercise and freedom of religious belief also shaped the climate of religious liberty from the early 1940s to mid 1960's.

### *Free Exercise and Freedom of Religious Belief*

The theory of liberty of conscience was central to the Court's rulings on free exercise and freedom of religious belief. While the Court espoused the principle of LOC in *Cantwell*, it did not always apply it consistently.<sup>81</sup> In a case decided merely two weeks later, *Minersville School Board v. Gobitis* (1940), the Court rejected the free exercise claims of Jehovah's Witnesses that their children be exempted from a compulsory flag salute in school.<sup>82</sup> Because they refused to comply with the school's policy, the children were expelled from school. According to the Jehovah's Witnesses' interpretation of the dictates of their faith and that of their faith community, the biblical text prohibited such practices as forms of idolatry. The requirement that their children to salute the flag, defendants argued, trampled their LOC, which affirms the right of individuals to believe what they choose to believe.

Even though the Court agreed that the State educational system could not force public expression that is contrary to one's conscience, it refused to apply this principle in favor of the compulsory flag salute. In sustaining their convictions, the Court affirmed the principles of LOC but emphasized that this right does not include an exemption from general laws that promote national unity, even for the purpose of protecting religious expression. The Court interpreted the nature of the requested exemption as motivated by a desire to gain a special benefit. This interpretation protected the State's interest to regulate,

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<sup>81</sup> Witte, *Constitutional Experiment*, 158.

<sup>82</sup> *Minersville School District v. Gobitis*, 310 US 586 (1940).

even in the face of a clear constitutional violation. Yet, the Court misunderstood the petitioner's request for an exemption as merely a request to practice their religion based upon the dictates of their faith; for them it was a fundamental duty of conscience not to worship a false idol in this manner. This petition for an exemption from the flag salute was within the zone of absolutely protected religious freedom that *Cantwell* had affirmed.

The Court, however, reversed its ruling in *Gobitis* with *West Virginia State Board of Education v. Barnette* in 1943, when Jehovah's Witnesses' children were again expelled from public school for failing to salute the American flag or recite the Pledge of Allegiance.<sup>83</sup> The majority read the First Amendment as exempting parties from compulsory participation in practices to which they were conscientiously opposed. The Court defended religious rights against the encroachment of compulsory laws: "To sustain the compulsory flag salute we are required to say that the Bill of Rights which guards the individual's right to speak his mind, left it open to public authorities to compel him to utter what is not on his mind."<sup>84</sup> Rather, "the test of its substance is the right to differ as to things that touch the heart of the existing order."<sup>85</sup> The Court justified its decision by invoking a general First Amendment right to freedom of conscience, the principle at the core of free exercise rights. Court protection of the right to resist practices to which a person is conscientiously opposed had longer-term consequences for the CRM. Free exercise cases like *Gobitis* cleared the way for CRM protestors to resist discriminatory laws that violated a higher law to which they believed they owed ultimate allegiance. Martin Luther King, Jr., leader of the CRM, argued for LOC in democracy, stating: "The Christian owes his ultimate allegiance to God, and if any earthly

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<sup>83</sup> *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943).

<sup>84</sup> *Ibid.*, 634.

<sup>85</sup> *Ibid.*, 642

institution conflicts with God's will it is your duty to take a stand against it."<sup>86</sup>

The Court further expanded First Amendment rights in *Marsh v. Alabama* by ruling that the freedom of the press and freedom of religion cannot be curtailed by private property owners who avail their property for public use in a corporate town that has the character of a municipality.<sup>87</sup> *Marsh* involved a company town in Chickasaw, a suburb of Mobile, Alabama that was owned by the Gulf Shipbuilding Corporation. Chickasaw, by all appearances and uses, was like any other town; its sidewalks and shopping district were open to all comers. The petitioner, a Jehovah's Witness, walked on the sidewalk of Chickasaw, stood close to the post office and commenced to dispense religious literature. The corporation posted the following notice in each store: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." The defendant was served notice that she could not pass out materials without a permit and that the corporation was not going to give her a permit. She responded that such a rule was unconstitutional because it prevented her from passing out her religious materials, and so she refused to leave the sidewalk.

In issuing its *Marsh* ruling, the Court was adamant that any person who lives in or comes to Chickasaw cannot be denied freedom of press and religion, even if a company has a legal title to the town. According to the Court, "[T]he more the owner, for his advantage, opens up his property for public use, the more his rights are curtailed by the statutory and constitutional rights of those who use his space."<sup>88</sup> Although a Commerce Clause challenge was not before the Court, the *Marsh* ruling emphasized that "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in

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<sup>86</sup> Martin Luther King Jr., *Why We Can't Wait*, (New York: Signet Classics, 2000), 84.

<sup>87</sup> *Marsh v. Alabama*, 326 US 501 (1946).

<sup>88</sup> *Marsh*, 506.

the functioning of the community in such a manner that the channels of communication remain free.”<sup>89</sup> Whereas a corporate town functions as any other town, the officers of the corporation cannot limit the freedom of expression and free press rights guaranteed by the First and Fourteenth Amendments of the Constitution.

Thus, *Marsh* stood for the proposition that, where a “business block” operates as the community’s retail area, and is freely accessible and open to all, the corporation that owns the town may not curtail the First Amendment rights of individuals. Chapter 3 will explain how civil rights litigators looked to *Marsh* to justify why the rights of private property owners should not trample the rights of CRM sit-in demonstrators to receive equal protection of the law.<sup>90</sup> Even when restaurant owners alleged that sit-in protestors were trespassing on private property, the Court refused to permit private property owners to violate protestors’ constitutional free speech rights and the right to equal protection of the law.

*Marsh* also reinforced the principle first announced by *Cantwell* that showed the connection between free press, religious liberty and other constitutional rights. Both are safeguarded by the First Amendment, which “lies at the foundation of a free government by men.”<sup>91</sup> Further, *Marsh* maintained the “case-by-case balancing” test first announced by *Cantwell* that weighs “the circumstances” and appraises “the reasons” to support a regulation of First Amendment rights. Therefore, the Court ruling established that society’s interest in protecting free expression and religious liberty in a public space outweighs the rights of property owners to restrict constitutional rights for the full enjoyment and use of their property.

However, in *Poulos v. New Hampshire* (1953), the Court affirmed that constitutionally

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<sup>89</sup> *Ibid.*, 507.

<sup>90</sup> Greenberg, *Crusaders*, 277.

<sup>91</sup> *Marsh*, 509.



protected rights are not free from regulation, especially where a constraint is designed to protect public safety.<sup>92</sup> The petitioner, a Jehovah's Witness, sought permission for the Witnesses to conduct services in a public park. The Witnesses offered to pay all proper fees and charges, and they abided by all the rules for getting permission to use the facilities. When officials denied the license on May 4th, the petitioners proceeded to hold the services until they were arrested. Responding to petitioners' contention that the ordinance was unconstitutional because it violated defendants' rights to assemble freely, speak, and worship, the Court held that "[t]here is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."<sup>93</sup> The Court also declared its unwillingness to sanction law breaking even for the purpose of obeying a divine law, which might be permitted in other contexts:

'One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions.' (quoting *Cox v. State of New Hampshire*, 312 US 569, 574 (1941)). If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.<sup>94</sup>

Thus, the Court ruled that a regulation that is designed to promote the public safety without unfair consideration of the time, place and manner of the usage of the streets, does not violate the First Amendment, even when it restricts a religious right that is protected in any other context. The Court was not persuaded that, where a license is arbitrarily refused and litigation is costly and time consuming, a person can speak without a license when

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<sup>92</sup> *Poulos v. State of New Hampshire*, 345 US 395 (1953).

<sup>93</sup> *Ibid.*, 408.

<sup>94</sup> *Ibid.*

remedial State procedures are available to correct the error: “Delay is unfortunate but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning.”<sup>95</sup> Therefore, *Poulos* delineated the limits of First Amendment rights in the face of nondiscriminatory State laws to protect public safety. *Poulos* also denied constitutional protection to acts of civil disobedience, when remedial State procedures are in place to correct official errors.

Chapter 3 will expound upon the limits of the Court’s tolerance for civil disobedience, by examining how these limits were tested in protest cases during the CRM. For instance, civil rights activists tested the Court’s limits of free exercise and freedom of religious belief in the Birmingham campaign, when they defied a court injunction against conducting Easter marches, given their concerns with delaying the marches.<sup>96</sup> The Court dismissed claims that the religious nature of the protest necessitated marching on Easter, and that the arbitrary action of State officials justified disregarding judicial process. Thus, these early cases demonstrate the Court’s commitment to expanding free exercise rights and free expression; however, they also show the limits of the Court’s tolerance for violating the law when other judicial means are available for resolving a dispute, and when nondiscriminatory laws are applied to protect national security.

#### *Sabbath Day Observance and the Limits of the Free Exercise Clause*

As shown in the previous section, *Cantwell* provided some measure of protection for core LOC and freedom of worship and protected public expressions of religion from discriminatory regulations. The Court accomplished this under a regime of heightened or intermediate scrutiny. But this regime was not stringent enough to protect against prejudicial

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<sup>95</sup> *Ibid.*, 409.

<sup>96</sup> *Walker v. City of Birmingham*, 388 US 307 (1967).

treatment of one minority—those who observed Jewish religious traditions—as evidenced in the following Sabbath day cases. The reality of biased treatment toward religious minorities prompted the court to develop the *Sherbert* test.

In a series of 1961 Sabbath Day Observance cases, the Court was less willing to provide an exemption from general laws that abridged free exercise rights.<sup>97</sup> In *McGowan v. Maryland* (1961), store-owners claimed that the Sunday blue law, prohibiting store sales on Sunday, abridged their First and Fourteenth Amendments.<sup>98</sup> The Court announced that “Sunday blue laws” prohibiting any labor and commerce on Sunday that was not deemed “necessary” or “essential” did not constitute religious establishment or a violation of the Equal Protection Clause, where “Sunday blue laws” had achieved ample “secular justifications” to meet constitutional requirements.<sup>99</sup> Because “Sunday blue laws” regulated secular activity, not religious conduct, the Court ruled that the law merely inconvenienced certain members of the faith who deem it necessary to work on Sunday.

The Court communicated the limits of its tolerance of minority religious expression once again when, in *Braunfeld v. Brown* (1961), it ruled that Sunday blue laws were not an establishment of Christian religion.<sup>100</sup> In this case, Abraham Braunfeld and the other Pennsylvania merchants, Orthodox Jews whose faith prevented them from doing business on Friday evening and Saturday, challenged a Pennsylvania law prohibiting them from doing business on Sunday. The petitioners complained that the law discriminated against them by giving competing Christian merchants an unfair advantage, because Christians could remain open an additional day. The Court ruled that the mere fact that the regulation created for

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<sup>97</sup> David N. Laband and Deborah H. Heinbuch, *Blue Laws: The History, Economics, and Politics of Sunday-Closing Laws* (Lexington, MA: Lexington Books, 1987), 39.

<sup>98</sup> *McGowan*, 420.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Braunfeld*, 599.

petitioners an “inconvenience” and an “economic disadvantage,” when alternatives exist for them to engage “in some other commercial activity which does not call for either Saturday or Sunday labor,” did not rise to the level of “abhorrence and religious prosecution” that violated the First Amendment.<sup>101</sup> The Court held that a Jewish apparel and furniture merchant’s free exercise rights were not violated since the legislature had a reasonable basis for the regulation, even though it affected certain groups differently than others.<sup>102</sup> In this case, the Court argued that the prohibition on Sunday sales did not infringe constitutional rights, because it was based upon grounds that were rationally related to the State’s objective of securing Sunday rest for “the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment.”<sup>103</sup> The Court ruled that the statute did not have the effect of infringing free expression because it applied to store hours, not religious conduct.<sup>104</sup> In *Gallagher v. Crown Kosher Super Market*, even a Kosher store operator who sold almost exclusively Kosher merchandise and served a mostly Jewish clientele was convicted for operating his business on Sunday, despite the fact that his Orthodox Jewish religion required adherents to eat kosher food and prohibited them from shopping on the Sabbath.<sup>105</sup> The operator was convicted for opening during those Sunday hours since the law was purely a restriction on commercial activity.<sup>106</sup> According to the Court, the regulation was permitted by the First Amendment because it did not amount to a restriction of religious activity.<sup>107</sup>

The Court's early 1960s decisions in these Sabbath observance cases provide the clearest demonstration of its failure to apply its free exercise principles consistently in the

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<sup>101</sup> Ibid., 605–06.

<sup>102</sup> *McGowan*, 425.

<sup>103</sup> Ibid., 448.

<sup>104</sup> Ibid., 429.

<sup>105</sup> *Gallagher*, 617.

<sup>106</sup> Ibid.

<sup>107</sup> *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S 582, 591 (1961).

case of religious minorities. Observing the Sabbath is not merely a trivial religious activity; for observers, it is a core religious belief, the violation of which is tantamount to abridging God's law. To believers who approach religion as a way of life, not as a private practice that lacks broader social significance, religious practices cannot be put on and taken off in accordance with regulated expression. The Court's acknowledgement that the Christian religion may be "otherwise" benefited by these Sunday laws indicates that these laws unduly infringed upon the free exercise rights of other religious groups, whose religious traditions require them to practice the Sabbath on another day.<sup>108</sup> The prohibition was not merely an economic inconvenience, but it established the Christian faith as the favored religion – with a national observance of the Christian Sunday Sabbath - while all other religions were disfavored and regarded as interfering with the State's objectives when their activities conflicted with a Christian faith tradition.

Further, providing Sabbath observers an exclusion to operate their businesses on Sunday would not have made it difficult for States to regulate all businesses, since the law provided exclusions to other groups and for certain classifications.<sup>109</sup> Even if the Court permitted the Jewish merchants to operate their businesses during the later evening and early afternoon like many other exempted businesses, the State's purpose would still have been achieved without denying Jewish merchants an exemption, since the sale of an item or similar items were permitted in certain stores.<sup>110</sup> The singling out of Sabbath observers who violated the regulation for religious reasons showed that the law was not nondiscriminatory, but had the direct effect of favoring one form of religious worship (Sabbath observance on Sundays) over another (Sabbath observance on Saturdays), and reinforcing stereotypes and

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<sup>108</sup> *McGowan*, 447, citing *Judefind v. State*, 78 Md. 510, 515–16 (1896).

<sup>109</sup> Laband and Heinbuch, *Blue Laws*, 41.

<sup>110</sup> *Gallagher*, 445.

animus traditionally directed against religious minorities like Jews who have faced a history of discrimination. The First Amendment prohibits this form of religious discrimination by the State.

Finally, the Court's unwillingness to provide an exemption for Sabbath observers to operate their businesses on Sundays demonstrated why the legislation was purely a religious regulation. If the law had been motivated by a secular purpose, then the legislature would not have fashioned a law that gave Sunday Sabbath observers an economic and religious advantage over Saturday Sabbath observers by denying the latter an exemption. The Court's rulings were an explicit acknowledgement that minority religions would not have veto power over the majority's religious freedom.<sup>111</sup> In our constitutional scheme no religion becomes the law of the State, because doing so subjects disfavored religions to the kind of religious intolerance and discrimination permitted in these cases. Paradoxically, the kind of religious discrimination permitted in these cases contradicted the climate of religious freedom encouraged in other free exercise cases, and defied America's long tradition of fighting to protect the rights of religious minorities abroad (i.e., Jewish observers during the Holocaust).

The *Torcaso* decision, which protected the liberty of conscience rights of an atheist, was issued the same month that the four Sabbath day cases denied the freedom of exercise rights of Jewish observers. This was the irony, and tragedy, of the *Cantwell* regime; it did not provide strict enough protection for religious practices like Sabbath observance, while protecting liberty of conscience claims. Despite the Court's contradictory rulings in cases involving exemption requests from religious minorities like Sabbath day observers, it held that religious test oaths were unconstitutional because they invaded a person's freedom of

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<sup>111</sup> Daniel F. Piar, "Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy, and Civil Liberties in Nineteenth-Century America," *William and Mary Bill of Rights Journal* 14, no. 3 (2006): 1009-10.

belief and conscience. In *Torcaso v. Watkins*, the Court expanded the principle that a State could not require a person to “profess a belief or disbelief in any religion” to include the requirement that a State could not require a party who is conscientiously opposed to declaring his belief in God to do so before commissioning him for the office of Notary Public.<sup>112</sup>

Based upon the framers who spoke out against test oaths and the intolerance that they promoted, the Court declared that, when the Constitution was adopted, they intended to outlaw test oaths as stated in Article VI. This article proclaims that, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”<sup>113</sup> Laws that imposed requirements that a person express a belief in the existence of God supported believers and disfavored non-believers, and were thus declared unconstitutional when they burdened an individual’s freedom of belief and religious liberty.

#### *The Sherbert Revolution and the Expansion of Religious Freedom*

Seeking to correct inconsistencies in free exercise decisions in terms of balanced protections for religious minorities, *Sherbert* provided a corrective by ruling that any substantial burden on religious belief or practice deserves strict scrutiny protection, and courts are free to give the burdened religious parties an exemption from those laws when needed.<sup>114</sup> In *Sherbert v. Verner* (1963), the highpoint of free exercise jurisprudence, the Court announced that the free exercise clause could provide an exemption from general laws and regulations that burdened the exercise of one’s “sincere” and true faith.<sup>115</sup> Specifically, the defendant, a member of the Seventh-day Adventist Church, was discharged by her South

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<sup>112</sup> *Torcaso v. Watkins*, 367 US 488 (1961).

<sup>113</sup> US Constitution, art. 6.

<sup>114</sup> Witte, *Religion and the American Constitutional Experiment*, 152-53.

<sup>115</sup> *Ibid.*, 153; *Sherbert v. Verner*, 374 US 398 (1963).

Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. Subsequently, the defendant was denied unemployment compensation because she failed, without cause, to accept “suitable work.”

In the strongest vindication of religious freedom since *Cantwell*, the Court overturned the decision of the South Carolina Supreme Court denying petitioners unemployment benefits. The disqualification from benefits, according to the majority, made the petitioner “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>116</sup> In effect, the government placed an unconstitutional burden on the exercise of her religion “as a fine imposed against appellant for her Saturday worship.”<sup>117</sup>

The impact of *Sherbert’s* landmark ruling was that it extended unemployment benefits to Sabbatarians, similar to Sunday churchgoers, demonstrating governmental impartiality in a pluralistic society. However, the holding was limited to unemployment eligibility requirements in South Carolina that were prohibited from forcing an individual to abandon his beliefs concerning the Sabbath; the Court has rejected other claims for exemption from generally applicable laws.<sup>118</sup> Thus, we can speak of the *Sherbert* standard that declares that, when a law infringes a person’s religious freedom, a State can apply it against that person only if it demonstrates a compelling governmental interest in its application that cannot adequately be served by other, less restrictive, means.

To summarize, the *Sherbert* revolution was important because, for the first time, it

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<sup>116</sup> *Ibid.*, 404.

<sup>117</sup> *Ibid.*

<sup>118</sup> See Kathleen M. Sullivan, “Religion and Liberal Democracy,” *University of Chicago Law Review* 195 (1992). Sullivan argues that the court has deployed two approaches to extend the holding in *Sherbert* to other exemption cases: first, “it has sometimes applied a form of heightened scrutiny, but has found a government interest in the uniform application of the law that outweighs the burden on the religious practice of the claimant”; second, “it has found some reason to forego any searching judicial scrutiny at all.” *Ibid.*, 215-216.



heightened protections for the beliefs of religious minorities, clearing the way for civil rights activists to press for even greater reform for religious and racial minorities.<sup>119</sup> First Amendment religious freedom reached its zenith in the *Sherbert* revolution of the 1960s—created by the strict scrutiny regime introduced by the Supreme Court in *Sherbert v. Verner* (1963).<sup>120</sup> In the two decades before *Sherbert*, the Court had already strengthened legal protection for religious rights in a series of cases in the areas of proselytism, public education, government benefits, corporate rights, and test oaths. Ironically, while the Court affirmed LOC and freedom of expression in principle, it was not always consistent in applying First Amendment principles, especially in the case of religious minorities. For instance, while the Court defended the absolute right to believe freely, not all religious conduct received constitutional protection. The rights of certain religious minorities, like Jewish people who wanted to observe the Sabbath and conduct business on Sunday, were not accommodated. Consequently, not all religious groups were placed on equal footing. In contrast, the *Sherbert* case challenged federal, State, and local government’s ability to discriminate against or deny a religious exemption to citizens, including those of despised religious minorities in the day. This ruling and consequent revolution for religious liberty in the early 1960’s was critical for the CRM.<sup>121</sup>

### III. Lower Court Decisions in the Wake of Sherbert

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<sup>119</sup> Steven D. Smith, “Religious Freedom and Its Enemies, Or Why The Smith Decision May be a Greater Loss Now Than It Was Then,” *Cardozo Law Review* 32 (2011): 2040-41; Stephen Pepper, “Taking the Free Exercise Clause Seriously,” *Brigham Young Law Review* 1986 (1986): 314-15, in which Pepper contends that “the smaller the minority, the more likely the majority will inadvertently impose on its religious interests, and therefore the greater need for protection under the free exercise clause”; Daria K. Nacheff, “Religion-Based Antitrust Exemptions: A Religious Motivation Test,” *Notre Dame Law Review* 57 (1982): 846-47.

<sup>120</sup> *Verner*, 398; See Greenawalt, *Religion and the Constitution*, 29–30.

<sup>121</sup> Julie Manning Magid and Jamie Darin Prenkert, “The Religious and Associational Freedoms of Business Owners,” *University of Pennsylvania Journal of Labor and Employment Law* 7 (2005): 207-08, in which the authors assert that “the courts gave great deference to the interest in civil rights and eradicating discrimination during the *Sherbert* era.”

Lower court decisions in the wake of *Sherbert* and its strict scrutiny regime provided more evidence of the zenith of religious freedom that coincided with the height of the CRM in the United States. Lower court cases employed *Sherbert* to protect soliciting, proselytizing, street demonstrations, and other activities by religious groups who helped paved the way for the CRM. The heightened religious freedom of the *Cantwell* regime, and even more of the *Sherbert* regime, gave strength to the religiously inspired and religiously organized CRM.

#### *Public Benefits*

In a State benefits case post-Sherman, the Court reaffirmed that the government is neither permitted to place unconstitutional prerequisites on the securing of public employment nor disregard the Constitution when it seeks to fire someone. In *State v. Minielly*, the civil service statute was allegedly violated when a deputy sheriff announced his intention to run for sheriff in an upcoming election.<sup>122</sup> The Court ruled that “the right to engage in political activity is implicit in the rights of association and free speech guaranteed by the amendment.”<sup>123</sup> Therefore, running for public office is a form of free speech that is protected by the First Amendment.

#### *Liberty of Conscience*

A State Court case under the doctrine of liberty of conscience employed *Sherbert*'s strict scrutiny regime to protect religious minorities seeking an exemption from State laws that conflicted with their religious beliefs. In *Sheldon v. Fannin* (1963),<sup>124</sup> petitioners were suspended from Pinetop Elementary School for insubordination because they refused to stand and sing the National Anthem. They claimed that their refusal to stand was dictated by

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<sup>122</sup> 411 P.2d 69 (1966).

<sup>123</sup> *Ibid.*, 73.

<sup>124</sup> *Sheldon v. Fannin*, 221 F. Supp. 766 (1963).

their religious beliefs as Jehovah's Witnesses, which included a belief that the Bible is the literal Word of Almighty God Jehovah. The Jehovah's Witnesses based their belief on the example of three Hebrew children referenced in the Bible—Shadrach, Meshach, and Abednego—who refused to bow down at the sound of musical instruments playing patriotic-religious music throughout the land at the command of King Nebuchadnezzar of ancient Babylon (Daniel 3:13-28). The Witnesses refused to recite the Pledge of Allegiance to the Flag of the United States because they perceived the patriotic ceremony to be the worship of a graven image (Exodus 20:4-5). The plaintiffs were expelled from Pinetop Elementary School because they refused to stand for the National Anthem.

Mindful of America's checkered history with religious minorities, the Court held that the advancement and improvement of society is secured, in part, when society protects the "freedom of the smallest minority to express unpopular ideas":

Our forbearers realized that ideas for preservation and improvement of a free society must come, not from the government, but from the people, and must compete for acceptance by the people, just as goods and services compete for acceptance in our free-enterprise economy. They realized too that in order to compete for acceptance, these ideas must be freely expressed by act and deed; that only in this way can the truth prevail; that only in this way can an idea despised today win the acceptance of reason tomorrow, or be thoroughly discredited; and that only by protecting the freedom of the smallest minority to express unpopular ideas by word or deed can the majority insure freedom to believe and express its own ideas, and to dispute and criticize those of others. <sup>125</sup>

Thus, the true test of the strength of our government is our ability to allow ideas to flow freely and be tested in the marketplace of ideas, especially detested ideas by marginalized groups. In so doing, the majority can ensure that its ideas can be expressed freely and enjoy the freedom to challenge others.

The Court announced that the standard of permissible restraint is the same for

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<sup>125</sup> Ibid., 772.

freedom of speech and freedom of religion. Even though the State may not establish a religion, it can place limits on religious expressions and practices that “create a clear and present danger of impairing the public health or safety, or of offending widely accepted moral codes, or of resulting in a more-than-negligible breach of the peace.”<sup>126</sup> Drawing upon *Sherbert*, the Court held that, barring a general application of a law that protects a fundamental State concern, laws that abridge free expression of religious beliefs are unconstitutional. Accepting the plaintiffs’ characterization of their conduct as religiously inspired, the Court ruled in *Sheldon* that “governmental authority may not directly coerce the unwilling expression of any belief, even in the name of ‘national unity’ in time of war.”<sup>127</sup> Given the fact that the Jehovah Witness pupils in Sheldon engaged in orderly conduct and did not disrupt the other students in the school, the Board’s action in excluding plaintiffs from the school for refusing to sing the National Anthem was an unconstitutional abridgement of their First Amendment free exercise rights.<sup>128</sup>

#### *Proselytizing, Soliciting, and Distributing Materials*

With respect to proselytizing and soliciting, *Sherbert* was used to protect the rights of parents to indoctrinate their children in the faith of their choosing, go door-to-door preaching, teaching, soliciting, and taking orders for religious materials, and pass out materials critical of school officials on school premises.<sup>129</sup> For example, in *Quiner v. Quiner*

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<sup>126</sup> Ibid., 773–74.

<sup>127</sup> Ibid., 775.

<sup>128</sup> Ibid.

<sup>129</sup> See, e.g., *City of Darlington v. Thompson*, 234 S.C. 89 (1959), in which the court held that since the ‘sale’ of such literature by defendants was merely collateral to their main purpose of preaching and teaching tenets of their religion, and there was no profit motive involved, they should not have been convicted for violating city ordinance; *Fowler v. State*, 93 Ga. App. 883, 883–884 (1956), in which the court held that the act of passing out literature criticizing a public school and its teachers, by a patron, lawfully on the school premises, is insufficient to constitute a crime, where the disturbance consists of the reaction of the teachers to their subsequent voluntary reading of the literature; *Ex parte Luehr*, 159 Tex. Crim. 566, 567 (1954), in which the court ruled that the application of the ordinance, which led to the conviction of a Jehovah’s Witness missionary

(1967),<sup>130</sup> before the divorce action was filed both parents belonged to a religious group called the “Brethren”(or Jehovah’s Witnesses). Both the appellant and respondent had been members of the Brethren all of their lives. The core tenets of their faith included the belief that the Bible is the infallible Word of God; that Christ is the Savior; that God is a loving Father; that hell and eternal punishment are realities; that all efforts to achieve social reform are fruitless because the world is built on a shaky foundation; and a belief in the priesthood of all believers. This means that the Holy Spirit directs a brother to “break the bread, pray, or minister, in subjection to the Lord in the midst.”<sup>131</sup>

The respondent testified that, a year and a half after their marriage, he noticed that his wife began to observe the concept of separation more strictly than at any other point in their marriage, much to his chagrin. Persons who belong to the “Exclusive Brethren” live “separate.” In other words, “the members shun all social relationships and social activities except as absolutely necessary, with all persons with whom they are not in ‘fellowship’ by which they mean nonmembers of their own religious group. All such persons are believed to be ‘spiritually unclean.’”<sup>132</sup> Moreover, “[a]lthough unorganized forms of play at school with other children are sanctioned, children of the ‘Exclusive Brethren’ may not visit or play with other children in their homes, or in their own homes or elsewhere. This precludes membership in Boy or Girl Scouts, camp Fire Girls, Little League, Y.M.C.A. and other similar youth groups.”<sup>133</sup>

Although the mother’s devotion to the principle of separation could create tension between the son and father’s relationship, the Court reasoned that it did not preclude both

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evangelist who went house-to-house preaching, soliciting, and taking orders for subscriptions to the Watchtower magazine, was in conflict with the Constitutions of the United States and this State.

<sup>130</sup> *Quiner v. Quiner*, 59 Cal. Rptr. 503 (1967).

<sup>131</sup> *Ibid.*, 506.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

the father and mother from providing distinct and impactful, nurturing, supportive, and encouraging environments for their son.<sup>134</sup> According to the majority, all religions are based upon the principle of separation in varying degrees, and all require that their followers adhere to certain rules, traditions, and tenets that impact how persons live their lives.<sup>135</sup> Thus, the Court held that religious views alone, despite how extreme they appear, are not enough to remove a child from the custody of a parent whose religious views are more extreme than the other's because of the probable effect those views may have on the mental welfare of the child. Courts transfer custody when there is evidence of abuse of the physical well-being of the child. The Court however, invoked *Sherbert* to argue that, although protection of religious beliefs is absolute, protection of religious practices is not absolute.<sup>136</sup> In other words, then the Court may find that the State's interest in protecting the safety and welfare of the child outweighs its interest in safeguarding free religious expression, if there is a showing at trial that the mother's religious beliefs lessened the child's love for his father or negatively affected her son's physical and/or emotional well-being. In short, cases like *Quinor* show the extent to which lower courts are willing to go, in light of the climate of religious freedom that emerged post-*Sherbert*, to protect the rights of religious individuals and groups to practice their religious beliefs, to the extent that said unpopular beliefs don't endanger the safety and well being of others.<sup>137</sup>

Even when views are so reprehensible and acrimonious as to inflame the passions of many, the lower court has held that the freedom of speech and press entails the right to

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<sup>134</sup> *Ibid.*, 514.

<sup>135</sup> *Ibid.*, 515.

<sup>136</sup> *Ibid.*, 517.

<sup>137</sup> Kent Greenawalt, "Child Custody, Religious Practices, and Conscience," *University of Colorado Law Review* 76-7 (2005). Kent Greenawalt argues that in a Post-Sherbert and Smith era a religious parent can conceivably claim that Smith does not apply to custody cases because the "Smith Court intimates the possibility that free exercise protection may apply to situations in which officials make individualized judgments about exemptions." *Ibid.*, 978.

publicly and truthfully discuss viewpoints without prior restraint or retribution. In *Heilberg v. Fixa*, the plaintiff received a letter from the defendant containing a Payment on Delivery (POD) Form.<sup>138</sup> The card informed the plaintiff that the Post Office possessed an unsealed package labeled “A Proposal Concerning the International Communist Party,” which was classified as communist propaganda. The package would be returned to sender if the form was not returned in less than 20 days and the addressee indicated a desire to receive the package.<sup>139</sup> The Court ruled against the requirement that the addressee indicate a desire to receive the mail, which would allow the addressee to receive future mail freely. The problem with this regulation was that it required the Post Office to maintain a list of individuals desiring to receive this kind of mail, which makes the addressee a possible target of attacks by others who may have access to the non-confidential list. The Court further ruled that the purpose of the statute was to restrict, control and limit the distribution of communist propaganda in violation of First Amendment rights, because the State had failed to satisfy the test established by the Court in *Sherman*. In particular, the State failed to prove that it had a compelling State interest to limit speech in order to protect the public from communist propaganda. There was no evidence that the dissemination of ideas had any other effect besides promoting the dissemination of ideas that are healthy to a well-functioning democratic society.

This strong protection for religious views, despite their extreme nature, had the effect of preparing the courts and the public for the kind of spirited activism that was apparent during the CRM, which represented the religious and racial minority’s attempt to press its vision of religious and racial freedom. Courts were likely to strike down laws that

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<sup>138</sup> *Heilberg v. Fixa*, 236 F. Supp. 405 (ND Cal. 1964).

<sup>139</sup> *Ibid.*, 407.

abridged free exercise rights, if there was no evidence that religious practices would cause harm to individuals or pose a threat to public safety, morals, and welfare.

### *Public Health Matters*

The Court departed from *Sherbert* when ruling in favor of public health matters. *Sherbert* did not address public health issues directly, although petitioners requested exemptions from vaccinations on the basis of religious grounds in *Wright v. Dewitt* (1965).<sup>140</sup> The Court ruled in *Wright* that reasonable State health regulations that address a “clear and present danger” to the health and safety of the general public do not violate free exercise rights.<sup>141</sup> The petitioners were members of the General Assembly and Church of the First Born and their children were students in the Dewitt School District #1 of Arkansas County. The school district passed a health regulation requiring all students to be vaccinated against smallpox before attending school. Petitioners objected that the regulation infringed their religious beliefs. The question before the Court was whether the health regulation violated the constitutional right to free exercise of religion. The Court reasoned that it was within the police power of the State government to require that all school children be vaccinated against small pox, given that it is a contagious disease that presents a clear and present danger to the health and safety of the general public. The significance of *Wright* for the CRM was that while freedom to believe and worship God could not be regulated by law, freedom to act in accordance with one’s beliefs was subject to regulation for the protection of the public.

### *Illegal Activities*

In instances involving prohibited or criminal activity, Courts tended to find a

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<sup>140</sup> *Wright v. DeWitt School District No. 1 of Arkansas County*, 238 Ark. 906 (1965).

<sup>141</sup> *Ibid.*



compelling State interest justifying the substantial infringement of a defendant's free exercise rights.<sup>142</sup> *People v. Woody* (1963)<sup>143</sup> involved Navajo Indians who were charged with the unlawful possession of peyote, a violation of the Health and Safety Code.<sup>144</sup> Appellants pleaded not guilty and asserted that their possession of peyote was protected by their constitutionally guaranteed right to the free exercise of religion as members of the Native American Church of the State of California.<sup>145</sup> The religion of the Native American Church has been referred to as the Peyote religion. Church members who consume peyote do so as a sacrament; consumption is as an expression of their faithfulness for blessings received. Upon consumption, members of the Peyote religion believe that they are possessed by the Holy Spirit and have contact with the Deity who provides guidance and injects purpose into their lives. Peyote is consumed sacramentally in what is called a "meeting," which is held in an enclosed place from sundown on Saturday to sunrise on Sunday, open to all who desire to attend, including non-Indians. It is led by someone called a "leader," and entails offering prayers, singing, consuming peyote, and using symbolic paraphernalia. Native Americans also use peyote as a cure for illness or disease, and view the substance as a "health restorer."<sup>146</sup>

On April 28, 1962, the defendants Woody, Anderson, and Nez gathered with other

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<sup>142</sup> See also *State v. Cade*, 244 La. 534 (1963), in which the court held that evidence involving testimony of other members of the Muslim sect failed to establish the advocacy of subversion by violence and did not prove defendant's guilt of criminal anarchy as charged, although the sect did advocate beliefs that incited racial prejudice.

<sup>143</sup> *People v. Woody*, 35 Cal. Rptr. 708 (1963).

<sup>144</sup> Kristen A. Carpenter, "Limiting Principles and Empowering Practices in American Indian Religious Freedoms," *Connecticut Law Review* 45 (2012): 413–414; Debra A. Mermann, "Free Exercise: A 'Hollow Promise' For the Native American in *Employment Division*, Department of Human Resources of *Oregon v. Smith*," *Mercer Law Review* 42 (1991): 1606; Donald A. Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee," *Harvard Law Review* 80 (2005): 1395-96. Giannella argues that *Woody* signals that *Sherbert* marks a shift in the Court's attitude, which would cause some precedents to be limited or overruled.

<sup>145</sup> *Woody*, 709.

<sup>146</sup> *Ibid.*, 711.

Native Americans and held a peyote ritual. They were observed by police officers who noticed that they were in “a stupor.” They became the subjects of an investigation as suspected possessors of peyote. Upon interrogation, the officers learned from the defendant Woody that he had furnished the peyote used in the ceremony and arrested them for possession of an illegal substance.<sup>147</sup>

Invoking *Sherbert*, the District Court held that the First Amendment protects both religious beliefs and actions. While the immunity granted to the former is absolute, the latter is not because certain conduct needs to be regulated in order to protect society.<sup>148</sup> For this reason, the Court determined that, because peyote has “toxic, deleterious, intoxicating and hallucinating effects,” it is appropriately regulated under police power.<sup>149</sup> When determining whether a law should be upheld or struck down, the Court announced that a statute will be upheld if any known facts support the conclusion that the law is “reasonably related to the promotion of the public health, safety, or general welfare.”<sup>150</sup> Given “the deleterious effects of peyote upon the user,” “the multiform dangers incident to its hallucinatory effects,” the challenges that those who ingest it have managing their daily routine, the paranoia that occasions such use, and its pattern of being a gateway drug that leads eventually to narcotic addiction, the Court held that peyote was detrimental to health.<sup>151</sup>

The Court further reasoned that the law in the instant case met<sup>152</sup> the “clear and present danger” test in the sense that the danger of peyote use and possession was grave and immediate enough to justify prohibiting its use. The requirements of the test are satisfied if there is “reasonable ground to believe that the evil to be prevented is a serious one” and

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<sup>147</sup> Ibid.

<sup>148</sup> Ibid., 713.

<sup>149</sup> Ibid., 714.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid., 714–15.

<sup>152</sup> Ibid., 715.

“that the danger apprehended is imminent.”<sup>153</sup> The defendants contended that there was no grave and immediate danger attendant upon possession of peyote for ceremonial use by members of the Native American Church; that the object of the instant statute could be achieved without prohibiting possession for such use; that, for this reason, the all-inclusive scope of the statute, absent any exclusionary provision permitting possession for a religious use, was not reasonably related to the object which it sought to achieve; and, as a consequence, insofar as the statute abridged their right to freely practice their religion, it was unconstitutional.

According to the Court’s interpretation of *Sherbert*, the State had to ensure that there were no alternative regulations that could address the evils that the statute sought to prevent without violating First Amendment rights.<sup>154</sup> The Court ruled that there was no alternative regulation that would address the evil of possession and consumption of peyote short of a criminal prohibition because the amount of peyote consumed at the meeting was not subject to regulation and the way that the ritual was practiced made it too easy for those who were not Native Americans to game the system.<sup>155</sup> The Native American religion case, rather than building upon the strengths of the *Sherbert* test to protect minority religions, painfully demonstrated the limits of the free exercise logic. Mainstream and minority religious groups could proselytize their faith, solicit customers to purchase their materials, teach the tenets of their faith on private doorsteps, protest public school policies, build their places of worship in residential neighborhoods, and receive tax exempt status, but they could not consume illegal substances, even if those who consumed them did so as a sacrament.

### *Sabbath Day Observance*

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid., 716.

<sup>155</sup> Ibid., 717.

The issue of Sabbath Day observance was still contested following *Sherbert's* landmark ruling that extended unemployment benefits to Sabbatarians. Although *Sherbert* provided strict scrutiny for claims involving infringement of religious beliefs and practices, the *Sherbert* regime was not stringent enough to shield religious minorities from discriminatory treatment. Sabbatarians were not able to observe their own Sabbath instead of the Christian Sunday closing laws without the burden of economic disadvantage.<sup>156</sup>

In *State v. Solomon* (1965), a Jewish merchant<sup>157</sup> was convicted for operating his business on Sunday in violation of the State's blue laws. The defendant was the manager of the Sam Solomon Company, a large general merchandise store in Charleston, South Carolina. He was an Orthodox Jew and did not operate his business on Saturday since his religious beliefs required that he observe Saturday as the Sabbath. Given the dictates of his faith, the defendant asserted his right to open the doors of his business on every day of the week excluding Saturday.<sup>158</sup> On Sunday, May 13, 1962, the defendant opened his business "as usual" and when the officers arrived on premises they observed customers purchasing all kinds of items including baby chairs, a ladies slip, and a white shirt. Consequently, the defendant was indicted for violating the statute forbidding retail on Sunday.

The defendant claimed that the Sunday closing law set aside a day of rest respecting the beliefs of a majority of Christians and discriminated against Saturday Sabbatarians by

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<sup>156</sup> *Carolina Amusement Co. v. Martin*, 236 S.C. 558, 566 (1960), in which the court held that a statute prohibiting public sports or pastimes on Sunday that was applied to the showing of motion pictures on Sunday could fairly and rationally be treated as a legitimate police regulation and, as such, is a valid law; *Tinder v. Clarke Auto Co.*, 238 Ind. 302 (1958), in which the court held that the law subjecting dealers who engage in business of buying, selling, and/or exchanging motor vehicles at retail on Sunday to fines and/or imprisonment greater than that imposed upon other businesses, which are made unlawful by general Sunday closing law, is not arbitrary and capricious; *State v. Fass*, 36 N.J. 102 (1961), in which the court ruled that a Sunday Closing Law was not invalid on the ground that it interfered with the free exercise of religion of a Sabbatarian who opened his retail store that sold floor coverings on Sunday.

<sup>157</sup> *State v. Solomon*, 245 S.C. 550 (1965).

<sup>158</sup> *Ibid.*, 557.

imposing an economic burden on them, since they had to close their business two days a week, while those who observed the Sabbath on Sunday merely had to close their business one day a week.<sup>159</sup> The Court, however, was not persuaded by the defendant's argument. First, it reasoned that the purpose of the statute was not religious, but rather to provide a uniform day of rest:

The statute was enacted, as declared in the preamble thereto, pursuant to the legislative finding and purpose that 'social, economic and other factors have made increasingly apparent the need for a more equitable and uniform method of securing the observance of a day of rest in South Carolina;' that 'it is in the interest of the moral, physical and mental health and the public welfare of the citizens of South Carolina that a uniform day of rest, in so far as practical, be observed.'<sup>160</sup>

Second, the Court held that the statute had a secular purpose because the terms of the statute confirmed the secular legislative purpose. After reviewing the statute's legislative history, the Court found that the purpose and effect of the statute was not to "aid religion" but to establish "a uniform day of rest in furtherance of the State's legitimate concern for the improvement of the health and general well-being of its citizens."<sup>161</sup> Third, the Court ruled that the statute demonstrated a secular purpose by providing an exemption for employees to attend church services who work in certain lawful businesses on Sunday where there are more than three employees. They argued that the church attendance exemption merely demonstrated respect for the right of persons to enjoy the free exercise of their religious beliefs.<sup>162</sup>

Citing *Sherbert*, the Court rejected the defendant's claim that the *Sherbert* holding necessitated a different outcome, where South Carolina's Unemployment Compensation Law had the impact of excluding persons who held certain religious beliefs from receiving

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<sup>159</sup> Ibid., 556.

<sup>160</sup> Ibid., 566–67.

<sup>161</sup> Ibid., 567.

<sup>162</sup> Ibid., 567–568.

State benefits. In addition, the Court distinguished this case from *Braunfeld*, where the Supreme Court acknowledged that the Sunday Closing law under attack placed an economic disadvantage upon the defendant in observance of his religious beliefs.<sup>163</sup> The Court concluded that the Sunday Closing law simply regulated secular activity and made the observance of certain religious beliefs more expensive, but did not make any religious practice unlawful. In *Braunfeld*, the Court established that it would not strike down legislation that did not make unlawful the religious practice of observing the Sabbath. For the same reasons, lower court rulings in Sabbath observance cases demonstrated the limits of the Free Exercise Clause despite the *Sherbert* revolution. Many courts were determined to limit *Sherbert's* ruling to the facts of the case and justify Sunday Closing laws on the basis of promoting public unity, even at the expense of encouraging harmony within and among certain religious minorities.

#### **IV. The Climate of Religious Freedom as a Catalyst for Civil Rights Revolution**

The climate of religious freedom that ensued post-*Cantwell* and post-*Sherbert* anticipated, predated and catalyzed the CRM. In this chapter, I have reviewed cases in which religious minorities petitioned the Court to protect their freedom of belief and freedom of expression. Before concluding this chapter, it is important to call attention to the important role that Jehovah's Witnesses played in expanding religious freedom. Leah Weinryb Grohsgal's dissertation builds a compelling case for the recognition and credit due Jehovah's Witnesses for the expansion of First Amendment rights. While other religious and nonreligious groups had previously challenged State and federal laws, the Witnesses stood

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<sup>163</sup> Ibid., 568, citing *Braunfeld v. Brown*, 366 US 605 (1961).

out as pioneers in linking religious liberty to other First Amendment protections.<sup>164</sup> This linkage fertilized the soil for the eventual expansion of civil rights in the form of racial equality.

Grohsgal provided strong evidence and support for the conclusion that Jehovah's Witnesses litigation strategy was groundbreaking for twentieth-century civil and human rights movements. In support of this view, she pointed to key cases between the 1930s and 1940s, in which Jehovah's Witnesses were plaintiffs, having the effect of expanding First Amendment rights. In *Lovell v. City of Griffin* (1938), Alma Lovell was arrested for distributing literature about the Jehovah's Witness faith.<sup>165</sup> The Court ruled that the Georgia ordinance requiring persons seeking to distribute materials (to sell or for free) to obtain prior consent from the City Manager of Griffin infringed the freedom of the press.<sup>166</sup> In *Lovell*, the Court reasoned that the ordinance that convicted Clara Schneider for canvassing without a permit attacked the freedom of the press.<sup>167</sup> In addition, the Court ruled that the First and Fourteenth Amendments protected the Cantwells' door-to-door canvassing with books, a pamphlet and a portable phonograph with recordings about Jehovah's Witnesses.<sup>168</sup> Grohsgal argued that, taken together, these cases represented a revolution in First Amendment protections: *Lovell* and *Schneider* expanded free press protections and *Cantwell* historically incorporated or applied the First Amendment Free Exercise Clause to the States through the Due Process Clause of the Fourteenth Amendment.<sup>169</sup>

Grohsgal also pointed out that the Witnesses' legal victories had an impact that was

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<sup>164</sup> Leah Weinryb Grohsgal, "Reinventing Civil Liberties: Religious Groups, Organized Litigation, and the Rights of Revolution" (PhD diss., Emory University, 2011), 283–284.

<sup>165</sup> *Lovell v. City of Griffin*, 303 US 444 (1938).

<sup>166</sup> *Ibid.*

<sup>167</sup> *Schneider v. State of New Jersey*, 308 US 147 (1939).

<sup>168</sup> *Cantwell*, 296.

<sup>169</sup> *Grohsgal, Civil Liberties*, 287–288.

far more significant than the expansion of their religious rights. While the NAACP and ACLU were casting and formalizing their legal strategy, by the mid-1930s, the Jehovah's Witnesses had already developed a robust legal strategy to expand First Amendment protections and sought to expand civil liberties for all.<sup>170</sup> Thus, the Witness cases were the most significant in creating the climate of religious freedom and freedom of expression. As such, Jehovah's Witnesses' petitions set the stage for a successful civil and human rights revolution because they integrated religious rights with free speech and civil rights to dismantle discriminatory policies.<sup>171</sup>

Finally, as Grohsgal pointed out, although the Jehovah's Witnesses did not participate directly in the CRM, their protest and legal strategies helped to change the climate that crystalized in the twentieth century civil and human rights revolution. Most Witnesses were not active participants in the CRM. They, as a religious organization, did not participate in litigation planning strategies for the sit-in and protest cases. However, the group contributed to the changing landscape in religious and civil rights protections by successfully fighting for freedom of worship, speaking the truth in the face of opposition, publicly connecting their activity with others seeking to expand civil liberties, exhausting the appellate process, and employing civil disobedience to expand rights.<sup>172</sup>

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<sup>170</sup> Ibid., 325–326.

<sup>171</sup> Ibid., 345.

<sup>172</sup> Ibid., 352. Although the Establishment Clause was drafted by Congress in 1789, the first Supreme Court case to focus on the clause was *Everson v. Board of Education* in 1947. The Court, in *Everson*, described that the intent of the Clause, drawing upon Thomas Jefferson's famous words, was to build "a wall of separation between the church and State." *Everson v. Board of Education*, 330 US 1, 16 (1947). Ironically, the "separation of church and state" principle released the church from the State, making it possible for the church to effect civil rights reforms. On the one hand, the Court recognized the importance of keeping the State and the church separate for the protection of both. For example, *Everson* provides that it was not an establishment of religion for State authorities to reimburse the parents of religious and public school children for the costs of using school bus transportation to religious schools. On the other hand, the Court was fully aware of the vital role that religion played in the lives of Americans and the larger society. In *Zorach*, while the Court concluded that, government must maintain a neutral posture with respect to competing religions or nonreligious groups, the principle does not require teachers to be indifferent to the religious needs of students to receive religious



## V. Summary and Conclusion

The aforementioned research and case studies show how principles that guided the Court's First Amendment religious freedom jurisprudence from the 1930s through the 1960s had important implications for the CRM. First, the Jehovah's Witnesses resisted laws mandating the flag salute because their faith provided that such ceremonial practices were prohibited. In resisting laws nonviolently and pursuing litigation, the group tied the quest for religious rights with efforts to expand civil rights. In addition, in challenging Sunday blue laws that prohibited Saturday Sabbatarians from discriminating against Jews and others religious minorities, these religious minorities claimed that laws that interfered with their religious practices and gave Christian Sunday Sabbath observers an economic advantage abridged their First Amendment and Fourteenth Amendment rights.

Further examination of the principles and tactics of the CRM will show how Free Exercise and civil rights are two sides of the same coin. The view that God's law is higher than the law of the State is a central tenet of nonviolent civil disobedience powerfully expressed in the CRM. Like the Witnesses, civil rights activists were seeking to overturn discriminatory laws and politics that infringed constitutional rights. Because groups like the Witnesses proselytized their faith, solicited support for their cause, appealed to divine law to justify civil disobedience and finally prevailed, they helped to establish a climate of religious freedom. This climate prepared the way for civil rights protestors over a decade later who similarly appealed to divine law, engaged in civil disobedience and worked for the expansion of rights for the benefit of other groups.

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support even during the school day. *Zorach v. Clauson*, 343 US 306, 314 (1952). Nevertheless, the Court struggled to maintain this important balance. Students can voluntarily pray but the State must not "prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Engel v. Vitale*, 370 US 421, 422, 430 (1962).

The dominant concern for promoting national unity as the prerequisite for keeping America safe showed the limits of judicial tolerance for religious freedom. Perceived threats to national security loomed large in the face of increasing religious pluralism during the 1950s and 1960s. National unity was an important concern of the Court and, thus, the desire to protect national cohesion often came at the expense of protecting the constitutional freedoms of politically powerless religious minorities. In the CRM context, there were similar concerns over the impact of the protests in eroding law and order and threatening public safety. Many assumed that civil disobedience encouraged anarchy and exacerbated religious and cultural division. This fear was misplaced, as the protest cases will show, because it falsely assumed that following divine law and engaging in nonviolent civil disobedience was unpatriotic activity. In fact, the goal of promoting unity between the races inspired protestors to use nonviolent methods to overturn laws that promoted racial division and threatened the public good.

Further, the Court affirmed the right of individuals to speak their mind without compulsion. This theme resurfaced in protest cases during the CRM where protestors sought to modify the law by changing public opinion about segregation. The fullest expression of individual freedom, according to the Court, is when an individual has the right to differ on things that “touch the heart of the existing order.” This is one reason why civil rights protestors challenged discriminatory law; they believed that a higher law—not only the Bill of Rights and the Constitution but also the Word of God—inspired them to offer an alternative vision that challenged the existing order of racism, Jim Crow, and segregation.<sup>173</sup> Finally, freedom of religion also prohibited officials from proscribing what shall be orthodox

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<sup>173</sup> Stewart Burns, *To The Mountaintop: Martin Luther King Jr.'s Mission to Save America 1955–1968* (New York: Harper, 2004), 322.

in politics, nationalism, or religion. Thus, like the Sabbath Observers and Witnesses, the CRM protestors believed that the laws of God were more exacting than the obligations imposed by the State. The State could not force CRM protestors to confess their faith in a tradition or practice that violated their own religious beliefs.

Another theme emerging from the free exercise cases that was revisited in protest cases during the CRM was that private property rights do not supersede constitutional rights. Once owners were “open for business” private business owners’ rights could be trumped by the constitutional rights of patrons. The *Marsh v. Alabama* (1946) case extended religious expression beyond State-run towns and municipalities to cover private towns that are infused with the public interest.<sup>174</sup> The more the owner opens up his business or property for use by the general public, the more his (property) rights become circumscribed by the constitutional rights of those who use them. The corporation, State, and officers cannot impose statutes that restrict the constitutional rights of those who use their property.

However, these cases also point to the limits of free exercise cases in protecting religious conduct from State infringement. While the Court held that the right to believe is absolute, it was not prepared to provide constitutional justification to engage in acts of civil disobedience even to protect a religious belief or expand civil rights. This trend emerged in nonviolent protests where the Court provided relief based in individual cases, but refused to rule that nonviolent protestors had a constitutional right to engage in acts of civil disobedience. Even if an official acted arbitrarily or capriciously to deny a constitutional right, inconvenience, delay, or cost was not deemed a sufficient justification to break the law, whatever the cause. The Court was overly concerned in these cases that, if it allowed one person to disregard laws or procedures, others would do the same and anarchy would

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<sup>174</sup> *Marsh v. Alabama*, 326 US 501 (1946).

replace the rule of law. Similar concerns over State action and governmental powers resurfaced in protest cases during the CRM.

In summary, in the period leading up to the CRM, a climate of religious freedom was encouraged by First Amendment cases that protected religious liberty, safeguarded the freedom to believe and worship minority faiths, placed limits on government regulatory powers, prohibited religious discrimination, and struck down prior restraints on religious freedom. These court rulings reminded protestors that religious and, very often, political speech enjoyed the highest constitutional protection; they affirmed the right of groups to follow the dictates of their faith, even if the higher law conflicted with State law. At the height of the *Sherbert* revolution, the climate of religious freedom opposed all forms of religious discrimination meant to target religious groups whose beliefs did not conform to the status quo. This climate of religious freedom provided an important stimulant to civil rights activists who were compelled to resist discriminatory laws that violated constitutional laws and were out of harmony with divine law. Chapter 2 will further examine the religious aspects of the CRM that aligned with the Free Exercise and Establishment clauses of the First Amendment.

## **Chapter 2: The Christian Dimensions of the Nonviolent Struggle for Civil and Human Rights during the Civil Rights Movement**

### **I. The Religious Foundations of the Civil Rights Movement and the Role Christian-based Struggle Played in Protecting Religious and Civil Rights**

The central aim of this dissertation is to examine the relationship between the climate of religious freedom fostered by court rulings in the 1930s through the 1960s, and the Civil Rights Movement (CRM). My thesis is that the climate of religious freedom supported civil rights activists' claims to freedom of expression, civil rights and human rights. In chapter one, I identified several ways in which court rulings in favor of free expression and liberty of conscience created fertile soil for the pursuant CRM. In Chapter two, I establish this link more firmly by explicating how the CRM was itself a religious movement, inspired by religious ideals, characterized by religious expression and mobilized by religious leaders and institutions. Throughout this chapter, I draw connections between the religious underpinnings of the CRM and the legal and social climate that protected religious liberty during that same era. I trace the role that Christian-based nonviolent struggle played in creatively projecting alternative centers of meaning, providing a zone of liberty and expanding the reach of democracy.

The Civil Rights Movement (CRM) marked a unique era in American history between 1955 and 1971, when a nonviolent struggle for civil and human rights transformed race relations throughout the country. A plethora of historical reviews have documented various facets of the CRM. However, the story of the legal, Christian, and philosophical principles that grounded nonviolent protest has not been fully told. In this chapter, I focus in particular on how the law, faith, and social justice interacted to create the conditions ripe

for the success of nonviolent civil disobedience during the CRM.

Rather than provide a comprehensive review of key moments and actors in the CRM, this chapter will focus on the role that religion played in the CRM. There is no denying that secular sentiments motivated social protest. This thematic review emphasizes key religious beliefs, religious expressions, religious leaders and religious institutions that were central to the CRM. In so doing, special emphasis is placed on the role of the Black Church in the CRM. I seek to address the unique ways that Black churches and religious leaders deployed a Christian-based nonviolent strategy of resistance against the system of Jim Crow and oppression. I acknowledge that radical calls for violent resistance by certain Black activists made the urgency of social change more apparent, and increased the appeal of nonviolent strategies. Yet, this dissertation will focus on the religious underpinnings of the nonviolent strategy of civil disobedience. This chapter focuses on how Martin Luther King Jr., the most influential spokesperson for the nonviolent struggle, grounded civil disobedience in political, philosophical, and Christian language.

## **II. The Christian Roots of Nonviolent Civil Disobedience During the CRM**

In order to advance the cause of civil and human rights, many civil rights activists deployed a Christian-based strategy of nonviolent civil disobedience. Nonviolent civil disobedience was consistent with many activists' views of the church's mission: to confront compassionately and courageously those institutions and structures that deny freedom and human dignity.<sup>175</sup> Biblical scholar Obery Hendricks Jr. noted that Jesus' strategy of nonviolent resistance in the face of violence, fear, and injustice was expressed powerfully in

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<sup>175</sup> See Luke 4:18–19 and Matthew 25:31–40 (New International Version).

the CRM.<sup>176</sup> Movement leaders interpreted the ministry of Jesus to command Christians to embrace the love commandment: love God and love your neighbor as you love yourself. The measure of neighborly love was one's willingness to sacrifice for the welfare of suffering and hurting humanity. Christians' love for God enabled them to face Billy clubs, fire hoses, racial animus, and legal gridlock with nonviolence. Their love for God enabled them to prophetically and actively resist darkness of evil and hatred with the light of love, justice, and forgiveness working through them.<sup>177</sup> The Christian-based strategy of civil disobedience first gained national prominence during the Montgomery Bus Boycott, which has been deemed by many the birth of the modern freedom movement. The Montgomery Bus Boycott presented a unique historical moment for marginalized blacks to form alliances in order to advance constitutional concerns and human rights. Civil disobedience provided the vehicle whereby persons could challenge discriminatory laws and policies that were unjust based upon appeals to conscience and a higher principle than the human law being violated.<sup>178</sup> Although the goal was to dismantle discriminatory laws that were contrary to natural law and

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<sup>176</sup> Obery M. Hendricks Jr., *The Politics of Jesus: Rediscovering the True Revolutionary Nature of Jesus' Teaching and How They Have Been Corrupted* (New York: Doubleday, 2006), 176–77.

<sup>177</sup> See Lewis Baldwin, *The Voice of Conscience: The Church in the Mind of Martin Luther King, Jr.* (New York: Oxford University Press, 2010), 6; Stephen Carter, *God's Name in Vain* (New York: Basic Books, 2000), 33; Timothy Jackson, "Church, World, and Christian Charity," in *Bonhoeffer and King 100*, eds. Willis Jenkins and Jennifer McBride (Minneapolis, MN: Fortress Press, 2010), 99-105.

<sup>178</sup> John Whitehead, "The Religious Freedom Restoration Act: Implications for Religiously-Based Civil Disobedience and Free Exercise Claims," *Washburn Law Journal* 33 (1994): 383-84, in which Whitehead argues that "religiously based civil disobedience (or integrity-based civil disobedience) is civil disobedience engaged in as a personal matter where one's conscience or religious beliefs forbid obedience to a particular law or policy."; James Luther Adams, "Civil Disobedience: Its Occasions and Limits" in *Political and Legal Obligation*, eds. Roland Pennock and John Chapman (Piscataway, NJ: Aldine Transaction, 1970), 293. Adams constructed the following definition of civil disobedience: 1) it is nonviolent; 2) based upon a public violation; 3) challenges a particular law or policies having the effect of law; 4) expresses a sense of justice in a civil society of cooperation among equals and (5) generally undertaken in the name of a presumed higher authority than the law in question; 6) as a last resort; 7) for the purpose of changing the law; and 8) with the intention of accepting the legal consequences of violating the law. Adams' definition of civil disobedience is indispensable to our understanding of the character of civil disobedience in the CRM with the following modifications to (3) and (5): namely, the violation is of a law, set of laws, policy, or set of customs having the effect of law and the violation is undertaken in the spirit of a higher religious principle and constitutional principle than the law in question.

eternal law, activists used nonviolent methods, disobeyed unjust laws, willingly accepted the penalty for violating the law, and sought to promote reconciliation even while exposing evils.<sup>179</sup>

The Christian/religious character of the nonviolent struggle was apparent in the theological tropes and public language utilized to define the purpose of the mass nonviolent protests. Although organizations such as the Student Nonviolent Coordinating Committee (SNCC), CORE, and the Council of Federated Organizations (COFO) have been described as secularized waves of the CRM, religious language inundated the early literature of this youthful and creative movement. In Albany, SNCC advertised its first mass meeting on November 8, 1961, by announcing, “To those who love the Lord and Freedom: COME; LISTEN; LEARN; LOVE!”<sup>180</sup> The statement of purpose, drafted by SNCC’s Rev. J.M. Lawson Jr., was delivered like a Black religious manifesto of the new South:

Each member of our movement must work diligently to understand the depths of nonviolence. We affirm the philosophical or religious ideal of nonviolence as the foundation of our purpose, the pre-supposition of our faith, and the manner of our action. Nonviolence as it grows from Judaic-Christian traditions seeks a social order of justice permeated by love. Integration of human endeavor represents the crucial first step towards such a society. Through nonviolence, courage displaces fear; love transforms hate. Acceptance dissipates prejudice; hope ends despair. Peace dominates war; faith reconciles doubt. Mutual regards cancel enmity. Justice for all overthrows injustice. The redemptive community supersedes systems of gross immorality. Love is the central motif of nonviolence. Love is the force by which God binds man to man. Such love goes to the extreme; it remains loving and forgiving even in the midst of hostility. It matches the capacity of evil to inflict suffering with an even more enduring capacity to absorb evil, all the while persisting in love. By appealing to conscience and standing on the moral nature of human existence, nonviolence nurtures the atmosphere in which reconciliation and justice become actual possibilities.<sup>181</sup>

The philosophy of nonviolent civil disobedience could not have been more

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<sup>179</sup> Clayborne Carson, *The Autobiography of Martin Luther King, Jr.* (New York: Warner Books, 1998), 95.

<sup>180</sup> Steven F. Lawson and Charles Payne, *Debating the Civil Rights Movement, 1945–1968* (Lanham, MD: Rowman & Littlefield, 1998), 141.

<sup>181</sup> J.M. Lawson Jr., “What Is SNCC? Philosophy?” *The Student Voice Newsletter* 1, no. 1 (June 1960).



unapologetic in its specificity and scope, or more subversive in exposing the evils of the racial status quo. The statement celebrates Christian love as the organizing force that unites "man to man," "remains loving and forgiving" in the face of evil and creates the condition where "reconciliation and justice become actual possibilities." While many in organizations like SNCC were motivated by secular ideals, this project focuses on how the core message of the nonviolent struggle was rooted in the language, the tropes, traditions and mission of the church. As the institution most independent from mainstream society, the church was more than merely "feel good religion"; it provided a potent platform for imagining freedom, expanding constitutional rights and catalyzing social reform. First, I will describe how the church and religious leaders helped birth and protect the CRM. I will then return to the discussion of civil disobedience as a Christian social ethic for the CRM later in this chapter.

*Nonviolent Resistance Creatively Projected an Alternative Center of Meaning*

The CRM provided Blacks with a new way of thinking about themselves as children of God and as full-fledged citizens of the American Republic. Given the challenges of ending racial segregation, the public participation of the church in the nonviolent struggle represented an important shift in the private and public character of the church. The church provided this disenfranchised group with a system of beliefs, traditions and symbols of meaning that enabled a people perceived as biologically inferior to see themselves as made in the Imago Dei and deserving of equal rights before the law. Leaders espoused that Blacks were not cursed, but they were chosen by God to redeem the soul of America and to help usher the reign of God's Kingdom permeated with love.

Civil rights activists highlighted what they saw as affinities between Christian,

political, and philosophical theories that justified peaceful protest.<sup>182</sup> Movement leaders drew upon what they believed were affinities between America's founding documents and Christian principles. These documents were written to protect the rights of white male property owners, but blacks interpreted the Constitution as applying to them and were determined to work to make their birthright real. While the Declaration of Independence and the Constitution were written to make real the promises of freedom for Anglo-Saxon men, the promise of these documents remained elusive for Blacks, women, low-wage workers, and others on the margins of society. Much of the rhetoric of the CRM was focused on pointing out how the system of segregation denied Blacks their birthright of freedom of equality.

Martin Luther King Jr. emphasized the overlapping principles of the Declaration of Independence and the Judeo-Christian heritage. According to King, the language of the Declaration of Independence was in harmony with "the sacred values of our Judeo-Christian tradition."<sup>183</sup> In addition, the document was a timeless treasure because it upheld values that King appropriated from the Black church and the personalism of Edgar S. Brightman and L. Harold DeWolf: "It is a profound, eloquent and unequivocal expression of the dignity and worth of all human personality." King's challenge was to exploit this universal language to advance his inclusive project.<sup>184</sup>

What really troubled King was the apparent contradiction between America's stated ideals and its failure to reflect those values in its treatment of oppressed minorities. He wanted all Americans to work without ceasing to realize the promise of "the Preamble to the

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<sup>182</sup> Ibid., 98.

<sup>183</sup> Ibid., 94.

<sup>184</sup> Lewis Baldwin et al., *The Legacy of Martin Luther King, Jr.: The Boundaries of Law, Politics and Religion* (Notre Dame, IN: University of Notre Dame Press, 2002): 127.

Constitution, the Constitution itself, the Bill of Rights, and the Thirteenth, Fourteenth and Fifteenth amendments.”<sup>185</sup> Because King believed in the sacred character and relevance of America’s founding documents, he was deeply troubled that government officials and the court system often permitted the passage and enforcement of laws that abridged blacks’ constitutional rights throughout the South.

King’s address at Holt Street Baptist Church during the event marking the launch of the Montgomery Bus Boycott was the first systematic statement of the religious and ethical underpinnings of the boycott. King was concerned about delivering a message that was radical enough to re-channel bitter resentments and moderate enough to temper passion and keep the sentiments within the limits of Christian faith. As he stared intently at a piece of notepaper, King recalled, “I knew that many of the Negro people were victims of bitterness that could rise to proportions. What could I say to keep them courageous and prepared for positive action and yet devoid of hate and resentment?”<sup>186</sup> Even before the boycott began, King understood that nonviolence was critical to the success of the movement, and vital to channeling the pent-up “bitterness” of blacks on the verge of engaging in more violent activity.

As restless spectators gathered in the church, hymns like “Onward Christian Soldier,” “Leaning on the Everlasting Arms” and chants echoed from the church walls. Given all the components of the meeting -- scripture reading, the prayer and the site of the meeting-- this mass assembly had all of the elements of a Black Baptist worship service. Rev. W.F. Alford opened the meeting with an inspiring prayer and U.J. Fields, pastor of Bell Street Baptist Church, read Psalms 34. In this text, David gives thanks to God who saved him from death

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<sup>185</sup> Martin Luther King Jr., *Why We Can't Wait*, (New York: Signet Classics, 2000), 25.

<sup>186</sup> Stewart Burns, *To The Mountaintop: Martin Luther King Jr.'s Mission to Save America 1955-1968* (New York: Harper, 2004), 26.

at the hand of King Abimelech by filling him with the Holy Spirit. Fields reminded his listeners that the same God who delivered David would protect the "poor" ones of Montgomery who sought the Lord. They were to 'turn away from evil and do good' because 'the Lord redeems his servants.'<sup>187</sup> As the seat of dissent, the Black Church functioned as a counterculture that deployed Christian imagery and symbols to help build the CRM.

King finally approached the podium on that auspicious night to deliver what he would later recall as one of the most important addresses of his life. He told the crowd that the protests were not motivated by a disrespect for law and order, but were based upon a commitment to bridge the gulf between constitutional rights and political reality:

We are here in a general sense because first and foremost we are American citizens, and we are determined to apply our citizenship to the fullness of its means. We are here because of our love for democracy, because of our deep-seated belief that democracy transformed from thin paper to thick action is the greatest form of government on earth.<sup>188</sup>

Further, protestors were there out of a determination to "get the situation corrected" in Montgomery.<sup>189</sup> The situation they were there to correct was a system of racial segregation that denied equal opportunity to blacks, which was a direct affront to divine and positive law.

King intoned that the boycotters were a "Christian people" who "believe in the Christian religion" and "the teachings of Jesus."<sup>190</sup> They were not anarchists who protested to imperil public order. They took their religious cause to the streets based upon their belief in the "great glory of American democracy" and a profound understanding that the "only weapon that we have in our hands this evening is the weapon of protest."<sup>191</sup> King exhorted

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<sup>187</sup> Ibid., 25.

<sup>188</sup> Martin Luther King Jr., "Holt Street Speech," in *The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts From the Black Freedom Struggle*, eds. Clayborne Carson et al. (New York: Penguin, 1991), 48.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid., 49.

<sup>191</sup> Ibid.

that their right to protest was enshrined by the constitution and the teachings of Christianity:

And we are not wrong, we are not wrong in what we are doing. If we are wrong, then the Supreme Court of this Nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong. If we are wrong, Jesus of Nazareth was merely a utopian dreamer and never came down to earth. If we are wrong, justice is a lie. And we are determined here in Montgomery to work and fight until justice runs down like water and righteousness like a mighty stream.<sup>192</sup>

In his public declaration, King reaffirmed the connection between positive law and divine law. In other words, because divine law affirmed the dignity and worth of blacks, they had a moral duty to resist laws that denied that fact. Further, King confessed that the boycott was right because it was a spiritual movement and the protestors were merely God's moral agents used to right a wrong and recalibrate the moral order of the universe. King was so certain that this was God's movement that he was determined to stake his presidency of the Montgomery Improvement Association, the law of the land and his faith on that fact.

The spiritual power and passionate fervor that motivated the planned Montgomery Bus Boycott protest activity were witnessed by movement participants and anxious spectators. Joe Azbell, who attended the meeting as a spectator, commented on the spiritual power he witnessed: "The meeting was much like an old-fashioned revival with loud applause added. I proved beyond any doubt that there was a discipline among Negroes that many whites had doubted. It was almost a military discipline combined with emotion." Azbell remembers that the overflowing crowd revealed that the nonviolent protest had the support of most in the Black community, a testament of the organizing power of ministers and leaders in the CRM.<sup>193</sup> "Bodies at the front were packed one against the other. It

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<sup>192</sup> Ibid., 50.

<sup>193</sup> Ibid., 52.

required five minutes for a photographer to move eight feet among these people."<sup>194</sup> He also witnessed the energy and the message of the speakers that demonstrated the distinctive Christian character of the movement:

The passion that fired the meeting was seen as thousands of voices joined in singing...The voices thundered through the church...The minister spoke of God as the Master and the brotherhood of man. He repeated in a different way that God would protect the righteous. As the other speakers came on the platform urging 'freedom and equality' for Negroes 'who are Americans and proud of this democracy,' the frenzy of the audience mounted.<sup>195</sup>

Thus, from the inception of the CRM, it was understood that protest was faith in action based on the deeply and widely held belief that this was God's movement. Protestors' commitment to democracy was deeply rooted in their Christian faith, interpretation of scriptures and songs that tied their spiritual movement to past, present and future struggles. They understood that, if freedom would be achieved, they had to be willing to let God use them to "set the crooked paths straight."<sup>196</sup>

#### *Nonviolent Resistance Provided a Zone of Liberty*

The central role of the Black Church in advancing the cause for constitutional improvement and human rights has been well documented.<sup>197</sup> From slavery to Reconstruction, from the first wave of the Great Migration to the Great Depression, from post-WWII to the Civil Rights Movement (CRM), Black churches have played a central role in the nonviolent struggle for religious and human freedom in America. The Black church and traditional civil rights organizations worked together in ways that challenged the secular

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<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Isaiah 40:3 (New International Version).

<sup>197</sup> Vincent Harding, "Awakenings (1954–1956)," in *The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts From the Black Freedom Struggle*, eds. Clayborne Carson et al. (New York: Penguin, 1991), 35–37; Peter Paris, *The Social Teaching of the Black Churches* (Philadelphia: Fortress Press, 1985), 67–8; C. Eric Lincoln and Lawrence H. Mamiya, *The Black Church in the African American Experience* (Durham, NC: Duke University Press, 1990), 398–404.

vs. religious dichotomy that characterized majority politics. Many Black churches were very instrumental in providing physical space, moral support and foot soldiers for the civil rights cause as they viewed civil rights protest as a form of religious expression. Churches often provided a forum and a zone of liberty where protestors could convene safely and orchestrate protests to creatively expand constitutional and human rights. In this way, the church fulfilled an important role of serving as a catalyst for social reform by drawing upon religious, philosophical and democratic principles to promote the common good. Consistent with its traditions of resistance that began during slavery, the Black church continued to play a central role during the CRM as activists realized the immorality of racial segregation and its contradiction of established constitutional and democratic principles.

The Albany movement of Albany, Georgia provides evidence of the Black church's instrumental role in supporting the CRM's acts of civil disobedience. The Albany movement was an offshoot of the Freedom Rides of the winter of 1961, organized by the Congress of Racial Equality (CORE). CORE's founder, James Farmer, was a graduate of Howard School of Divinity and race relations secretary for the pacifist Fellowship of Reconciliation. Despite the rejection of both violent and many nonviolent methods by genuine pacifists, Farmer believed that nonviolent direct action was a necessary tactic to fight de facto segregation.<sup>198</sup> CORE prepared to test compliance with *Boynton v. Virginia*, which declared segregation in interstate train and bus terminals unconstitutional.<sup>199</sup>

Fueled by the prospects for racial reform, the Freedom Riders rode buses through communities throughout the south during the spring of 1961 to challenge the continued

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<sup>198</sup> Andrew Young, *An Uneasy Burden: The Civil Rights Movement and the Transformation of America*. (New York: HarperCollins, 1996), 164–165.

<sup>199</sup> *Boynton v. Virginia*, 364 US 454 (1960).

practice of segregation on buses and in terminals.<sup>200</sup> The persistent activism of this courageous band of youthful activists compelled the Kennedy administration to provide protection for the constitutional rights of the riders. The Freedom Riders also compelled the Kennedy administration to vigorously enforce *Boynton* administratively with the passage of the Interstate Commerce Commission (ICC) order of Sept 22. This order prohibited legal segregation in interstate travel facilities.<sup>201</sup> After the issuance of the ICC order in September 1961, an assemblage of black ministers from Albany mailed a respectful piece of correspondence to petition the city government to set up biracial meetings to address segregation in Albany and encourage the city to move toward full compliance of the ICC. The assemblage felt that it was their responsibility as ministers of the gospel to address social evils that were denying the constitutional and human rights of God's chosen people.<sup>202</sup> These talks and subsequent demonstrations laid the groundwork for the nonviolent Albany movement, a defining campaign for the CRM as a whole.

The Albany movement was not the only instance outside of Montgomery where black churches participated in the CRM. The Birmingham movement was another important example of the power of the Black church to energize a community to combat the common evil of racial injustice while drawing upon the religious traditions and symbols of the black church to promote social reform. A central leader in this campaign was Rev. Fred Shuttlesworth, an advocate for racial justice in Birmingham, Alabama since 1954, when he embarked on a journey to enroll his daughter in a white school after the court handed down the *Brown* decision.<sup>203</sup> With the courageous assistance of a small group of ministers,

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<sup>200</sup> Young, *An Uneasy Burden*, 165.

<sup>201</sup> Interstate Commerce Act, *US Code* 49 (1961), § 316(d). Young, *An Uneasy Burden*, 165–166.

<sup>202</sup> Young, *An Uneasy Burden*, 166.

<sup>203</sup> *Ibid.*, 187.



Shuttlesworth established the Alabama Christian Movement for Human Rights in the late 1950s.<sup>204</sup> This organization was designed to serve as a surrogate for the NAACP, which was outlawed in 1956 by an Alabama court injunction because it refused to turn over its membership list to the State Attorney General's Office.<sup>205</sup>

The centrality of the Christian faith was evident in every stage of the protests—from the prayers offered during nonviolent protests to the music used to inspire and encourage protestors to believe in the righteousness of their cause; from the tactics used to the explicit appeal to scripture to guide political action. Prayer, as a religious practice, was invoked throughout the civil rights protests as a means of providing divine covering for protestors who were in constant danger, and to remind all of the cosmic dimension of the struggle. Rev. Charles Billups, a key ACMHR member, was kidnapped by the Ku Klux Klan, roped to a tree and, and pummeled. Although he survived, it was said that he escaped because he insisted upon praying aloud for his kidnappers.<sup>206</sup>

In the case of the Birmingham struggle, every day, before the actual protests, activists gathered at the Sixteenth Street Church to sing freedom songs and spirituals, discuss the preliminaries of the demonstration, receive updates on the progress of campaigns, and hear motivational speeches and sermons. These gatherings braved the spirits of protestors who risked both life and limb to resist moral evil and defend the rights of African Americans. Once the business was discussed, each protestor was told to check to see if they had a toothbrush, washcloth, and a small Bible for study in the likely event that they were arrested during demonstrations. They would then form a circle of prayer while singing 'We Shall

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<sup>204</sup> Davis W. Houck and David E. Dixon, eds., *Rhetoric, Religion, and the Civil Rights Movement 1954–1965* (Waco, TX: Baylor University Press, 2006): 250–251.

<sup>205</sup> Andrew Young, *An Uneasy Burden*, 198–199.

<sup>206</sup> Ibid.

Overcome.’ Each marched out of the church by twos, down Fourth Avenue toward city hall, and on to jail. Each day a group was arrested. The following day the same process unfolded until the city jails were full.<sup>207</sup> Utilizing the intermingled spaces of the Black church and civil rights organizations, activists participated in sustained public contestation in these public spaces that shaped Black Christian identity, developed reason, influenced the formation of moral character and offered transformative possibilities for broader discursive practices.

*Nonviolent Resistance Expanded the Reach of Democracy*

The struggle to change unjust laws was based upon the principle that eternal and natural law ought to ground positive law, and that laws denying human dignity and worth were unjust and should be overturned. Disciples of nonviolence conceived the church-centered CRM as the fulfillment not only of a divine plan, but as a variant of Henry David Thoreau’s idea of “the effectiveness of a creative minority who serves the State by resisting it with the intention of improving it.”<sup>208</sup> In this way, protestors believed that the church of the CRM was a modern day version of the church of the apostles.<sup>209</sup> Given the strong commitment of most civil rights activists to the moral and ethical principles of the Christian faith, the CRM was essentially a Christian movement committed to the principles of religious freedom and racial equality.<sup>210</sup>

Nonviolence incorporated Christian tenets as well as the tactics of global human rights activists, namely Gandhi. Unlike some activists, Martin Luther King Jr., was not

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<sup>207</sup> Ibid., 208.

<sup>208</sup> Baldwin et al., *Legacy*, 100.

<sup>209</sup> Baldwin et al., *Legacy*, 100.

<sup>210</sup> Thus, the Southern religious historian, Samuel S. Hill, is correct in saying that King’s Southern Christian Leadership Conference (SCLC), formed in 1957 to coordinate the activities of local protest organizations across the South, and “to give the total struggle a sense of Christian and disciplined direction,” was actually an “intentional type of religious-political movement” which “sought the embodiment of the teachings of Jesus in the laws of American society.” Baldwin et al., *Legacy*, 86.

initially committed to Gandhian nonviolent civil disobedience during his first introduction to the movement. King's hesitant embrace of nonviolence was emblematic of the ambivalence and skepticism that many held toward this method during the CRM era. Inspired by the teachings of the social gospel movement, King began a serious study of the social and ethical theories of the great religious leaders. He had learned of Gandhi through his close relationship with Mordecai Johnson, a friend of his father (Daddy King), but he did not become a disciple of Gandhi at that point. Rather, his connection to Gandhi strengthened over time.<sup>211</sup> Instruction from fellow civil rights leaders (activists), Glenn Smiley and Bayard Rustin, helped deepen King's awareness of Gandhian principles.<sup>212</sup> They brought King into nonviolent training workshops, which were an expanded form of similar workshops designed by Fellowship of Reconciliation and CORE activists years before. King, who was still open to the use of violent methods in the case of personal self-defense, faced increasing criticism from many of his liberal allies, including Bayard Rustin, who felt that King's qualified commitment to nonviolence—that is, openness to self-defense in the case of white

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<sup>211</sup> Martin Luther King Jr., *Stride Toward Freedom: The Montgomery Story* (New York: Harper & Brothers, 1958). King confessed that his commitment to Gandhi-style nonviolence emerged much later in the boycott after he seriously engaged Gandhi and expanded his own understanding of nonviolence. David Garrow, *Bearing the Cross: Martin Luther King Jr., and the Southern Christian Leadership Conference* (New York: HarperCollins, 1986). According to Garrow, a close MIA member and biographer, L.D. Reddick, pointed out that King's philosophy of nonviolence was in its formative and early stages. When King gave his first speech at MIA, he did not mention Gandhi or civil disobedience but emphasized Christian principles, democratic values, fairness, and compassion. Later that month, around Christmas, King's nonviolent position was more refined. As the MIA brochure produced later in the boycott states "this is a movement of passive resistance, depending on moral and spiritual forces." *Ibid.*, 32.

<sup>212</sup> Burns, *Mountaintop*. Burns records a conversation between King and Rustin, where Rustin told King that he was undercutting the movement's momentum and "betraying nonviolent principles" by keeping guns in his home and armed guards outside. Rustin felt that these actions were "not only ...hypocritical but would invite more violence than it would repel." King, offended, responded that "the movement is nonviolent." "We're not going to harm anybody unless they harm us," King emphasized. He said that "if whites attacked blacks they had the right to defend themselves, their homes, and their families." *Ibid.*, 138. Garrow, *Bearing the Cross*. Rustin responded that, in this historic situation, such rights were trumped by a greater moral responsibility. He responded that a commitment to Gandhian nonviolent principles demanded a complete rejection of retaliation, even in the case of self-defense. See Garrow, *Bearing the Cross*, 82.

terror against blacks—could lead to catastrophic violent conflict.<sup>213</sup> The tipping point came when King realized that the key to overcoming hate and righting injustice rested in maintaining an absolute commitment to the love commandment as expressed through nonviolent civil disobedience.

Civil rights activists identified strongly with Gandhi's nonviolent human rights program because it provided a social strategy for resisting social evil that was consistent with Christian principles of agape love and nonviolent resistance.<sup>214</sup> The Gandhian notion of "satyagraha," translated as "truth-force or love force," corresponded with the Christian understanding of the power of agape love to overcome evil and right wrongs.<sup>215</sup> King realized, for the first time, that the Christian doctrine of love coupled with Gandhi's method of nonviolent direct action was the most potent tool available to oppressed persons in their struggle against social injustice. According to King, "Christ furnished the spirit and motivation while Gandhi furnished the method."<sup>216</sup> King weaved together Jesus' love ethic and Gandhian passive resistance to create "a synthesis of visionary and socially relevant nonviolent philosophy."<sup>217</sup> Nonviolent passive resistance legitimated noncooperation with evil, but it did so based upon a recognition that love or "soul force" is more powerful than hate in eliminating evil.

Armed with a Christian method to resist social evil, civil rights leaders believed that the philosophical and democratic values of the right to free speech, equal dignity and worth, freedom of religion, and equal protection of the laws were consistent with the values and principles embedded in the Judeo-Christian tradition. Nonviolent soldiers grew increasingly

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<sup>213</sup> Garrow, *Bearing the Cross*, 111.

<sup>214</sup> Martin Luther King Jr., "Pilgrimage to Nonviolence," in *I Have a Dream: Writings and Speeches that Changed the World*, ed. James Washington (New York: Harper San Francisco, 1986): 58–59.

<sup>215</sup> *Ibid.*, 59.

<sup>216</sup> *Ibid.*, 38.

<sup>217</sup> *Ibid.*, 38.

frustrated with the efforts of politicians and the court system to block the realization of blacks' birthright of freedom. Yet, King believed that one day the promise of American founding principles would be realized, even if it required the radical reorganization of society.

As King made evident in his initial speech for the Montgomery Bus Boycott, nonviolent activists resisted unjust laws, but they were not anarchists.<sup>218</sup> When Thoreau championed civil disobedience, he cautioned the faithful not to cooperate with the positive State laws when they became insufferable. While nonviolent activists resisted certain unjust laws, the movement did not embrace the principle of total noncooperation with the State or all positive laws. Activists focused protests on certain campaigns that could draw national and international attention to the CRM.

Characterizing himself and nonviolent protestors as “political prisoners” whose constitutional right to protest had been abridged, King believed that organized resistance to unjust laws was the greatest demonstration of respect for the law of the land if one is willing to go to jail. In King’s famous “Letter from a Birmingham Jail,” he emphasized that there are just and unjust laws. Drawing upon Augustine, King maintained that, “An unjust law is no law at all.” While King agreed that the absence of justice violated positive law, he rejected Augustine’s argument that conformity to the law is a necessary condition for legal validity. He agreed with Thomas Aquinas that laws are defined as just when they promote the common good, stay in the scope of the lawmaker’s power, and when burdens are distributed equitably to advance the common good.<sup>219</sup> King also agreed with Aquinas that a law is unjust

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<sup>218</sup> Leslie W. Dunbar, “Civil Disobedience: Ethical and Political Views,” in *Benjamin E. Mays: His Life, Contributions and Legacy*, ed. Samuel DuBois Cook (Franklin, TN: Providence House, 2009). Dunbar challenges the view of Thoreau as a patron saint of the sit-in movement, arguing that, when Thoreau taught civil disobedience, he was encouraging his contemporaries to resist state laws when they became intolerable. Thus, Thoreau did not possess the kind of respect for state law that is conveyed by participants and leaders of the sit-in demonstrations. *Ibid.*, 211–12.

<sup>219</sup> Anton C. Pegis, ed., *Introduction to Thomas Aquinas: The Summa Theologica* (New York:

when it commands people to act in ways that are contrary to divine law. King appropriated Aquinas' notion of unjust law as inconsistent with the ends of natural and divine law.<sup>220</sup> Thus, resistance to segregation was justified by natural law and divine law because it inequitably distributed burdens to blacks and denied the sacred worth and dignity of all persons.<sup>221</sup>

Given these norms and principles, King felt justified in calling upon activists to break laws for the advancement of civil rights. As Timothy Jackson points out, King held that civil disobedience was “permitted, even required, in order to resist codified social wrongs, because there is a ‘higher moral law’ with a prior claim on us.”<sup>222</sup> In other words, King resisted the inclination to “segregate positive law (acts actually on the books) from natural law (timeless dictates of a good conscience) and eternal law (the will of God).”<sup>223</sup> According to King, both natural law and eternal law ought to shape and inform positive law, and “without this moral foundation, no one in the struggle for racial justice could hope for true victory.”<sup>224</sup>

In addition to his maturing views on nonviolence, King shared a commitment with Aquinas, Luther, Calvin, and Augustine to “the priority” of the Good News that Jesus Christ redeems the soul of a fallen people.<sup>225</sup> Since King maintained that Christ was one with God, he was certain that Christ was involved in the freedom movement and that his mercy and

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McGraw-Hill), 629.

<sup>220</sup> Ibid., 621–22.

<sup>221</sup> Martin Luther King Jr., “Letter From a Birmingham Jail,” in *A Testament of Hope*, ed. James Washington (New York: HarperCollins, 1991), 294–95.

<sup>222</sup> Timothy Jackson, “Martin Luther King, Jr. (1929–68)” in *The Teachings of Modern Christianity*, Vol. 1., eds. J.W.J. and F.S. Alexander (New York: Columbia University Press, 2006), 446–50. See also Anthony Cook, “Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King Jr.,” in *Critical Race Theory: The Key Writings That Formed the Movement*, ed. Kimberlé Crenshaw (New York: New Press, 1995), 94, 100.

<sup>223</sup> Jackson, *Martin*, 452.

<sup>224</sup> Ibid.

<sup>225</sup> Jackson, *Martin*, 451.

forgiveness could redeem the soul of even the most extreme segregator.<sup>226</sup> This belief inspired King to write his famous letter in response to concerns by white clergy who thought the Birmingham protests were moving too fast. King's detailed response reflected the civil rights leader's theological understanding that Christianity always demanded a deeply nonconformist and suspicious posture toward the State apparatus, although current times required a more militant public stance. Because he lived in a different time plagued by different moral problems, King persisted that "we have both a moral and religious justification for passively resisting evil conditions within the social order."<sup>227</sup>

Although physical and confrontational, civil disobedience is far from an invitation to anarchy; it is grounded in a commitment to accept the penalty for violating the law. According to King, protestors have an absolute commitment to accept the penalty for civil disobedience because the strategy is grounded in the love ethic. He emphasized a strong connection between love of God and love of neighbor in the context of a sharing community, which he characterized as the "Beloved Community." While the love commandment had, at times, been used to justify the subordination of blacks and the exclusion of women, King believed that Christian love could never produce injustice. He accepted that Jesus Christ, as the model for agape love, unselfishly sacrificed his life for the benefit and well-being of all.<sup>228</sup> Additionally, because life is deeply social in nature, King maintained that love can exist only in the context of social relations. That is, the love of God comes alive in a world that removes barriers to seeing oneself as a child of God and one's neighbor as a child of God deserving of one's love.

The movement's commitment to Christian love provided a moral framework for

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<sup>226</sup> Ibid.

<sup>227</sup> Baldwin et al., *Legacy*, 85–86.

<sup>228</sup> Ibid., 166.

nonviolent action. After the police dispersed and used force against protestors in Birmingham, Andrew Young and Dorothy Cotton faced the possibility that the protest would unravel into violence unless something was said to address the protestors' frustrations. Mounting the podium at Sixteenth Street Baptist Church and staring into the bruised and angry faces of weary protestors, Andrew Young reminded demonstrators why the protests should continue to be guided by nonviolent principles and methods, despite the use of violence against them. At first not knowing what to say, Young reminded the protestors that:

[W]e cannot win if we sink to their level. They are relying on dogs and batons as instruments of violence. If we throw rocks and curse them, they will have succeeded in dragging us down to their level, and once we are on their level of violence, any violent act will be acceptable and approved.<sup>229</sup>

Here, Young warned of the morally degenerating impact of violence, even retaliatory violence, and also of the prudential reasons for using violence for a people in the numerical minority and politically disenfranchised. The listeners' commitment to nonviolence would guarantee them a "moral victory" in the civil rights struggle. Young also suggested that exposing the moral evils of segregation and Jim Crow would either awaken the moral conscience of the nation or enable the movement to triumph over the moral evil of segregation through the strength of their "superior moral power...." despite white resistance. The goal of the movement was not to "kill white people" or impair public morals and safety, but to transform the system of segregation into a true democratic community or 'beloved community' through the power of agapic love. Young reminded his listeners: "[B]ut if we dare to love all people, even white people who fear us, what happens? Perhaps we can put an end to the system which is hurting us both—black and white."<sup>230</sup> Thus, the civil rights struggle was "an evangelical freedom movement" that based salvation not merely on a

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<sup>229</sup> Young, *An Uneasy Burden*, 196.

<sup>230</sup> *Ibid.*, 219.



person's relationship to God, but on reordering black and white relationships. The product of this "salvation," as Young pointed out, was private as well as public liberation from the entanglements of racism.<sup>231</sup>

The religious roots of nonviolent protest were even evident in the pledge that each protestor was responsible for making before participating in the protests. Each demonstrator was informed that they would have to practice and model the principle of nonviolent direct action before they were permitted to march. The pledge read that each protestor would "pledge myself, my person, and my body to the nonviolent movement" and faithfully observe ten the commandments."<sup>232</sup> The ten commandments were as follows. First, demonstrators pledged to practice daily meditation on the life and teachings of Jesus Christ. Adults and precocious teenagers were each given Bibles to ensure that Christ's commands to love God, neighbor and self were expressed in their participation in civil rights protests. Second, demonstrators were reminded that the aim of the nonviolent movement was to achieve justice and reconciliation, not to subdue the opponent. This was an explicit rebuke of those militants advocating retaliatory violence to defend protestors against violent attacks. Militants who advocated that the use of violence, not love, would entangle Blacks in the manacles of racism.

Third, protestors were cautioned to model their lives on the moral virtue of love since God is love. Workers were invited to embrace agapic love, a love based on the necessity of forgiveness, not revenge or hate-filled retaliation. Fourth, protestors were required to pray daily so that God could use them to set men and women free. In addition, demonstrators were required to forfeit private desires so that human liberation might be

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<sup>231</sup> Ibid., 232.

<sup>232</sup> Ibid., 238.

achieved for all. Protestors were also enjoined to be courteous with both friends and enemies. This commandment was reemphasized after the Montgomery Boycott ended and blacks were allowed to ride the city buses.

Next, civil rights leaders reminded protestors to be courteous to whites and not to taunt bus drivers. Further, activists were directed to make an effort to engage in regular acts of public service, not merely to participate in occasional marches. The movement believed that a true commitment to the freedom struggle required a passion for service fueled by sustained work on behalf of the poor, the marginalized and the hurting. Then, protestors were instructed to abstain from physical violence, abusive words, and a heart hardened to the needs of others. They were required to seek to maintain good physical and spiritual health. Finally, movement participants were directed to obey the orders of leaders and captains of the protests.<sup>233</sup>

Thus, the methods of nonviolence were firmly rooted in Christian principles and moral values of collective responsibility and civility. Movement participants didn't just recite this pledge but they lived by it, as demonstrated by the rare instances of violence during nonviolent protests. The movement's nonviolent principles were so appealing because their Christian roots echoed the moral values and Christian practices reflected in Southern culture. Through the use of nonviolent tactics, the movement was able to help the nation see segregation as a moral evil, contrary to State and divine law, and it became a matter of time before the laws changed to reflect the emerging national consensus.

### **III. Summary and Conclusion**

This chapter detailed the Christian dimensions of the CRM, thereby advancing the

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<sup>233</sup> Ibid.

claim that religious practices, religious institutions, and religious leaders were mobilizing forces in the CRM. From the inception of the CRM, protestors believed that their protest was protected activity because it was part of God's movement in history. Further, their commitment to nonviolent civil disobedience was deeply rooted in their Christian faith, interpretation of scriptures, and values that tied their spiritual movement to past, present, and future struggles. The best exemplar of this tradition was Martin Luther King Jr., who led the nonviolent freedom struggle with the aim of creating the beloved community.

Nonviolent freedom fighters understood that, if freedom would be achieved, moral agents had to be willing to take action against injustice without waiting for others to take action in the streets and in the courts. Protestors realized that freedom is not given freely, but must be fought for, pressed for, struggled for, and died for in the streets, in the courts, in jails, in restaurants, in schools, at kitchen tables, and on front porches.

As disciples of freedom and justice, protestors believed that they had a moral mission to prick the conscience of the nation as embodied in the amended Constitution, human rights law, and God's law. Their freedom campaign emphasized that it was not enough to undergo a personal conversion; society must experience a social conversion of values to transform legal institutions that were out of harmony with God's law. The movement not only worked to change the law, but it also employed nonviolent tactics to promote civil and human rights consistent with its Judeo-Christian philosophy. As civil rights protestors increasingly took their religion to the streets, they worked with litigators to desegregate schools, buses, libraries, trains, hotels, restrooms, and restaurants, and expand voting rights through the power of nonviolent mass civil disobedience. More than individual controversies, these protests were part of a larger religious movement to dismantle segregation and expand the boundaries of freedom and equality to include the whole human

race.

### **Chapter 3: Political Expediency or Misguided Legal Strategy? Rediscovering the Religious Character of the Civil Rights Movement in the Protest Cases**

This chapter will show how racial and religious discrimination and liberty are linked and how they helped to advance the cause of civil and constitutional improvement. The central paradox of this chapter is that the Civil Rights Movement (CRM) was largely religiously motivated, and often sought to press religious liberty and equal protection claims through the courts. However, the inability of the Court, and of many scholars, to value the religious and nonviolent dimensions of the CRM complicated efforts to secure reform through the courts. In particular, justices, at times, acknowledged the religious motivations of the protestors, but did not fully appreciate the religious character of the movement itself in terms of its goals, parameters and plans. In most CRM court cases, justices dodged the constitutional questions that undergirded nonviolent civil disobedience.

My aim here is to highlight the religious dimensions of the CRM, both motivationally and legally, by noting how relevant court cases unfolded, and by putting them in a larger theological context. This lens on the CRM reveals a curious inconsistency between the centrality of religious beliefs and practices in motivating nonviolent protests, and the peripheral role that religion played in the CRM's litigation strategy and legal outcomes. While litigators did not appeal to the Free Exercise Clause, because the goal was not to obtain a religious exemption from a general law, the ironic effect of this litigation strategy was to reinforce the unpopular view of the CRM as a secular movement with no moral or democratic bearings.

In this chapter, I review protest cases in the CRM, showing how the legal battle in the Court for equal rights worked in tandem with the nonviolent battle in the streets. This analysis juxtaposed the Christian tenets of nonviolent civil disobedience against the litigation

strategies previously adopted by religious minorities like Jehovah's Witnesses, Jews and Mormans. Civil rights activists held a distinct view of religious freedom; contrary to Jehovah's Witnesses and Sabbatarians, civil rights activists did not seek to obtain exclusion from a general law in order to practice their religious beliefs freely. Rather, civil rights activists' understanding of divine law led them to pursue full inclusion in American society through nonviolent civil disobedience. The CRM sought to expand and fulfill liberty and equal protection rights, not destroy American institutions. In so doing, Black churches, and black preachers like Martin Luther King Jr. offered the public and the State a model of religious inclusion that would transform American society and secure greater equality and liberty for all.

This chapter will also draw attention to the limitations on religious expression that were established by court rulings, and draw parallels between the Court's concern with public safety in protest cases for religious freedom and racial equality. Whereas the climate of religious freedom helped to mobilize the religious activism that was germane to the CRM, protest cases show how the Court acted to temper the nonviolent activism of civil disobedience over a failure to fully appreciate the distinctive democratic, religious and ethical dimensions of the CRM. In short, civil rights activists were not anarchists, rebels or radicals with a sinister cause. They were champions and defenders of biblical, democratic and human rights principles, whose chief causes were to live out their faith, attain the promise of the American dream and create a better world for all people.

## **I. The Impact of the Climate of Religious Freedom on the Movement to Expand Civil Rights**

The Supreme Court expanded religious liberty post-*Cantwell* and post-*Sherbert*, due to

the robust efforts of minority religious groups like the Witnesses.<sup>234</sup> Initially, minorities' petitions for religious liberty led the Court to change discriminatory laws for the benefit of all citizens. As discussed in Chapter 1, religious minorities' litigation and protest tactics prepared the soil for an expansion of civil rights in several ways: religious minorities resisted discriminatory laws nonviolently, directly challenged laws and policies, made an explicit connection between religious freedom and civil rights, used various methods to disseminate their message, and realized the power of minority groups to strengthen democratic civil and legal deliberation. The religious minority groups who helped to usher in the climate of religious freedom—Jehovah's Witnesses and Sabbatarians – did not take a prominent role in CRM demonstrations or litigation strategy decisions. Nevertheless, the CRM, as a religious movement that fought against racial discrimination, benefited from the broader climate of religious freedom that made the courts less tolerant of both racial and religious discrimination.<sup>235</sup>

#### *The Impact of the Religious Character of the CRM on Litigation Strategy*

The CRM led the charge to desegregate public schools during the same time period that the Court extended First Amendment rights of religionists to practice their faith, worship, and propagate their beliefs. A review of CRM litigation strategy shows that the religious character of the CRM did not figure prominently in the court cases for two reasons. First, some litigators believed that spirit-filled protest demonstrations compromised efforts to press for reform through the courts, and were ambivalent about defending such activity. Second, the Free Exercise Clause provided redress for individuals and groups seeking to be excluded from general laws that regulated society, but it did not provide an adequate remedy

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<sup>234</sup> Witte, *Religion and the American Constitutional Experiment*, 146.

<sup>235</sup> Grohsgal, "Reinventing Civil Liberties," 352.

for nonconformist groups who sought greater inclusion within the larger society.<sup>236</sup> The civil rights activists did not want to be excluded from general laws. Rather, they wanted the laws to be applied to them equally and without discrimination. In a society that excluded blacks from a range of rights and privileges, religion provided a zone of liberty. Protestors could seek to expand free expression and civil rights by reinterpreting constitutional principles in light of their religious experience. CRM activists were pushing society to embrace a particular view of religious equality and human dignity for all, including African Americans.<sup>237</sup> Despite the zenith of religious liberty that preceded and coincided with the CRM, the courts had not established precedent in protecting this inclusive view of religious equality and human dignity for all.

From the inception of the CRM, attorneys focused intently on devising a legal strategy that would provide relief to protestors who engaged in nonviolent civil disobedience. The chief legal strategist, the Legal Defense Fund [LDF] of the NAACP, grounded its defense strategy in Fourteenth Amendment equal protection and First Amendment liberty principles. Once the NAACP won the *Sweatt v. Painter* (1950),<sup>238</sup> *McLaurin v. Oklahoma State*

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<sup>236</sup> Roy Wilkins. *Standing Fast: The Autobiography of Roy Wilkins* (New York: Da Capo Press, 1994). Roy Wilkins, executive secretary of the NAACP during the CRM, expresses clearly the goals of the movement: “What the NAACP wanted, what I wanted, was to include Negro Americans in the nation’s life, not to exclude them. America was our land as much as it was any American’s—every square inch of every city and town and village.” *Ibid.*, 319. Thurgood Marshall, interview by Ed Erwin, printed as “The Reminiscences of Thurgood Marshall,” in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences*, ed. Mark Tushnet (Chicago: Lawrence Hill Books, 2001). Although Justice Thurgood Marshall was publicly critical of the activists’ “disregard for the law” he was emphatic about the central role of Black Churches in the struggle: “Eighty percent of the branches of the NAACP when I went there were run by ministers, in churches. Ninety-eight percent of the meetings were held in Negro Churches. The Negro church support was beautiful, from one end of the country to the other.” He went on to say that “[T]here were some bad ones [churches]. But I don’t think there would have been an NAACP without the church.” *Ibid.*, 510.

<sup>237</sup> Thurgood Marshall, “The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws,” in *His Speeches, Writings, Arguments, Opinions and Reminiscences*, ed. Mark Tushnet (Chicago: Lawrence Hill Books, 2001), 124-125.

<sup>238</sup> *Sweatt v. Painter*, 339 US 629 (1950), in which the Court reasoned that the separate law school that Sweatt was forced to attend because his admission was denied to the School of Law of the University of Texas failed to qualify because of concrete differences in facilities, both because of quantitative differences in facilities and invisible factors.



*Regents* (1948),<sup>239</sup> *Sipuel v. Board of Regents of University of Oklahoma*,<sup>240</sup> and *Henderson v. United States* (1950),<sup>241</sup> Thurgood Marshall and lawyers of LDF kept pressing the courts for racial equality. During NAACP's 1951 convention, Marshall convened a team of lawyers to devise a plan to effectively dismantle Jim Crow and overrule *Plessy v. Ferguson*.<sup>242</sup> Their goal was to develop a legal strategy that would remove the color barrier in transportation, employment, public recreation and assembly, juries, certain residential neighborhoods, certain segments of the military, and elementary schools.<sup>243</sup>

Jack Greenberg, former director-counsel of the NAACP LDF and a key litigator in the protest cases pointed out that their defense strategy focused on the primary issue that State enforcement of private racial discrimination abridged the Equal Protection Clause.<sup>244</sup> The litigators were guided by the assumption that racial prejudice, as enforced by the courts and the State was unconstitutional.<sup>245</sup>

Interestingly, a free exercise case involving a Jehovah's Witness provided legal justification for the NAACP's litigation strategy, demonstrating the important role this religious minority played in setting the climate of religious freedom. As Greenberg remarked, *Marsh v. Alabama* was critical to the NAACP's defense strategy. In this seminal case, as

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<sup>239</sup> *McLaurin v. Oklahoma State Regents for Higher Education*, 339 US 637 (1950), in which the Court ruled that when a public institution treats a student differently because of the color of his or her skin it is depriving him or her the equal protection of the law in conformity with the Fourteenth Amendment.

<sup>240</sup> *Sipuel v. Board of Regents of University of Oklahoma*, 332 US 631, 632 (1948), in which the Court found that the University of Oklahoma, that denied Sipuel admission based upon the color of her skin, had to provide her with "secure legal education afforded by the state institution" in keeping with the Fourteenth Amendment.

<sup>241</sup> *Henderson v. United States*, 339 US 816 (1950), in which the Court argued that a railroad failed to offer Henderson the same level of service provided to a white passenger when the dining car steward refused to seat him in the dining car.

<sup>242</sup> Mark Tushnet, *The NAACP Legal Strategy Against Segregated Education, 1925–1950* (Chapel Hill, NC: The University of North Carolina Press, 1987), 135; *Plessy v. Ferguson*, 163 US 537 (1896).

<sup>243</sup> Roy Wilkins, *Standing Fast: The Autobiography of Roy Wilkins* (New York: De Capo Press, 1994), 211.

<sup>244</sup> Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994), 276.

<sup>245</sup> Juan Williams, *Thurgood Marshall: An American Revolutionary* (New York: Three Rivers Press, 1998), 287.

discussed in Chapter 1, the Supreme Court, on First Amendment grounds, overturned the trespass convictions of Jehovah's Witnesses for proselytizing in a company town.<sup>246</sup>

Although Chickasaw was a private town, the Court held that it was not immune from the State action doctrine. Inspired by this precedent, Greenberg and other attorneys reasoned that they would take a case to the Supreme Court involving trespassing on private property similar in size to Chickasaw. Then, they would defend protestors prosecuted for trespassing in smaller businesses, which they would win on the basis of precedent. Eventually, they hoped to win a case that involved "a dime store or a corner store."<sup>247</sup>

The NAACP LDF pursued this strategy to defend CRM activists based upon *Marsh*, even though they did not argue that the civil rights demonstrators were religious activists. The long-established premise that the "fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment"<sup>248</sup> was central to both the legal strategies of the Jehovah's Witnesses and CRM activists. The defense believed that the liberties protected by the Fourteenth Amendment were essentially the same as those shielded by the First Amendment, which guarantees religious freedom. In short, legal pragmatists believed that the goal of racial equality could be achieved when dynamic lawyers used legally malleable concepts to shape social developments outside the courthouse.

While civil rights lawyers championed the power of the courts to press for legal reform, they also recognized that the success of litigation, to a large extent, depended on the

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<sup>246</sup> *Marsh v. Alabama*, 326 US 501 (1946); Greenberg, *Crusaders*, 275–76.

<sup>247</sup> Greenberg, *Crusaders*, 276–77.

<sup>248</sup> *Cantwell v. Connecticut*, 310 US 296, 307–08 (1940). It is important to note here that, while NAACP litigation strategists were inspired by the First Amendment advances of groups like the Witnesses, most civil rights activists and Black Church members that participated in the protest were unaware of the expansion of minority religious rights in Free Exercise law. I argue that the activity of the Witnesses fertilized the soil for civil rights activists and Black Christians to offer an expansive view of civil and human rights that eventually took hold in the larger society.

socio-political context.<sup>249</sup> By necessity, the courts and the church worked in tandem to further the civil rights struggle. During the height of the CRM, hundreds of protestors were arrested for using nonviolent civil disobedience to integrate public spaces, and the NAACP LDF shepherded many of these sit-in cases through the courts. While Marshall expressed deep concern privately over nonviolent direct action, he expressed public support for the sit-in movement. Marshall's ambivalence about King and mass civil disobedience was shaped, in part, by the riots he had witnessed in parts of the South and the North. Marshall worried that "King's street theatre" came dangerously close to sparking race riots. These experiences fueled Marshall's concerns that protests, even those employing nonviolent methods, would lead to white backlash and eventual black annihilation. Not only did Marshall disclose privately that he felt the movement was a dangerous distraction, he also felt that King and the demonstrators were a drain on the NAACP's resources. Marshall claimed that NAACP's resources could have been put to better use besides bailing lawbreakers out of jail.<sup>250</sup>

*Public Acknowledgements of the Religious Character of the Protests by Protest Litigators*

Despite Marshall's private misgivings, he was publicly supportive of King, and credited the involvement of Black Churches and nonviolent direct action as contributing to the success of efforts to protect and expand civil and human rights. During his speech at the 1951 NAACP convention, Marshall publicly remarked that the success of the Montgomery Bus Boycott was due to the "unblemished forthright Christian leadership of men like M.L. King, Rev. Abernathy and E.D. Nixon."<sup>251</sup> Although he criticized King and street protest leaders in private, Marshall encouraged convention delegates to closely examine King's

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<sup>249</sup> Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford, 2011), 151.

<sup>250</sup> Williams, *Thurgood Marshall*, 247.

<sup>251</sup> *Ibid.*, 251.

nonviolent technique to see “to what extent it can be used in addition to our other protest movements.”<sup>252</sup> Moreover, during an interview when Marshall was asked whether he believed the CRM had the effect of helping the movement achieve its long-term goals, he responded in the affirmative: “Oh, they achieved much. If you put them in the scale, they would weigh very heavy, because it reached people’s consciousness.”<sup>253</sup> In the same interview, Marshall was asked whether nonviolent direct action saved the movement, and again, he responded in the affirmative: “I think it might have died on the vine. We knew in the beginning that the courts could not solve the problem, because the courts just don’t have the authority. It’s the public, the minds, the souls of the people that have to do it, and you do that with protest.”<sup>254</sup>

While Marshall was emphatic in public that the success of the movement was largely attributable to nonviolent protests, at times his comments seemed an exaggeration. Marshall and certain civil rights attorneys stated that civil rights litigation, coupled with nonviolent direct action, although a risky alternative, had much to offer a movement that was “dying on the vine” after the slow pace of reform post-*Brown*. Yet, if this is what Marshall firmly believed then he would not have worried privately, along with many whites, that nonviolent direct action violated the property rights of white business owners and imperiled law and order.

As an attorney, and eventually a Supreme Court justice, Marshall had to believe that the courts were essential to compelling social reform, especially in face of entrenched public views that violated minority rights.<sup>255</sup> In fact, as Brown-Nagin points out, ironically, nonviolent sit-ins and direct action, not merely legal precedent, set the pace of legal reform

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<sup>252</sup> Ibid.

<sup>253</sup> Marshall, “Reminiscences,” 478–79.

<sup>254</sup> Ibid., 479.

<sup>255</sup> Ibid.

post-*Brown*, and Marshall's reactive comments acknowledged this fact. Marshall and the LDF faced criticism by student leaders that the tools of the NAACP were inadequate to dismantle the system of segregation. In the face of such criticism, Marshall and the LDF yielded to public pressure to defend the students:

Based on states' and localities' use of law enforcement officials to halt peaceful demonstrations; in this sense, the lawyers would test the constitutionality of the anti-trespass laws. But at best, the strategy he outlined would generate a ruling that the students had the right to demonstrate—a proposition that the students and many others took for granted. Marshall and other lawyers speculated that the arrests could be the basis for a much more profound challenge: the lawyers could frontally attack state enforcement of private actors' racial discrimination.<sup>256</sup>

Marshall's skepticism may have been justified, given the fact that many believed that constitutional arguments could not attack discrimination by private parties. However, an examination of Supreme Court cases during the period of the sit-in movement from 1960 to 1964, reveals that the walls of segregation in restaurants, theaters, and many other public places came tumbling down with a legal strategy that relied on peaceful protests. In each consecutive case, the Court protected demonstrators' constitutional rights to free speech, peaceful assembly, and nonviolent protest, while emphasizing the limits of pressing for reform through the courts. For instance, the Court required petitioners to seek legal redress for each case. This judicial maneuver to resolve disputes was based upon a valid application of State laws, while seeking to avoid constitutional rulings on the legality of racial segregation.

The following review of protest cases will also show that the conditions leading to the eventual expansion of civil rights were not without legal consequence. There was a backlash effect in religious civil disobedience cases challenging racial segregation. As legal concerns increased over the expansion of the Black Power Movement and riots in various southern and northern localities, there was a presumption that civil disobedience

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<sup>256</sup> Brown-Nagin, *Courage to Dissent*, 153–54.

undermined the rule of law, encouraged widespread civil disorder, and was unjustifiable even on religious terms. The Court revealed the limits of its tolerance for acts of civil disobedience when it emphasized that one's frustration with the judicial process, no matter how righteous the cause, did not justify violating the law.<sup>257</sup> The presumption that civil disobedience either directly incited violence or created the conditions for violence and social unrest resurfaced in Court opinions, despite the fact that protestors, for the most part, maintained a firm commitment to the philosophy of nonviolence grounded in Judeo-Christian principles. Notably, this strategy of achieving equality through the Courts was frequently in conflict with other organizations that believed in nonviolent direct action and more aggressive tactics. However, based on all accounts, demonstrators were inspired to take their grievances to the streets, and eventually the courts, by their faith in God's law and their belief that the highest law of the land, properly understood, could prevail.

*The Limits of Brown Spur Many to Press for Reform on the Streets*

Constitutional litigation, which succeeded in ending school segregation in *Brown v. Board of Education* (1954),<sup>258</sup> at least in part inspired sit-in activists.<sup>259</sup> However, during the start of the sit-ins in early 1960, the NAACP's legal strategy was a source of frustration, not inspiration, for many young people who felt that *Brown* had failed to jumpstart an egalitarian revolution as promised. Displeasure with litigation as the primary protest method propelled many youth to refocus their energy on taking nonviolent direct-action protest to the streets

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<sup>257</sup> *Walker v. City of Birmingham*, 388 US 307 (1967).

<sup>258</sup> *Brown v. Board of Education*, 347 US 483 (1954) in which the Court ruled that separate public schools for black and white school children are "inherently unequal."

<sup>259</sup> Greenburg, *Crusaders*. Greenburg mentions sit-in participant, Franklin McCain, who "recalls that Brown inspired these young students not as the vindication of a basic legal principle, but as an example of determined people setting out to accomplish something and succeeding." Ibid., 271.

as a more aggressive means of demanding an end to State segregation.<sup>260</sup> Given the failure of the Supreme Court to protect minority rights in the face of white opposition to desegregation, students began to press for reform outside of the courts.

In response to centuries of racism and discriminatory policies, the NAACP and other civil rights organizations had developed a legal strategy to end segregation.<sup>261</sup> Starting in the 1930s, the NAACP led the fight to end segregation in graduate and professional schools. More than a decade before the initial sit-in cases, the Supreme Court decided in principle that judicial assistance in enforcing segregation policies of private parties contravened the Equal Protection Clause.<sup>262</sup> The lawyers relied on *Shelby v. Kramer* (1948), where the Court held that judicial enforcement of racially restrictive covenants would violate the Fourteenth Amendment. The issue in *Shelby* involved whether courts could enforce contracts where members of a neighborhood agree not to sell their real estate to blacks. The State's theory was that the Constitution did not extend to private contractual agreements, and that court enforcement merely amounted to implementing the agreement of private parties. The Supreme Court, however, was not persuaded and ruled that courts may not enforce racially restrictive covenants because "participation of the consists in the enforcement of the restrictions."<sup>263</sup> Thus, the Court ruled that the "action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the

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<sup>260</sup> Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 349–350.

<sup>261</sup> Diane McWhorter, *Carry Me Home: Birmingham, Alabama: The Climatic Battle of the Civil Rights Revolution*. (New York: Simon & Schuster, 2002). McWhorter argues that "[t]he sit-ins were actually an old dimension, not some spontaneous plague on the lone white preserves of a fully integrated consumer economy." *Ibid.*, 150. Belinda Robnett, *How Long? How Long?: African-American Women in the Struggle for Human Rights* (New York: Oxford University Press, 1997). Robnett, who documents the involvement of women in the struggle for civil rights, argues that "nonviolent protest had been operating long before its incorporation into the civil rights movement." *Ibid.*, 49.

<sup>262</sup> *Shelby v. Kraemer*, 334 US 1 (1948); *Barrows v. Jackson*, 346 US 249 (1953).

<sup>263</sup> *Shelley*, 13.

meaning of the Fourteenth Amendment.”<sup>264</sup> However, *Shelley*, like *Sherbert*, did not spark an egalitarian revolution as some hoped, because the Court limited its ruling to the facts of the case and refused to hold that segregation in public accommodations violated the Fourteenth Amendment.

*Brown v. Board of Education*,<sup>265</sup> a consolidation of five court cases that reached the Court from 1951 to 1952, provided an opportunity for the Court to finally address the question of public school segregation that it had avoided in its university segregation cases in a quickly changing political environment.<sup>266</sup> On May 1954, the Court issued its ruling in *Brown*, unanimously nullifying the practice of racial segregation in public education. Stressing the importance of public education in the prevailing environment, the Majority announced that segregated public education was “inherently unequal” and abridged the equal protection clause of the Fourteenth Amendment. Despite *Brown*’s impact on eroding the doctrinal underpinnings of Jim Crow segregation and its implementation decision announcing “all deliberate speed,”<sup>267</sup> the impact of *Brown* was to show that litigation alone could not desegregate public schools and, “[t]hrough a campaign of massive defiance, fraud, evasion, southern states had almost completely nullified *Brown*.”<sup>268</sup> Many blacks began to explore more expedient methods of change outside the courts.

Disappointed by the slow pace of civil rights reforms post-*Brown*, by the summer of 1958, youth discontent reached a boiling point; students were angry at the broken promise

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<sup>264</sup> *Ibid.*, 14.

<sup>265</sup> *Brown*, 483.

<sup>266</sup> Peter F. Lau, “From the Periphery to the Center: Clarendon County, South Carolina, *Brown*, and the Struggle for Democracy and Equality in America,” in *From the Grassroots to the Supreme Court: Brown v. Board of Education and American Democracy*, ed. Peter F. Lau (Durham, SC: Duke University Press, 2004), 105-06.

<sup>267</sup> See *Brown v. Board of Education*, 349 US 294, 299 (1955).

<sup>268</sup> Klarman, *Jim Crow*, 381; Jack Greenberg, *Race Relations and American Law* (New York: Columbia University Press, 1959), 220–221; Charles M. Payne, *I’ve Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle* (Berkeley, CA: University of California Press, 1995), 34–35.



of *Brown*; sympathizers were disheartened over the anti-NAACP crusade in Southern States, disgusted with President Eisenhower's lack of executive assistance, and displeased with the radicalization of southern politics.<sup>269</sup> These failures provided an impetus for students to explore nonviolent tactics, which later played a critical role in Congress' passage of the Civil Rights Act of 1964. However, as discussed above, even though many students were dissatisfied with litigation, protestors quickly turned to the NAACP for legal defense when confronted with legal troubles for their activism. This grass roots activism laid the foundation for broad civil rights changes that the Supreme Court lacked both the will and the commitment to bring about on its own. Throughout the South, college students became the primary change agents in advancing the struggle for civil and human rights. The sit-ins in Durham, North Carolina, Winston-Salem, North Carolina, and Oklahoma from 1960 to 1964 were part of the first-wave of student protests.<sup>270</sup>

As the sit-ins spread through the South, young activists like Rev. Douglas E. Moore from Durham, a minister who had attended SCLC meetings for two years, began contacting friends throughout the South for support, including Rev. James Lawson who lived in Nashville.<sup>271</sup> Ministers like Rev. Lawson and other young activists hosted strategy sessions for deploying nonviolent protest strategies in the CRM well before protestors employed such techniques in the Greensboro movement.<sup>272</sup>

The sit-ins provided an important model for protest that showed students they could affect the political process by appealing to Christian nonviolent strategies. The sit-ins also showed how this form of activism could accomplish more to end segregation than litigation

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<sup>269</sup> Klarman, *Jim Crow*, 381–385.

<sup>270</sup> David Garrow, *Bearing the Cross: Martin Luther King Jr., and the Southern Christian Leadership Conference* (New York: HarperCollins, 1986), 127.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

strategies alone. Sit-ins also provided a meaningful opportunity for whites and blacks to work together to promote the common good. The increasing confidence of the student activists was evident in a new organization, the Student Nonviolent Coordinating Committee (SNCC), and in a new wave of protests called “Freedom Rides.”<sup>273</sup> Freedom Riders were an interracial band of civil rights activists – largely comprised of young adults – who rode interstate buses throughout the South beginning in 1961, to protest the non-enforcement of US Supreme Court decisions and presidential executive orders declaring that segregation on public buses was unconstitutional.<sup>274</sup> Most southern States refused to enforce these decisions.

Despite the success of the sit-in movement in inspiring waves of protests, gaining media attention, and increasing national support to end segregation, college students realized that legal action was needed to force desegregation of white businesses, like restaurants, hotels, and other public services. White business owners were, for many reasons, resistant to change. Due to pressure from the Black Church, the black press, and civil rights activists, the NAACP decided to defend the protestors on the grounds that restaurants had to deal with everyone who walked in their doors, regardless of race, based upon the Fourteenth and First Amendments. According to Derrick Bell, “there seems to have been an initial step in the process of judicial review in which courts rejected all claims by protestors if the record indicated they had been responsible for violence or aggressively disruptive behavior.”<sup>275</sup> If petitioners overcame this initial hurdle, “courts then inquired whether the protest sufficiently involved First Amendment rights so as to entitle the protestors to a presumption of validity,

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<sup>273</sup> Clayborne Carson et al., “Ain’t Scared of Your Jails,” in *The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts From the Black Freedom Struggle*, eds. Clayborne Carson et al. (New York: Penguin, 1991), 108.

<sup>274</sup> See *Morgan v. Commonwealth of Virginia*, 328 US 373 (1946); *Boynton v. Virginia*, 364 US 454 (1960).

<sup>275</sup> Derrick Bell, *Race, Racism and American Law* (New York: Aspen, 2004), 558.

even though their conduct, examined alone, seemed violative of peace and order.”<sup>276</sup> In fact, as the next section will show, the Supreme Court balanced both the character and mode of the civil rights action against the interests and manner of State interference; if the protestor’s action did not pose a significant threat to the State, then the Court ruled that it was lawful.<sup>277</sup>

## II. Nonviolent Resistance and the Equalitarian Revolution Through the Courts

Sit-in decisions involved attempts by protestors to advance the egalitarian revolution initiated by *Brown*, effectively ending segregation in public accommodations. In sit-in cases, protestors were charged with such violations as trespass, disturbing the peace and inciting violence. Activists, trained in nonviolent protest methods, understood that the struggle for civil rights was between justice and injustice, and that a commitment to Christian love required resistance to unjust laws. As long as protestors remained committed to nonviolence, which was most often the case, courts provided relief for defendants.

### *Sit-ins and the Power of Nonviolence to Overcome Racial Discrimination*

Protestors, for the most part, were committed to the philosophy of nonviolent direct action and this fact contributed greatly to the legal victories they achieved. Protestors learned how to make moral arguments drawing upon philosophical and political views to achieve religious goals in constitutionally acceptable ways. Although the ideal was to break down the barriers of hatred and misunderstanding that prevented individuals from seeing and respecting the God-given humanity of all, protestors knew that only nonviolent collective action and organized defiance could achieve the destruction of such barriers. Thus, as discussed in Chapter 2, nonviolence was not merely a “strategy or device,” although many described it in this way. Rather, it was a philosophy that was animated by Judeo-Christian

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<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

beliefs, democratic traditions, and human rights principles. In Martin Luther King's words, it became "a way of life with love and redemption as its center."<sup>278</sup> This insight is important, particularly in the context of court cases, where judges often viewed the communication and conduct of protestors as motivated by a desire to achieve a political end. The reality, however, was that, for many members of the CRM, nonviolent resistance was an expression of their faith that the Bible mandated resistance to social evil and their belief that the promise of freedom and equality extended to all Americans, especially disenfranchised Blacks.

The Montgomery Bus Boycott, led by Martin Luther King Jr., showcased the power of nonviolent direct action. Throughout the South, building on the momentum of *Brown* and Montgomery, citizens and organizations began to hold demonstrations and sit-ins to challenge Jim Crow laws that segregated public accommodations, including lunch counters, water fountains, libraries, parks, hotels and buses. While civil rights leaders advocated violating unjust/immoral laws, they respected legal authority and accepted the penalty for breaking the law, which made nonviolent direct action and civil disobedience a form of moral action. Going to jail for violating an unjust law was the highest form of fidelity to the Constitution.

The sit-in protests that began in 1960 were a great demonstration of the power of nonviolent direct action and social protest to press for legal reform. The first wave of protests took place in the businesses on Canal Street, in Greensboro, North Carolina. This was so in order to target businesses owned by the white Christian business elite of the city, who were deeply committed to maintaining the existing order of racial segregation. Youth in

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<sup>278</sup> Martin Luther King Jr., "A Message from the President," *The Southern Christian Leadership Conference Story*, no. 1 (1963): 6.

Greensboro, North Carolina, inspired by the Oklahoma sit-ins, staged a series of protests. The Canal Street protests that were led by members of the NAACP Youth Council and the Congress of Racial Equality (CORE) were part of a second wave of sit-ins designed to dismantle segregation. This second wave of sit-ins began with the activities at the lunch counter of Woolworth's in Greensboro on the first day of the protest. Sit-ins generally followed the same pattern: protestors sought service in segregated facilities, protestors were denied service, and protestors refused to leave the facilities, even in the face of shouts, curses, and whispered support from white bystanders.<sup>279</sup> Greensboro students from North Carolina Agricultural and Technical College were the impetus for the sit-ins; this protest received national attention and sparked numerous sit-ins at lunch counters throughout the South.<sup>280</sup>

CORE was founded in 1942, a part of the later termed "Big Six" civil rights organizations (including the National Association for the Advancement of Colored People, Southern Christian Leadership Conference, Congress of Racial Equality, Student Nonviolent Coordinating Committee, the Brotherhood of Sleeping Car Porters and the National Urban League). CORE was committed to using nonviolent civil disobedience modeled after Gandhi and Jesus Christ to end racial discrimination in the South. One of the founders of CORE, James Farmer Jr., was the organization's first leader, honorary chair of the Democratic Socialists of America, graduate of Howard Divinity School of Religion and mentee of theologian Howard Thurman. The day before the first Woolworth's sit-in, Rev. A.L. Davis hosted the CORE nonviolent direct action training workshop at his church, to ensure that all protestors maintained their commitment to be disciples of nonviolence.

Ministers often played important leadership roles in nonviolent protests, offering

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<sup>279</sup> Bell, *Race*, 545.

<sup>280</sup> Robnett, *How Long?*, 98.

their churches for mass meetings to organize and inspire the protestors. On March 2, 1961, 186 black high school and college students gathered at Zion Baptist Church for a mass meeting in Columbia, South Carolina and then marched down to the State House grounds in groups of 15 to peacefully press advocate for civil rights reforms. Marchers were taught to remain peaceful and nonviolent throughout the march. One marcher raised a sign that demanded “Down with segregation!” Yet, another lifted up a sign that warned, “You may jail our bodies but not our souls.” Motivated, grounded and strengthened by their faith in God, demonstrators listened attentively to a dynamic sermon by a neighborhood pastor, sang spiritual songs and praised God with their bodies.<sup>281</sup>

The Court recognized protestors’ commitment to principles of nonviolence by granting relief for disciplined and orderly conduct. Nonviolent protest sat well with a judiciary concerned about maintaining law and order. In *Lombard v. State of Louisiana* (1963), three black college students and one white college student entered the McCrory Five and Ten Cent Store in New Orleans, sat down at the refreshment counter at the back of the store and requested service. The Court ruled that there was no criminal mischief because petitioners were “orderly” and there wasn’t a clear or present threat of violence by reason of public demonstrations.<sup>282</sup>

In the case of *Edwards v. South Carolina* (1963), over 300 onlookers watched as protestors exercised their First Amendment right to assemble peaceably, espouse their cause, and petition through nonviolent means. The Court ruled in *Edwards* (1963) that delivering a religious speech, singing loudly patriotic and gospel songs, and clapping feet and hands as part of one’s protest are “basic constitutional rights in their most pristine and classic

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<sup>281</sup> Prentice Hall, “Supreme Court Cases: Edwards v. South Carolina, 1963,” accessed March 20, 2014, [http://www.phschool.com/atschool/ss\\_web\\_codes/supreme\\_court\\_cases/edwards.html](http://www.phschool.com/atschool/ss_web_codes/supreme_court_cases/edwards.html).

<sup>282</sup> *Lombard v. State of Louisiana*, 374 US 267, 277–78 (1963).

form.”<sup>283</sup> The Court reasoned that, even when the views of the minority (here racial and religious) are opposed by the majority of a community, so as to provoke hostility, dispute, conditions of unrest, and even anger, such protest responses are an acceptable consequence of protecting free speech in our democratic government. As in the Free Exercise cases, the Court vigorously defended religious liberty as a basic constitutional right, whether it was used for the purpose of promoting evangelism or opposing racial discrimination.

Religious or political speech is protected from abridgement, and hecklers cannot veto the free speech rights of persons. The *Cox v. Louisiana* (1965) decision was a good example of this view.<sup>284</sup> The case emerged after the boycott of a segregated restaurant in Baton Rouge led to the arrest of 23 black college students. In 1961, 23 students from Southern University, a black college, were arrested in downtown Baton Rouge, Louisiana, for picketing stores that maintained segregated lunch counters.<sup>285</sup> The boycott of the stores was part of a general protest movement against racial segregation, directed by the local chapter of CORE and led by the appellant, an ordained Congregational minister, the Reverend Mr. B. Elton Cox, who also served as a Field Secretary of CORE.<sup>286</sup> A few days before the protest, Cox and other protestors participated in a “direct nonviolent clinic” sponsored by CORE and St. Mark’s church.

Rev. Cox led about 2,000 students peacefully down to the courthouse, where the marchers commenced to sing freedom songs and hymns and the inmates responded with singing. The courthouse grounds were transformed into a sanctified worship service of the segregated South. Cognizant of the nonviolent and religious character of the protests, the

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<sup>283</sup> *Edwards v. South Carolina*, 372 US 229, 235 (1963).

<sup>284</sup> *Cox v. State of Louisiana*, 374 US 536, 547–48 (1965).

<sup>285</sup> *Ibid.*, 538.

<sup>286</sup> *Ibid.*, 523–39.

Court in *Cox* held that unsettling, annoying, or inconvenient speech is insulated from censorship and punishment; the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous and that, although students cheered, clapped, and sang, there was no clear and present danger of a substantive evil that justified the violation of fundamental rights.<sup>287</sup> While the Court acknowledged the religious and nonviolent character of the protest, it failed to address the larger constitutional as to whether the State enforcement of segregation in private establishments amounted to the kind of State action that violated the Equal Protection Clause of the Fourteenth Amendment.

In addition, the Court ruled that the mere presence of persons did not amount to a disturbance of the peace or a breach of peace.<sup>288</sup> In *Taylor v. Louisiana* (1962), the Court ruled that defendants' conduct was not a breach of peace, where four to six petitioners went into a bus station waiting room reserved for whites and demanded to purchase tickets in that section as interstate passengers. The record indicated that petitioners were "calm, orderly and polite" and the only evidence offered was that they violated a custom that segregated persons based on color, a custom not permitted in interstate facilities based upon federal law.<sup>289</sup> Even if petitioners remained on the property after being asked to leave, the Court ruled that, although their appearance might have moved onlookers to engage in violent conduct, their presence alone did not amount to a breach of peace by the petitioners.<sup>290</sup>

The Court maintained a similar judicial tact in *Barr v. Columbia* (1964), one of the five

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<sup>287</sup> See also *City of Sumter v. Lewis*, 241 S.C. 364 (1962) in which the court held that the conduct of defendants who walked on a sidewalk in single file line, carried placards protesting racial segregation, but neither made noise nor obstructed the flow of traffic, did amount to a breach of peace; *State v. Edwards*, 239 S.C. 339, 344 (1961) in which the court held that appellants breached the peace because they refused to heed and obey the reasonable orders of the police and commenced "a fifteen minute noisy demonstration in defiance of such orders."

<sup>288</sup> *Garner v. State of Louisiana*, 368 US 157 (1961).

<sup>289</sup> *Taylor v. State of Louisiana*, 370 US 154 (1962) (per curiam). See *Peterson v. City of Greenville*, 373 US 244 (1963).

<sup>290</sup> *Bowie v. City of Columbia*, 378 US 347, 355 (1964).



sit-in cases to be decided by the Court on June 22, 1964, where petitioners remained in a library after being asked to vacate the premises. The Court held that “we are reluctant to assume that the breach-of-peace statute covers petitioners’ conduct here,” where petitioners were peaceful from the moment they entered the library until the time they were forced to leave.<sup>291</sup> Further, where protestors’ conduct while in a library was calm, mild-mannered, and decorous, “[t]here was no violation of the statute which petitioners are accused of breaching; no disorder, no intent to provoke a breach of the peace, and no circumstances indicating that a breach might be occasioned by petitioners’ actions.”<sup>292</sup> The Court did not address the question of whether private actions of segregation that were enforced by State courts amounted to the kind of State action that violated the Equal Protection Clause of the Fourteenth Amendment.<sup>293</sup> Instead, the Court merely addressed the question of whether petitioners breached the peace. The Court ruled that their conduct amounted to nonviolent action, based upon Christian and democratic principles for the purpose of promoting a vision of an inclusive society.

The Court was less sympathetic to protestors who engaged in violent conduct. In *People of State of Michigan v. Bernard*, petitioners were involved in picketing outside City Hall in Ann Arbor, Michigan, in protest against alleged police brutality against Negroes. The picketing proceeded peacefully and was in the process of dispersing when a fireman collided with the picket line and was hit on the head by one of the picketers. Other firemen advanced to the scene and got into a fight with some of the picketers. Several police then came to the scene and arrested petitioners to preserve the peace. The petitioners resisted arrest. The

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<sup>291</sup> *Barr v. City of Columbia*, 378 US 146, 150 (1964).

<sup>292</sup> *Brown v. State of Louisiana*, 383 US 131, 141 (1966).

<sup>293</sup> McKenzie Webster, “The Warren Court’s Struggle With the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodation,” *Journal of Law and Politics* 17 (2001): 373–407.

Court ruled that protestors who resist arrest when officers are seeking to preserve the peace are not exercising their First Amendment rights. The right to freedom of expression or freedom to picket does not encompass the right to stir disorder and breach the peace. In instances where violence is imminent, officers do not violate constitutional rights by preserving the peace.

The significance of *Lombard, Edwards, Taylor, Bowie* and *Cox* is that they set the limits for protected and unprotected speech, and they provided protection for conduct that was essentially nonviolent and democratic. These decisions also signaled a shift in the national climate: protests swelled in number and momentum to end segregation through civil disobedience and litigation increased. As long as protestors took the moral high ground through nonviolence, the Court shielded them from attack.

#### *Rulings Limited to the Facts of the Case*

An examination of Supreme Court sit-in cases during the height of the CRM further reveals that, in each instance, the Court declined to rule on the constitutionality of racial segregation in public accommodations, but most often limited its rulings to the facts of each case.<sup>294</sup> In *Boynton*, the Court avoided the constitutional questions and based its ruling on a legal contention not raised before the Supreme Court.<sup>295</sup> The case involved reversing a conviction of an African American law student for trespassing after entering a restaurant designated for “whites only” in a bus terminal. The Court ruled that racial segregation in public transportation was unlawful because it violated the Interstate Commerce Act, which

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<sup>294</sup> Greenburg, *Crusaders*. Greenburg argues that, although cases traditionally rejected the other side’s position, the Court refused to “make new doctrine, or even strengthen old doctrine.” *Ibid.*, 308. Instead, decisions “portended further legal battles every inch of the way, for the decision conveyed a wariness about establishing general principles that might broadly affect property and personal relationships in situations other than those closely resembling the cases at bar,” *Ibid.*

<sup>295</sup> *Boynton*, 454.

prohibited discrimination in interstate passenger travel. It moreover held that bus transportation was sufficiently related to interstate commerce to allow the United States Federal government to regulate it to forbid racial discrimination in the industry. While the Court's ruling was historic, it avoided the constitutional question, which left the Court's ruling vulnerable to attack.

As mentioned above, most cases did not deal with the Equal Protection Clause and Due Process Clause; instead, the Court dealt with the cases on narrower grounds. In *Garner v. State of Louisiana*,<sup>296</sup> a case litigated by NAACP and the Justice Department, the Court held that the evidence was insufficient to support finding that defendants, who sat at "white lunch counters" in business establishments, disturbed the peace. The defendants had been charged with violation of the Louisiana breach of peace statute against demonstrating boisterous conduct or engaging in passive conduct likely to lead to breach of peace. Defendants' conviction of breach of peace by the lower court violated their rights to due process of law under the Fourteenth Amendment. In dissent, Douglas and Harlan voiced their displeasure with the majority's judicial tact. They reasoned that the majority's refusal to deal with substantive constitutional questions made it difficult to reverse convictions where petitioners were interested in more than remaining at the white lunch counter and challenging a police request to move from the counter. The Court's ruling did not acknowledge that these petitioners were challenging the system of Jim Crow that legalized segregation in dining facilities in this part of the South through nonviolent means.<sup>297</sup> The nonviolent attempts by protestors to expand the reach of democracy, especially to African Americans, was lost on the majority.

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<sup>296</sup> *Garner*, 170.

<sup>297</sup> *Ibid.*, 200–201.

Again, in *Bell*, the Court decided the case on State law grounds, avoiding the Fourteenth Amendment question at stake. The Court's rationale was that it was avoiding a situation where a decision based on a federal question might be reversed by the State court. Justice Douglas again dissented, contending that the Court's judicial tact was based upon a desire to avoid the constitutional question on an issue that divided black and white and North and South.<sup>298</sup> In other words, the failure of the Court to address the constitutionality of segregation in restaurants exacerbated the crisis and left "resolution of the conflict to others, when, if our voices [the justices] were heard, it would have become clear and precise."<sup>299</sup> In addition, the dissent called for a ruling that would place all segregated restaurants and policies that are enforced by the State, "on an equal footing and the reasons given in this and most of the companion cases for refusing service to Negroes would evaporate."<sup>300</sup> Justice Douglas's dissent did not move the majority.

The Court's practice of limiting their decisions to State law or statutory rights continued in *Hamm v. Rock Hill*, where the Court dealt only with the statutory rights created in the Civil Rights Act and favored an interpretation of the statute that made "a constitutional decision unnecessary."<sup>301</sup> Thus, while the Court continued to protect the rights of protestors to demonstrate nonviolently, according to the dictates of their faith, the pace of legal reform was shaped mostly by civil rights protestors who used civil disobedience. This was made apparent by the justices' unwillingness to resolve the question of the constitutionality of segregation in public spaces while instead, limiting their rulings to the

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<sup>298</sup> *Bell v. State of Maryland*, 378 US 226, 242–43 (1964); See *Robinson v. State of Florida*, 378 US 153, 155 (1964) in which the Court ruled that we do not reach the broad question of whether the Fourteenth Amendment of its own force forbids a State to arrest and prosecute those who, having been asked to leave a restaurant because of their color, refuse to do so.

<sup>299</sup> *Bell*, 250.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Hamm v. City of Rock Hill*, 379 US 306, 316 (1964).

facts of each case.

*The State Action Hurdle and Judicial Relief to End Racial Discrimination*

As a general matter the Fourteenth Amendment freedoms and other fundamental freedoms require that there be proof of State action before a party can gain relief. When an individual was employed by the government and acted as a government official, there was State action and the Constitution applied.<sup>302</sup> The Court has held that a government officer is acting under color of law and becomes a State actor when he or she acts in an official capacity, even when individuals engage in actions that violate State law.<sup>303</sup> The civil rights cases had to overcome this hurdle of proving State action in order to provide judicial relief for victims of racial discrimination.

Precedent established that the Constitution requires that State power not be exercised to force private parties to deny equal protection to any group.<sup>304</sup> The Court, however, did not address the constitutionality of State action to enforce segregation in segregated restaurants, but merely overturned criminal convictions for trespassing and breach of peace.<sup>305</sup> In *Lombard*, the Court ruled that city or State law was not intended to preserve the peace in a nondiscriminatory manner because it made it unlawful for a business to permit blacks and whites to sit together. Such a discriminatory regulation legalizing segregation and prohibiting nonviolent conduct could not stand, according to Douglas in his concurring opinion, because “[b]usinesses serving the public cannot seek the aid of the State police or the State courts or the State legislatures to foist racial segregation in public places

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<sup>302</sup> Erwin Chemerinsky, *Constitutional Law Principles and Policies*, 2nd ed. (New York: Aspen Law & Business, 2002), 495.

<sup>303</sup> See *Lugar v. Edmondson Oil Co.*, 457 US 922, 928–32 (1982).

<sup>304</sup> *Shelley*, 1.

<sup>305</sup> *Ibid.*

under its ownership and control.”<sup>306</sup> Unfortunately, although *Brown* prohibited segregation in the field of public education, segregation was still the way of life in most public spaces.

Where an individual is authorized by the State and acts under the authority of the State to enforce segregation, this constitutes State action, even if the person may have taken the same action without the assistance and backing of the State.<sup>307</sup> On June 30, 1960, African American college students staged a protest, in tandem with national protests, to challenge nondescript racial exclusionary policies at a privately owned park, Glen Echo Amusement Park. In *Griffin v. Maryland*, where two black men were asked to leave the said park, the president of the corporation claimed he would have excluded blacks even if State law had not authorized his actions.<sup>308</sup> The Court ruled this fact was extraneous to the case. In fact, the police officer, the Court ruled, asked blacks to leave the park because he was enforcing the racial segregation policy of the operator of the park, and he arrested petitioners for trespassing because he was ordered to do so.<sup>309</sup> Even where State polices do not “directly and expressly” prohibit desegregation in restaurants, if they place burdens on businesses that serve both Whites and Blacks, such policies constitute State action in violation of the Fourteenth Amendment.<sup>310</sup>

The Court was also particularly concerned about States that vested public officials with the authority to determine which expressions were permitted and which were not, in effect, suppressing the free expression of ideas, a practice prohibited by the Constitution. In *Cox*, the city gave public officials unfettered discretion to regulate the use of public streets

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<sup>306</sup> *Lombard v. State of Louisiana*, 374 US 267, 277–78 (1963) (Douglas, J., concurring). See also *Peterson v. City of Greenville*, 373 US 244 (1963) (in which the Court held that Kress Management, in deciding to exclude Negroes, did precisely what the city law required).

<sup>307</sup> See *Home Telephone and Telegraph Co. v. Los Angeles*, 227 US 278 (1913).

<sup>308</sup> *Griffin v. State of Maryland*, 378 US 130, 135 (1964).

<sup>309</sup> *Ibid.*, 136–37.

<sup>310</sup> *Robinson v. State of Florida*, 378 US 153, 156–57 (1964).

for parades and meetings.<sup>311</sup> The Court ruled that the “lodging of such broad discretion in a public official” to determine what amounts to permitted speech “permits the official to act as a censor,” an unjustifiable infringement of petitioners’ First Amendment rights; however, the Court did not rule that nonviolent protestors had an absolute right to protest. For example, a State or its agent may restrict the use of public libraries or any other facilities, “[b]ut it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all.”<sup>312</sup>

### **III. Gradually Chipping Away on the Wall of Segregation**

During the CRM, the Court employed a number of secondary principles to justify its decisions. These principles are important because they show the range of values and legal standards that grounded Court opinions. Secondary principles included: the Fourteenth Amendment, the First Amendment, State law, the Interstate Commerce Act and the Civil Rights Act. Each of these decisions gradually chipped away at institutionalized segregation. The legal blow to segregation came with the passage of the Civil Rights Act, which made desegregation the rule of law and provided statutory protection for nonviolent civil disobedience.

#### *The Due Process Clause*

The Due Process Clause prohibits State governments or their instrumentalities from depriving persons of life, liberty, or property without due process of law and legalizes measures to guarantee fairness. This principle figured prominently in several cases. In *Wright v. Georgia* (1963), the Court ruled that petitioners’ convictions violated the Due Process Clause because the commanding officer’s order was designed to enforce racial discrimination

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<sup>311</sup> *Cox*, 55.

<sup>312</sup> *Ibid.*, 557.

in the park.<sup>313</sup> Moreover, the statute that prohibited blacks from using the park was constitutionally vague because it was a “generally worded statute that punished conduct that cannot be constitutionally punished.” Thus, defendants did not have “adequate notice” that the park was set aside for young white students.<sup>314</sup>

A different case led the Court to invoke the Due Process Clause on the grounds that the State did not provide warning that an action was unlawful before the conduct at issue occurred. In *Bonie v. City of Columbia*,<sup>315</sup> where two Negro college students were arrested after staging a sit-in at the restaurant of Eckerd’s Drug Store, the Court ruled that the State failed to provide prior warning that petitioners’ conduct was made criminal by the statute.<sup>316</sup> According to the Court, the statute provided that only “entry upon the lands of another after notice from the owner barring such entry” was prohibited.<sup>317</sup> The statute failed to mention that “the different act of remaining on the premises after being asked to leave” was also forbidden.<sup>318</sup>

#### *The Equal Protection Clause and the Right to be Treated Equally*

The Equal Protection Clause requires each State to provide equal protection under the law to all persons within its jurisdiction. The Court avoided addressing the question of whether segregation violated the Equal Protection Clause, despite efforts by protestors, because The Majority did not believe that the Equal Protection Clause covered public accommodations based upon the legislative history and debates leading to the ratification of the Fourteenth Amendment. However, a small but very vocal minority argued that the

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<sup>313</sup> *Wright v. State of Georgia*, 373 US 284, 292 (1963).

<sup>314</sup> *Ibid.*, 292.

<sup>315</sup> *Bonie*, 347.

<sup>316</sup> *Bonie*, 355.

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*



Fourteenth Amendment safeguards the rights of all Americans to be treated as equal citizens especially with respect to public accommodations.<sup>319</sup> Friends of the Court have argued that the tendency of government officials to use their authority to restrict freedom of expression led to ratifying the Fourteenth Amendment to prohibit official abuses.<sup>320</sup>

*Protecting First Amendment Rights and Avoiding the Perils of Democracy*

The Court reiterated the Constitution's protection of freedom of speech, freedom of the press, the right of persons to assemble peaceably and the right to petition the government for redress of grievances. These freedoms may not be abridged unless there is a "clear and present danger of a serious substantive evil."<sup>321</sup> As noted, speech is free from censorship even when speech is opposed by the majority, becomes annoying, provokes unrest, and happens to be unsettling. With respect to the CRM, the Court ruled on the basis of free speech that "delivering a religious harangue, singing loudly patriotic and religious songs, clapping feet and hands" are all basic First Amendment rights.<sup>322</sup> These rights are free from repression in cases where the minority expresses views that disturb the majority. Censorship would "lead to the standardization of ideas either by legislatures, courts, or dominant political or community groups."<sup>323</sup>

The Court was quick to point out, however, that freedom of action is not absolute.<sup>324</sup> First Amendment rights can be abridged by a State acting in its interest for the protection of public health and safety. As the Court held in *Cox*, "[t]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions

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<sup>319</sup> *Bell*, 286 (Goldburg, J., concurring).

<sup>320</sup> Brief of Amici Curiae American Jewish Friends, 2, *Walker v. Birmingham*, 388 US 307 (1967).

<sup>321</sup> *Edwards*, 237.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Cox*, 552.

<sup>324</sup> *Ibid.*, 555.

or beliefs to express may address a group at any public place and at any time.”<sup>325</sup> In fact, the maintenance of liberty means that we maintain a society based on public order to avoid the perils of anarchy.<sup>326</sup>

When free speech involved demonstrations, marching, and parading on public streets and sidewalks, the State could legitimately regulate to ensure the free passage of traffic and the prevention of violence. According to the Court in *Walker*, where protestors were arrested for defying an injunction preventing a march on the Friday before Easter in Birmingham, prior restraints on free speech do not free petitioners from the responsibility to obey the law even, if legal resolution of the crisis does not come until after the event that was the cause for the protest. The minority was sharply critical of the majority’s insistence on maintaining law and order over and against protecting freedom of expression. Justice Douglas sharply criticized the majority because the real motivation for the prior restraint on freedom was not for the maintenance of law and order but petitioners were “denied a permit solely because their skin was not of the right color and their cause was not popular.”<sup>327</sup> As Douglas stated, “[e]ven when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble,” such a regulation may be dishonored when the law is “invalid on its face.”<sup>328</sup> In addition, the dissent argued that the majority’s ruling was “plainly repugnant to the principle that First Amendment freedoms may be exercised in the face of legislative prior restraints, and a fortiori of ex parte restraints is broader than such legislative restraints, which may be challenged in any subsequent proceeding for their violation.”<sup>329</sup>

In response to concerns that permitting petitioners to violate an unconstitutional law

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<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> *Walker*, 336 (Douglas, J., dissenting).

<sup>328</sup> Ibid.

<sup>329</sup> Ibid., 348.

would promote anarchy, the Court argued that the only risk would be to the individual defying the law. Thus, according to the petitioners in *Walker*, an individual who violates an injunction because he believes that a law is unconstitutional runs the risk of receiving an unfavorable judgment if the Court rejects his or her claim. Such a freedom would be reserved for exceptional cases by individuals who have no choice but to act because the circumstances are too grave to delay. These individuals should be given the chance to assert their First Amendment rights and risk their freedom without fear that law and order would be compromised.<sup>330</sup>

### *Civil and Voting Rights Victories*

Even after the marginal gains of *Brown*, the Montgomery Bus Boycott, the Birmingham Campaign, the March on Washington and Court protection of protestors' free speech rights, the civil and voting rights of millions of African Americans in the South were imperiled. The Selma to Montgomery March in 1965 constituted a significant victory for the CRM. Selma was selected as the site of the CRM's voter registration campaign in part because of the strong anti-racial inclusion tact of the officers on the police force. Sheriff Clark possessed a temper that "could be counted on to provide vivid proof of the violent sentiments that formed white supremacy's core." The other reason Selma was so successful was that the organizers had a more focused objective—expand voting rights—and they maintained their commitment to Christian-based civil disobedience. As a consequence, Selma was a major victory of civil liberties. As anticipated, Sheriff Clark's anger manifested in brutality. Clark initially exercised restraint, but grew impatient with the protestors' demands and started using brutal police force. The police brutality culminated in Bloody

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<sup>330</sup> Respondents' Brief, 8, *Walker v. City of Birmingham*, 388 US 307 (1967).

Sunday on March 7, 1965, when police officers violently and brutally attacked marchers as they crossed the Edmund Pettus Bridge in route to Montgomery. The nation mourned, and support for racial reform rose sharply after images of children sprayed by water hoses, bitten by dogs and beaten with sticks were broadcast on national television. The death of two white volunteers from the North was also deeply disturbing: a Unitarian minister from Boston and a mother of five from Detroit.<sup>331</sup>

The next week a massive wave of support demonstrations took place nationally. Hundreds of ministers traveled to Selma to support Martin Luther King Jr., SCLC, SNCC and the NAACP. Thousands of citizens petitioned their elected officials to do something to end the senseless violence and disturbing actions of white officials and citizens of Selma. In a landmark decision, President Johnson proposed Voting Rights legislation before a joint session of Congress as a much-needed step to finally help the nation “overcome this crippling legacy of bigotry and injustice.” In so doing, President Johnson reaffirmed his conviction that “we shall overcome.”<sup>332</sup> Before Selma, public officials and citizens were deeply divided about the course of civil rights and democratic reform, but the images of senseless violence directed against mostly peaceful, Christian, and nonviolent protestors shifted the momentum on the side of the movement to advance the cause of constitutional improvement for all.<sup>333</sup>

The Civil Rights Act of 1964 signaled the end of institutionalized discrimination in

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<sup>331</sup> Taylor Branch, *Parting the Waters: America in the King Years 1954–63* (New York: Simon & Schuster, 1989), 779–80, 794–96; Adam Fairclough, *To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr.* (Athens: University of Georgia Press, 2001), 229–43; Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004).

<sup>332</sup> Lyndon B. Johnson, “Special Message to the Congress: The American Promise,” in *Public Papers of the Presidents of the United States*, vol. 1 (Washington, D.C., 1966), 281, 284; Cong. Rec. 111, 4984–89, 5014–15 (1965).

<sup>333</sup> Lyndon B. Johnson, “Special Message to the Congress: The American Promise,” in *Public Papers of the Presidents of the United States*, vol. 1 (Washington, D.C., 1966), 281, 284; Cong. Rec. 111, 4984–89, 5014–15 (1965).

public accommodations.<sup>334</sup> While the Act was an historic and monumental achievement, the Court was called upon quickly to enforce the law and to determine whether peaceful attempts to be served on an equal basis were exempted from criminal prosecution. In *Hamm v. Rock Hill* (1964), the Court ruled that the Civil Rights Act abates conduct that occurred before its enactment as well as “still-pending convictions.”<sup>335</sup> According to the Court, the Civil Rights Act “forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities.”<sup>336</sup> Thus, because courts transformed a crime (peaceful attempts to be served on an equal footing with whites) into a right, the Court reasoned that the act decriminalized civil disobedience.

The dissent in *Hamm* was sharp in its insistence that the Court should not provide a blanket sanction of nonviolent civil disobedience and left open the possibility that it weigh only each circumstance. Justice Black rejected the majority’s ruling that one of the purposes of the Civil Rights Act was to legalize civil disobedience.<sup>337</sup> On the contrary, he argued that a key purpose of the Act was to remove “disputes out of the streets and restaurants and into the courts, which Congress has granted power to provide an adequate and orderly judicial remedy.”<sup>338</sup> However, in *Cox*, the Court was clear to distinguish protected nonviolent disobedience from “riotous conduct” that conflicts with “properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the

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<sup>334</sup> Civil Rights Act of 1964, Public Law 88-352, § 602, U. S. Statutes at Large 78 (1964), 241, 252–53.

<sup>335</sup> *Hamm v. City of Rock Hill*, 379 US 306 (1964).

<sup>336</sup> *Ibid.*, 318–19.

<sup>337</sup> *Ibid.*, 318 (Black, J., dissenting).

<sup>338</sup> *Ibid.*, 318–19.

administration of justice and other essential governmental functions.”<sup>339</sup>

### *Judicial Process*

A persistent concern of the Court was that protestors maintain respect for judicial process even in the face of arbitrary procedures and discriminatory laws. In *Walker v. Birmingham* (1967), where Birmingham city commissioner Bull O'Connor, a staunch defender of Jim Crow, denied two attempts to obtain a permit to march on the basis that blacks would not march in Birmingham. Petitioners violated an ex parte injunction issued on the heels of the Good Friday march by moving forward with the demonstration.<sup>340</sup>

The *Walker* decision provides another instance of role of religion in civil rights protests, and the Court's uneasiness in granting an absolute right to engage in acts of civil disobedience, even when the purpose and motivation are religious. It also shows the limits of judicial support for nonviolent protests when they involve violating court orders. In *Walker v. City of Birmingham*,<sup>341</sup> the Court sustained the contempt convictions of Martin Luther King Jr. and others for violating an injunction prohibiting the Birmingham marches planned for Good Friday and Easter Sunday. The Court did not address the question of the validity of the injunction or the statute under which the protestors' petition requests were repudiated (although the same Birmingham statute was later nullified in *Shuttlesworth v. City of Birmingham*.<sup>342</sup>) Instead, the Court stressed the overarching need to maintain respect for judicial procedure, which trumped free speech concerns:

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to

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<sup>339</sup> *Cox*, 574.

<sup>340</sup> *Walker*, 311.

<sup>341</sup> *Ibid.*, 307.

<sup>342</sup> *Shuttlesworth v. City of Birmingham*, 394 US 147 (1969).

ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.<sup>343</sup>

The Court, here, makes explicit its view that violations of judicial orders would not be permitted regardless of whether secular, philosophical, racial or religious views provided justification for the violation. Thus, violations of judicial orders would not be permitted whether the actor was motivated by a desire to promote racial reform, protect the right of the individual to communicate his ideas first and suffer the consequences later, or oppose procedures that impair the free exercise of religious freedoms. Even where discriminatory laws violate First Amendment rights, and the exercise of those rights cannot be delayed, the Court ruled that petitioners could not deny the courts the opportunity to respond to their constitutional challenges.<sup>344</sup>

This reasoning was remarkable because of the length the Court goes to protect judicial process even in the face of clear constitutional infringement. The Court's reasoning also suggested growing impatience with civil disobedience, even when laws were violated to expand free speech and protect religious expression. The Court asserted such protection of the judicial process in the *Walker* decision, despite the fact that many protestors participated in the march because of their love for democracy and their commitment to God's law, which called into question the laws of segregation.

In trial testimony offered by Dr. Martin Luther King Jr., Fred Shuttlesworth and Rev. Abernathy, petitioners affirmed that their civil disobedience was an expression of their deeply held religious beliefs. Commenting on the injunction served to him, Rev. Shuttlesworth stated that the injunction was "a flagrant denial of our constitutional privileges"

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<sup>343</sup> *Walker*, 320–321.

<sup>344</sup> *Walker*, 318–19.

and that the order would not retard the progress of the movement.<sup>345</sup> Rev. Abernathy echoed the same sentiments in his statement that “[A]n injunction nor anything else will stop the Negro from obtaining citizenship in his march for freedom”.<sup>346</sup> Rev. King was more explicit in defending the violation of the injunction based on religious and political grounds. He emphasized that the protestors had “anchored our faith and hope in the righteousness of the Constitution and the moral laws of the universe.” In other words, the protestors were motivated by their faith in God’s law and their faith in American democracy that the Constitution, appropriately applied, vindicated the constitutional rights of the protestors to assemble, protest unjust laws and demand equal protection of the law.

King was emphatic that the protests did not violate the federal law, but rather the State judiciary broke the federal law by violating the protestors’ rights under the First and Fourteenth Amendments. The federal judiciary, as King stated, had clearly defined the privileges and rights that were protected by the First and Fourteenth Amendments, which were “too sacred to be trampled upon by the machinery of State government and police power.” King distinguished this State injunction from other federal injunctions “out of respect for the forthright and consistent leadership that the Federal judiciary has provided” in promoting the principle of desegregation as the Federal law. He charged that the State court was unconstitutionally aligning itself with White segregationists in order to use the force of law to sanction practices that reinforced “an unjust and illegal system of racial separation.” The march was held “not out of any disrespect for the law” or based on an effort to “evade or defy the law or engage in chaotic anarchy.” Rather, out of “the highest respect for the law”, as King remarked in his Letter from Birmingham Jail, the protestors

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<sup>345</sup> Appellate Brief, 349, *Walker v. City of Birmingham*, 388 US 307 (1967).

<sup>346</sup> *Ibid.*



decided to protest in defiance of the State court injunction in conformity to their Christian belief that our equality before God requires that the laws of the State mirror that same equality. In other words, the protestors' "great love for the Constitution of the U.S." and their "desire to purify the judicial system of the State of Alabama" led them to protest, fully aware of the rightness and consequences of their decision.

King's remarks affirmed the right of the protestors to defy the law, based on the protestors' views of the supremacy of Federal law and the religious and moral character of their political protests. The protestors' right to demonstrate was protected by the First and Fourteenth Amendment. State laws and policies enforcing segregation trampled petitioners' constitutional rights.

In dissent, Justice Brennan criticized the majority's overriding concern with public order:

We cannot permit fears of 'riots' and 'civil disobedience' generated by slogans like 'Black Power' to divert our attention from what is here at stake—not violence or the right of the State to control its streets and sidewalks, but the insulation from attack of ex parte order and legislation upon which they are based even when patently impermissible prior restraints on the exercise of the First Amendment rights.

Justice Brennan rebuked the Court majority for being sidetracked by fears of riots, civil disobedience and Black Power from the crucial constitutional issue at stake. Not only did the Majority conflate threats of 'Black Power' with civil disobedience, when it was clear that the protests were motivated by religious scruples, it permitted a prior restraint on First Amendment rights to stand even though such actions were condemned by the Court as far back as *Cantwell*. The rights to picket and parade are methods of expression were protected by the First Amendment, and must not be infringed by ex parte orders where petitioners did not have a fair opportunity to be heard in Court before they were restrained.

Brennan reasoned that, since these demonstrations involved the use of public

grounds, they could be policed as to the time, manner and location. However, the State was prohibited by the First Amendment from barring protests on public grounds for the purpose of petitioning the government for a redress of grievances.<sup>347</sup> Moreover, where a “permit has been arbitrarily denied” one should not have to go down “the long and expensive route of this court to obtain remedy” before making a speech, delivering a sermon, picketing, parading or assembling. More specifically, if a person must exhaust all judicial remedies before speaking, protesting or parading, the occasion necessitating immediate protest would have passed and the protest would have become “futile or pointless.”<sup>348</sup>

The issue of timing, which is particularly germane in the case of civil rights protests, was critical to the Birmingham protests, which were designed to take place during the Easter season to awaken the moral conscience of the nation. In essence, the injunction issued by the State was designed to disrupt and undermine the goal of the protestors to shine the moral spotlight of the nation on Birmingham. The injunction sought to interrupt their demonstrations before they could gain mass support for their nonviolent efforts to end segregation policies in the city.<sup>349</sup> Moreover, given the fact that all of the petitioners were ministers that represented religiously oriented organizations, the injunction was calculated to ban demonstrations on Good Friday and Easter Sunday, ceremonies of “special sacramental significance” on which “church-oriented organizations” hoped to draw national attention to their demonstrations.<sup>350</sup> Thus, Brennan argued that the injunction was unconstitutional because it gave Commissioner Connor broad discretion to deny petitioners their First Amendment rights—freedom of religion, speech, assembly and petition. Here, the Court

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<sup>347</sup> *Walker*, 334–335. (J. Brennan, dissenting).

<sup>348</sup> *Walker*, 336.

<sup>349</sup> Appellate Brief, 70–71, *Walker v. City of Birmingham*, 388 US 307 (1967).

<sup>350</sup> *Walker*, 349 (J. Brennan, dissenting); Appellate Brief, 71, *Walker v. City of Birmingham*, 388 US 307 (1967).

demonstrated the limits of its tolerance for civil disobedience: respect for judicial process trumps any asserted claims of constitutional violations. Thus, the fact that protest activity was nonviolent and religiously motivated did not shield it from attack; the protestor must exhaust all legal remedies before engaging in demonstrations, even if the point of demonstrating would have been lost with delayed timing.

#### **IV. Summary and Conclusion**

As this chapter shows, the sit-in movement was directly impacted by a wave of public-spirited activism by clergy, students and organizers who relied on the Christian faith and nonviolent principles to protest racial inequality on the streets and via the courts. Protests were not only nonviolent, for the most part, but many of the actors were either explicitly religious or implicitly committed to the Christian and moral underpinnings of nonviolent direct action. The Court responded favorably to nonviolent protests by providing relief for petitioners' claims. However, decisions were limited to the facts of the case and the Court declined to address the constitutionality of segregation in public accommodations under the Fourteenth Amendment. The Court faced the constitutionality of segregation head on only after Congress passed the Civil Rights Act of 1964.

While the Court granted the power of States to regulate the public streets and sidewalks in the interest of public safety, it could not abridge constitutional rights without the threat of clear and present danger or public harm. This placed a very heavy burden on States that had to be satisfied before States could restrict rights, and it complicated efforts by white radicals to block reform and restrict First Amendment rights merely for speech that was inconvenient, annoying, irritating, and unpopular. The protection of unpopular speech from public censure was central to the founders' intent when ratifying the First Amendment. Even though the Court protected the kind of pristine speech that is basic to our

constitutional scheme, it was quick to point out that freedom of speech is not absolute and its manner, mode, and means of communication could be regulated. States could not vest authority within one official to decide what speech is acceptable, place prior restraints on free speech, and pass regulations that discriminate against one group. However, when faced with an asserted violation of constitutional rights and a violation judicial process, the Court tipped the scales in favor of respect for judicial process.

The high water mark of the sit-in cases came with the passage of the Civil Rights Act of 1964. This was the first time that the Court ruled that segregation in public accommodations violated federal law, although it declined to rule on the constitutionality of segregation each time the claim was presented to the Court. This was also the first time that the Court interpreted a federal law to remove peaceful attempts to challenge segregation from the class of criminal activity. While the Court's ruling was historic, it raised the issue of whether all forms of prayer-filled nonviolent disobedience were authorized, or only action in connection with the desegregation of public accommodations. Was the Court expanding free expression rights to religious groups and others to participate in public action that might involve matters of public debate and public policy? Most importantly, was the Court acknowledging the vital role that religions can play in protecting constitutional freedoms and promoting the common good?

In the next two chapters, I will argue that the Court's protection of the right of religious groups to express their views and engage in conduct, even conduct that went beyond mere proselytizing to include pressing for social reform, was an acknowledgment that racial and religious discrimination and liberty are linked. Namely, as civil rights advocates, both ministers and lawyers frequently remarked, the religious foundations and dimensions of the CRM kept the movement for civil and human rights from "dying on the

vine.” Was this an implicit acknowledgement that, without the church, the movement for civil and human rights would have floundered? If so, what does this suggest about the interrelationship between the church, ethics and the law for the advancement of civil rights, and human rights?

The Court realized that the right to express one’s religious beliefs and worship God according to the dictates of one’s faith is interrelated with the protection of individual rights and the expansion of civil rights. I will also argue that this expansive understanding of freedom of expression and religious rights offered in the period of the CRM and endorsed by the Courts has profound implications for the current and future direction of civil and human rights struggles. While religious freedoms and civil rights were expanded in the period of the CRM, the current contraction of civil and religious rights has slowed down the pace of democratic reform, thus making the lessons and legacy of the CRM more relevant now than ever before.

#### **Chapter 4: The Ethic of the Black Church Civil Rights Movement: The Accent on Christian Love and the Journey Toward Justice**

The Civil Rights Movement (CRM) embodied a struggle that began with the early church and continues to this day: the complex and shifting relationship between the church and society. Inspired by Biblical faith, activists sought to proclaim a prophetic word in the context of extreme social injustice. Christian ethicist Peter Paris pointed out that the religious experience and moral predicament of black Americans have been shaped by blacks' ability to adapt and accommodate to racial oppression. Black Americans have possessed the capacity, and exercised the power to: transform Christian teachings into a platform, think and act in ways to affirm black self-worth, and sustain black communities confronting racial oppression.<sup>351</sup> The historic CRM was distinguished from what America had previously experienced by its commitment to ground ethical action in democratic values and the Christian principle of Christian love.

The first three chapters of this dissertation emphasized the legislative and judicial aspects of the religiously inspired CRM. Chapters 1, 2, and 3 explained how the climate of religious freedom, as set forth by the Court rulings in favor of religious and racial minorities fertilized the soil of a grassroots religious movement. This chapter shifts the focus from the judicial and legislative action of the CRM to the ethical tenets of the CRM. The accent on Christian love was a central (and oft-debated) aspect of the religiously inspired, nonviolent CRM. Love, as the central ethical/theological trope, provided the catalyst for activism for racial justice in the larger society during the CRM. The best example of this symbiosis between the love ethic of Jesus and justice regarding religion, the law and public life was Rev.

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<sup>351</sup> Peter Paris, *The Social Teachings of the Black Churches* (New York: Augsburg Fortress, 1985), 3.

Martin Luther King Jr.

## **I. Critical Ethical Approaches to the Study of Agape Love**

This chapter critically examines King's commitment to agape love in light of the work of Anders Nygren and Reinhold Niebuhr. The discussion develops along several lines. First, attention is given to Nygren's interpretation of the Gospel, which puts agape love at odds with justice, arguing that Christians must simply ignore rights claims and social justice generally in favor of sacrifice and forgiveness. Nygren's position is viewed as a proper point of departure for understanding an important strand of opposition to Church-led social action. Second, Niebuhr tends to accent justice, seeing pure love of neighbor as "an impossible possibility" or even as unjust. I will show that Niebuhr downplays how Christian teachings intimately connect love with justice in all situations to the detriment of their proposals.

Finally, I will reflect on King's theory of agape love, with some attention to how this was a quest to work toward the beloved community. This discussion is important because it shows that the church-led CRM, far from imperiling the security of the State and respect for the law, affirmed self-worth and promoted the good of all people. I will examine the roots of nonviolent protest, especially Martin Luther King Jr.'s commitment to the love ethic of Jesus, and how his understanding of its requirements shaped the ethic of the movement.

For King, the love ethic of Jesus was not idle sentimentalism, but a powerful means and motivation through which persons could love themselves and others more fully, based upon their love for God. Finally, despite the weaknesses in King's position, I will defend it as the best pathway to social change, while responding to alternatives with justifying reasons. King's radical vision of the good and just society provided a model for dismantling structures of oppression and promoting political inclusion and accountability within social

and political institutions.

*Nygren: Agape as Freely Giving and Forgiving Love*

As a classical agapist, Nygren offered a distinctive interpretation of the love command of Jesus based upon his reading of Old Testament history, social scientific theory and the humanities. While his interpretation of New Testament sources was praised during his time, eventually scholars pointed to flaws in Nygren's interpretation of scriptures, particularly Jesus' love command. As an agapist, Nygren advanced the view that agape love is distinctive and incompatible with all other forms of love, which he characterized as illegitimate. Agape, he argued, "excludes all self-love. Christianity does not recognize self-love as a legitimate form of love. Christian love receives God's love and loves the neighbor; its main adversary is self-love which must be subdued."<sup>352</sup> Thus, Christian love excludes and surpasses all other loves.

Nygren maintained that all other loves besides agape are expressions of love as eros. Eros, Nygren surmised, had a tinge of selfishness, in particular, self-love. The latter was as normal as anything else. But, to quote Nygren, "What can induce a man to love just simply his neighbor, with no further object in view? What, above all, can induce him to love an enemy?"<sup>353</sup> Nygren responded that only agape love has the capacity to do that because it "has nothing to do with the kind of love that depends on the recognition of a valuable quality in its object."<sup>354</sup> To make his case, he argued that, if God's love depended on the worth of the object "God's love would not in the last resort be spontaneous and unmotivated but would

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<sup>352</sup> Anders Nygren, *Agape and Eros*, trans. Phillip S. Watson (Philadelphia: The Westminster Press, 1953), 217.

<sup>353</sup> *Ibid.*, 215.

<sup>354</sup> *Ibid.*, 78.



have an adequate motive in the infinite value inherent in human nature."<sup>355</sup> Nygren's view was based upon the presupposition that God's love for us does not depend upon what we have done but, instead, our fellowship with God is contingent upon God's love and forgiveness, which are "spontaneous and unmotivated."<sup>356</sup>

Through Jesus Christ, we have the chance to enter into fellowship with God. According to Nygren "what Jesus seeks to bring is not a new conception of God, or new ideas about God, but a new fellowship with God; that is to say, the new element is connected with the very heart of the religious life, for it concerns the very nature of fellowship with God itself."<sup>357</sup> For Nygren, the offer of God-human fellowship through divine sacrifice and forgiveness is at the "very heart" of Christian life. Reflecting on the teachings of Jesus, Nygren concluded that God's forgiving love, not justice, orders our fellowship with God: "God's attitude to men is not characterized by *justitia distributiva*, but by *agape*, not by retributive righteousness, but by freely giving and forgiving love."<sup>358</sup>

Nygren was emphatic that it is not our worth or value that motivates God to love us. Rather, God's love for us makes us the object of God's love. We have no worth or value outside of God's love. "The man who is loved by God has no value in himself; what gives him value is precisely the fact that God loves him. *Agape* is a value-creating principle."<sup>359</sup> Because God's love for us makes us the object of God's love, our efforts to extend God's love to our neighbors are thwarted unless we forget about "all concern for doing justice."<sup>360</sup> Nygren made his case more forcefully, arguing that Jesus "enters into fellowship with those who are not worthy of it." According to Nygren, fellowship with Jesus is directed "against

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<sup>355</sup> Ibid., 79.

<sup>356</sup> Ibid., 79.

<sup>357</sup> Ibid., 68.

<sup>358</sup> Ibid., 70.

<sup>359</sup> Ibid., 78.

<sup>360</sup> Ibid.

every attempt to regulate fellowship with God by the principle of justice.”<sup>361</sup>

In fact, Nygren contended that the very persons who were most opposed to Jesus’ ministry were those who prided themselves in being the defenders of justice: “That Jesus should take lost sinners to Himself was bound to appear, not only to the Pharisees, but to anyone brought up and rooted in Jewish legal righteousness, as a violation of the order established by God Himself and guaranteed by his justice.”<sup>362</sup> Based upon the law of justice, religious leaders charged that it was a violation of the law for Jesus to forgive sinners and offer God’s love to persons who violated Jewish legal codes and rituals. Such persons deserved condemnation, death even, but not forgiveness and reconciliation with God. This is why Jesus accented love and why the church must continue to do the same.

Nygren held that agape love makes no amends for justice and he supported this view through his interpretation of key biblical texts. The Parable of the Prodigal Son, according to Nygren, concerned the failure of the Elder Brother to understand the depth of God’s love toward us; it was not about whether the Elder Brother was wronged by the love the father showed toward the Prodigal Son. “From his point of view, from the point of view of justice, the Elder Brother is entirely right; his younger brother’s conduct has furnished no grounds for such a love as his father has shown him. But that makes it so much more plain that the father’s love is an altogether "spontaneous" love.”<sup>363</sup> The accent on spontaneous love, not justice, was the overriding moral value of this text, according to Nygren.

Nygren’s *Agape and Eros* rightfully deserves critical study because it clarifies the Christian view of agape love in helpful ways. First, Nygren provided a systematic interpretation of agape love that explained the meaning of Jesus’ love command. God’s love

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<sup>361</sup> Ibid., 86.

<sup>362</sup> Ibid., 83.

<sup>363</sup> Ibid., 90.

is not based upon the worth of individuals, but the free gift of God's love. The heart of the Gospel message is the fellowship with God that faith in Jesus makes possible to sinners saved by grace. Second, Nygren rightfully understood that love is the metavalue, the highest virtue and the moral principle upon which all values and principles are based. It has a character that is distinguished from all other loves. Therefore, the principle of agape love is what we need to practice and model.

Despite the strengths of Nygren's position, several weaknesses make it an implausible view. First, Nygren assumes that a person cannot love thy neighbor out of a desire to do good for the other and, at the same time, care for someone out of a concern for one's own personal benefit. Human beings are not as simple, predictable and one-dimensional as Nygren seems to suggest. A person may advance the well-being of another based upon genuine love for him or her, and at the same time, advance one's personal well-being. For example, one can provide food and shelter to a homeless person out of a sincere desire to advance the well-being of that individual and because doing so will hopefully lead to that person being rewarded in this life and in heaven.

Second, Nygren's view that agape love is entirely unrelated to justice is untenable. When we provide justice, we are actually seeking to do good in someone's life. The fact that we have no worth or value outside of God's love for us means that, when God first loved us, he gave us worth, rights and value that must be cherished, protected and respected. When we secure justice for our brothers and sisters, we are protecting the rights that God provides to all as children of God. That is what it means to treat someone justly. Thus, Jesus does not require that we be indifferent to justice, but that we do good to others out of agape love and

we treat them justly because love requires nothing less.<sup>364</sup>

In fact, Nygren's reading of the parables of the laborers (Matthew 20:1-16) and the prodigal son (Luke 15:11-32) seems to be a misreading of those texts.<sup>365</sup> He understood the landowner saying to the early workers, "Friend, I do thee no wrong: didn't not thou agree with me for a penny? Take up that which is thine, and go thy way."<sup>366</sup> According to Nygren, those who present a grievance (the righteous) demand justice but the order of justice is invalidated by God's unmotivated love. Even assuming that Nygren's interpretation is correct that the grumbling early comers were wrong in thinking that they had been treated unfairly because they were entitled to receive more pay than the late comers (sinners), they were not wrong because they focused on justice to the exclusion of love. The early comers were wrong because their understanding of justice was too limited as Wolterstorff asserts.<sup>367</sup> They were right to demand their share for their labor; that's justice. They were wrong in demanding more than the others who came late; that's God's love. Love and justice together requires that we respect the rights of others but we also understand that God's love gives rewards to persons who are undeserving.

Moreover, in his interpretation of the parable of the prodigal son, Nygren downplayed the importance of justice. Yes, the father challenged the elder brother's protests that he was being unjustly treated by the father's hasty celebration of the younger brother's return home. But the reason why the elder brother could not accept the father's behavior is because he had a very narrow definition of justice based on rewards and punishments, when God's view of justice is grounded in love and forgiveness. Even so, the father didn't dismiss

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<sup>364</sup> Nicholas Wolterstorff, *Justice in Love* (Grand Rapids, MI: Eerdmans, 2011), 46.

<sup>365</sup> Nygren, *Agape and Eros*, 89–90.

<sup>366</sup> *Ibid.*, 90.

<sup>367</sup> Wolterstorff, *Justice in Love*, 46.

the elder brother's claims as irrational but he said, "You are always with me, and all that is mine is yours. But we have to celebrate and rejoice, because this brother of yours was dead and has come back to life, he was lost and has been found."<sup>368</sup> From the standpoint of justice, the younger brother's behavior did not justify the father's reward.<sup>369</sup> The elder brother was right. The father did not rebuke the elder son for making his justice claim as he said, "everything I have is yours." Rather, he challenged him to expand his understanding of justice to be attuned to God's love and forgiveness. While God's justice rewards merit, God's love gives freely based upon forgiveness and mercy. In sum, the elder son needed to expand his understanding of justice, not abandon all justice claims, because the father was free to give the younger brother what he pleases out of love.

In short, Nygren's view fails as a defensible position because he does not appreciate that one can promote the good of the other person because she is your neighbor and doing so promotes your advancement. Further, when we treat someone justly we seek to promote someone's good. And so, love is not disinterested in justice. We need to be able to characterize justice and ascertain whether we have been wronged. Perpetrating injustice is never permissible. Love expands our view of justice; it is never dismissive of injustice. Nygren seemed to misread the Gospel, because Jesus accents agape love but never to the disadvantage of justice. Nygren falsely assumed that love and justice are an either/or, not a both/and relationship. We need a commitment to both love and justice, but justice graced by God's love. An alternative view of agape love appreciates the important role that God's love plays in establishing justice for all of God's people.

*Niebuhr: Love of Neighbor as an "Impossible Possibility"*

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<sup>368</sup> Luke 15:31–32 (New International Version).

<sup>369</sup> Wolterstorff, *Justice in Love*, 49.

Contrary to Nygren, Niebuhr highlighted justice, seeing pure love of neighbor as "an impossible possibility" or even as unjust. He was emphatic that love is for non-conflict situations and justice is appropriate for situations of conflict. Niebuhr distinguished love and justice in terms of a rational vs. religious ethic. He argued that a religious ethic (which includes the Christian ethic) and rational ethic are worlds apart:

A rational ethic seeks to bring the needs of others into equal consideration with those of the self. The religious ethic (the Christian ethic more particularly, though not solely) insists that the needs of the neighbor shall be met, without a careful computation of relative needs. This emphasis upon love is another fruit of the religious sense of the absolute. On the one hand, religion absolutises the sentiment of benevolence and makes it the norm and ideal of the moral life. On the other hand it gives transcendent and absolute worth to the life of the neighbor and thus encourages sympathy toward him. Love meets the needs of the neighbor, without carefully weighing and comparing his needs with the self. It is therefore ethically purer than justice, which is prompted by reason. Since it is more difficult to apply to a complex society, it need not for that reason be socially more valuable than the rational principle of justice.<sup>370</sup>

A rational ethic aims to promote justice, while religion pursues love as the ideal. The challenges of applying the love command in a complex society, characterized by the paradoxical relation of "self-seeking and self-giving", makes the rational ethic more appropriate as a social ethic than the religious ethic.<sup>371</sup> Thus, according to Niebuhr, although love is ethically purer than justice, it is more difficult to apply the love ethic to a complex

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<sup>370</sup> Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (New York: Charles Scribner's Sons, 1932), 57.

<sup>371</sup> Reinhold Niebuhr, *Man's Nature and His Communities* (New York: Charles Scribner's Sons, 1965), 106–107.

society and, therefore, love should not be the social norm.

Because the religious ethic concerns meeting the needs of neighbors before the self, agape love is considered a higher value than justice. Niebuhr held that when Jesus enjoined us to love our neighbors as ourselves, he was not commanding us to love our neighbor with some kind of love or other; he was instructing us to love our neighbors with that special kind of love which is neighbor-love, agape love. Niebuhr maintained that agape love is an expression of benevolence that involves loving another because she is one's neighbor. He concurred with Nygren that agape love cannot have oneself as recipient; instead, it is other-focused and self-sacrificial love that is characterized by pure disinterestedness.

On the question of the proper application of the ethic of agape love Niebuhr differed from agapists like Nygren. He contended that in situations of conflict one should not treat thy neighbor with agape love. According to Niebuhr, assuming one's neighbor is involved in a conflict and loving her with agape love could result in an injustice to her, then one should apply justice. Niebuhr was concerned about perpetuating injustice against the most vulnerable by requiring that "a person tr[y] to live her entire life by the 'law of love.'"<sup>372</sup> He argued against the likelihood of achieving divine love, claiming that a love "which seeketh not its own" will not be able to survive in historical society because of the "self-assertion of others."<sup>373</sup>

Placing this discussion in the context of Niebuhr's writings more broadly, Niebuhr was not suggesting that meeting the needs of the neighbor always requires self-sacrifice. Niebuhr had some concerns that agape love, as applied, could lead to victimization, in "even the most perfectly balanced system of justice in history" where there is "a balance of

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<sup>372</sup> Reinhold Niebuhr, *The Nature and Destiny of Man*, vol. 2 (New York: Charles Scribner's Sons, 1943), 72.

<sup>373</sup> Ibid.

competing wills and interests."<sup>374</sup> He was worried that the accent on love could result in circumstances where the victims of injustice would be harmed even more.

Rather than fixing our eyes on love as the cure all for the world's problems, Niebuhr surmised that prophetic faith is the better course, because it understands that ultimate meaning cannot be achieved in history or eternity. Instead, God's kingdom is in and not of this world.<sup>375</sup> As Niebuhr stated "[Jesus'] Kingdom of God is always a possibility in history, because its heights of pure love are organically related to the experience of love in all human life, but it is also an impossibility in history and always beyond every historical achievement...."<sup>376</sup> Thus, pure love or agape love is an "impossible possibility" because the ideal is related to the experience that humans experience, but it cannot be achieved within history because of competing self-interest.

Niebuhr avoided simple ideas and concepts and, instead, presented Christianity paradoxically. The individual cannot "complete" herself in history; she can imagine an "integrity of spirit which has validity in 'eternity'" as well as hopes, dreams and fulfillment which is only achievable in eternity.<sup>377</sup> To be sure, any interpretation of the love commandment as unworkable, outdated, or as completely attainable and always required unfortunately strips Christianity of its paradoxical character tension.<sup>378</sup> Given the grave perils of our socio-political life Niebuhr was cautious of any strategy that offers false optimism.<sup>379</sup>

There are several strengths of Niebuhr's position that are worth noting. First, Niebuhr's paradoxes align with a key tension of the Christian faith – the notion that the

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<sup>374</sup> Ibid.

<sup>375</sup> Timothy Jackson, *Love Disconsoled: Meditations on Christian Charity* (Grand Rapids, MI: Cambridge University Press, 1999), 101–102.

<sup>376</sup> Reinhold Niebuhr, *An Interpretation of Christian Ethics* (New York: Seabury, 1979), 19.

<sup>377</sup> Gene Outka, *Agape: An Ethical Analysis* (New Haven: Yale University Press, 1972), 30.

<sup>378</sup> Jackson, *Love Disconsoled*, 103.

<sup>379</sup> Outka, *Agape*, 30.



kingdom of God is here already and not yet. In particular, Niebuhr's view that the love commandment is an "impossible possibility" has been railed as contradictory, which is partly true. Christianity is full of paradoxes. Niebuhr proposed that prophetic religion is based upon certain creeds, myths and beliefs that, according to Tim Jackson, "transcend philosophical reason."<sup>380</sup> The love commandment is a worthy ideal but historical realities and sinful self-interest complicate its full attainment in history. While the love command ought to be the standard of our ethical life, any effort to make it compulsory distorts the necessary tension of prophetic faith and ethical reason.<sup>381</sup> In other words, while we must "love our enemies as ourselves," we must balance this with demands of survival in a harsh world.

Second, given the concerns about injustice, Niebuhr rightfully argued that prophetic faith sometimes requires that we drink from the bitter cup of self-sacrifice but, at other times, it necessitates that we refuse to drink from that cup to protect the vulnerable from the weight of oppression. Given the concerns of victimization among the most vulnerable – blacks, Hispanics, gays, women, the physically challenged, etc.--- it is problematic to dictate that the victims of oppression have to respond in one way. This concern has been raised by some of the most vocal critics of the CRM, and it has been echoed by all groups that seek to protect the rights of the most vulnerable among us.

While Niebuhr's concerns about victimization are warranted, his views seem to be based upon a misreading of the Gospel in at least one respect. Nowhere in scripture does Jesus command that we are to take the way of love under some circumstances and not others, and Niebuhr seems to suggest that the way of love is sentimental and nonconfrontational. We must always "love our enemies." Jesus is most emphatic about this

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<sup>380</sup> Jackson, *Love Disconsoled*, 103.

<sup>381</sup> Timothy Jackson, "Justice in Love," *Notre Dame Philosophical Reviews: An Electronic Journal*, March 16, 2012, accessed March 20, 2014, <http://ndpr.nd.edu/news/29488-ju/>.

in situations of conflict, on the individual and institutional levels. In Matthew 18, Jesus says when our sister sins against us we are to go point out her fault in love and, if she still refuses to listen, one is in his or her right to get one or two witnesses before taking her before the church.<sup>382</sup> The goal is to seek justice not only but to promote forgiveness and possible reconciliation based upon the norm of Christian love. Further, when our enemies persecute us, Jesus tells the church to “love your enemies and pray for those who persecute you” in all seasons.<sup>383</sup>

The notion that love invites victimization distorts the twin concern for justice and love throughout the gospel. The fact that love is the highest moral value does not mean that concerns about justice are irrelevant. Instead, God’s love expands our understanding of justice such that when we advance the good of our neighbor in the name of love we do so in light of God’s purpose for creation. The good that we can achieve on behalf of our neighbor is far greater than what we can achieve without God’s love. In Matthew chapter 12, the disciple, through the prophet Isaiah, reminds us that one of Jesus’ chief aims is to “proclaim justice to the nations”: “Here is my servant whom I have chosen, the one I love, in whom I delight; I will put my Spirit on him, and he will proclaim justice to the nations.”<sup>384</sup> Jesus even rebuked the Pharisees in his day because of their hypocrisy and their contempt for justice which indicated their lack of love for God and God’s people: “Woe to you Pharisees, because you give God a tenth of your mint, rue and all other kinds of garden herbs, but you neglect justice and the love of God.”<sup>385</sup> Throughout the Bible, contrary to Niebuhr’s view, Jesus reminds us to apply both love and justice to all situations.

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<sup>382</sup> Matthew 18: 15–17 (New International Version).

<sup>383</sup> Matthew 5:43–44 (New International Version).

<sup>384</sup> Matthew 12:18–21 (New International Version).

<sup>385</sup> Luke 11:42 (New International Version).

Contrary to Niebuhr's view that there are situations in which love should not be applied, the assumption that love of neighbor invites victimization simplifies and distorts the Gospel message. It is precisely the commitment to offer oneself up for the sake of love that tests our faith and commitment to God. No one is forced to engage in self-sacrifice, but it reflects an intentional decision based upon "unconditional commitment, equal regard, and passionate service."<sup>386</sup> That is, the way of love means that one "suffers for the truth and embraces martyrdom when necessary"; Jesus lovingly suffered and avoided death at times, realizing that all summons to self-sacrifice are not from the hand of God.<sup>387</sup> Womanist theological ethicist Cheryl Townsend Gilkes spoke to the oppression of black men and women, noting that sometimes the courageous acts of self-reflection and self-examination lead to the preservation of life, which allows one to take the first step toward fulfilling our "response-ability" to promote the good of our brothers and sisters.<sup>388</sup>

In sum, the Bible requires that love be practiced in all situations, especially in situations of conflict. Jesus requires that we be committed to love and justice on the individual and collective levels, in formal and informal contexts. Thus, Niebuhr's view of love and justice does not seem to comport with Jesus' view of love and justice, which are not context specific and situational but ought to govern every aspect of our lives. Finally, perhaps Niebuhr is too pessimistic about human nature. As the experiences of minorities demonstrate, many vulnerable groups put their needs before others for the sake of preserving their humanity in the face of injustice, not because they are driven by sin and

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<sup>386</sup> Timothy Jackson, *The Priority of Love: Christian Charity and Social Justice* (Princeton, NJ: Princeton University Press, 2003), 23.

<sup>387</sup> *Ibid.*

<sup>388</sup> Cheryl Townsend Gilkes, "'Go and Tell Mary and Martha': The Spirituals, Biblical Options for Women, and Cultural Tensions in the African American Religious Experience" in *Womanist Theological Ethics: A Reader*, eds. Katie Cannon, Emilie Townes, and Angela Sims (Louisville, KY: Westminster John Knox Press, 2011), 217-21.

greed.

## II. In Defense of King: Agape Love and its Harmonious Relation to Justice

As a student at Morehouse College, Howard Thurman's conception of the love ethic of Jesus helped King to think about the implications of the Gospel for transforming social relations and promoting common sharing in the broader community.<sup>389</sup> According to Thurman, the highest expression of love can be achieved only when persons, connected to the infinite, develop a loving community that resists all barriers to collective unity.<sup>390</sup> Love, as the fundamental criterion of Thurman's theological ethics, is expressed in three important ways.<sup>391</sup> First, Thurman argued that love requires making amends, confessing faults, and reestablishing connections with persons who have contributed to the breakdown of loving relationships in subordinate communities.<sup>392</sup> For Thurman, this was the way to reconcile individuals who have natural claims on community but work in concert with hostile outside forces that thwart common unity. While calling attention to destructive behavior is important, the second manifestation of love places demands upon each member of the community to recognize the "*imago dei*" in the human personality.<sup>393</sup> The third type of love expounded in Thurman's Christian ethics is a "common sharing of mutual worth and value" in the wider human community. Thurman maintained that both oppressor and the oppressed are part of the same ethical ground.<sup>394</sup> King and other civil rights activists incorporated these three types of love expounded by Thurman in their ethical system. The CRM challenged the oppressed to forgive and make amends with the opposition, recognize

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<sup>389</sup> Stewart Burns, *To The Mountaintop: Martin Luther King Jr.'s Mission to Save America 1955–1968* (New York: Harper, 2004), 452.

<sup>390</sup> Howard Thurman, *Jesus and the Disinherited* (Boston: Beacon, 1976), 164.

<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ibid.*, 165.

the image of God in the oppressed and the oppressor alike, and affirm the equal worth of all people.

Similar to agapists who came before him, King argued that the norm of love must ground Christian ethics as embodied in the double love commandment. The imperative to love our enemies is absolutely necessary for our survival. Contrary to those who mocked agape love as too soft and ineffectual, King emphasized that “Jesus is not an impractical idealist; he is the practical realist.”<sup>395</sup> For King, the love ethic of Jesus was not idle sentimentalism, but a powerful means and motivation through which persons could love themselves and others more fully based upon their love for God. In responding to criticism that the priority of agape love denies the importance of self-love, King said that love of God, which includes love of one’s enemies, is the prerequisite to self-love.<sup>396</sup> Thus, self-love is only possible when we love God first who shows us how to love ourselves through the power of forgiveness, which empowers us to share God’s love with others.<sup>397</sup> While Christianity requires individuals to love their adversaries, such love is not passive or reckless.<sup>398</sup> Without this commitment, King warned that the CRM would be a mere frame of what it could hope to be.

King and other civil right activists emphasized a strong connection between love of God and love of neighbor in the context of a civil society, which he characterized as the “Beloved Community.” While some militant leaders of the CRM rejected the love commandment introduced in the Sermon on the Mount as being nothing more than perilous thinking that caused blacks to deny self-love in order to win the friendship of whites, King

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<sup>395</sup> Martin Luther King Jr., *Strength to Love* (New York: Fortress, 1963), 34.

<sup>396</sup> King, *Strength*, 35.

<sup>397</sup> Ibid.

<sup>398</sup> Ibid.

believed that Christian love could never produce injustice. Jesus Christ, as the model for agape love, unselfishly sacrificed his life for the benefit and well-being of all.<sup>399</sup> Additionally, because life is deeply communal in nature, King maintained that love can exist only in the context of social relations. That is, the love of God comes alive in a world that removes barriers that keep one from seeing both oneself and one's neighbor as a child of God deserving of one's love.

In other words, Jesus is not calling attention to *eros* which the ancient Greeks define as preferential and often sensual love or to *philia*, which means friendship;<sup>400</sup> rather, Christian love is based on the New Testament notion of *agape*, which means "...understanding and creative, redemptive goodwill for all men."<sup>401</sup> This means that true Christian love respects all persons and seeks to bring them into community in the same way. Christ united all people and forgave his enemies as a precondition for knowing God and achieving true holiness. In the Bible, as King understood it, Christ-like love is superior to all other values. It is the love commandment on which all other commandments hang. Agape love requires that we forgive our enemies as Christ forgave his and laid down his life for all. It requires that we suffer, not unwillingly or blindly, but for the sake of love and to the benefit of our neighbors. King and the CRM remind us that love of God is the primary force used to overcome fear, bigotry, and willful ignorance and to love others. CRM protestors firmly believed that, until humans learned how to love others with the love of God, all attempts to end injustice and build a beloved community would fail.

Despite King's appeals to unconditional love of enemies in the movement, a growing

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<sup>399</sup> James Cone, *Martin and Malcolm and America: Dream or a Nightmare* (New York: Orbis, 1992), 126; Thurman, *Jesus*, 166.

<sup>400</sup> Timothy Jackson, *Priority*, 68.

<sup>401</sup> King, *Strength*, 52.

number of young radicals began to reject such appeals due to frustration with the slow pace of civil rights reform, white violent resistance to integration and the increasing awareness of black poverty and powerlessness in Southern rural communities and Northern ghettos. The white press stoked the flames of dissension by warning Americans that these groups were one step away from starting a violent revolt against “whitey.”

King was concerned that increasing coverage of Malcolm X and the Black Panther Party that promoted Black self-love would alienate sympathetic whites and encourage frustrated blacks to channel their hatred toward whites. One of King’s most vociferous critics, Malcolm X, possessed a defiant and aggressive style of leadership that appealed to young people who were not exposed to or disciplined in the philosophy of nonviolence.<sup>402</sup> Malcolm X was able to tap into a sense of disappointment, restlessness, anger and disillusionment with the “hypocrisy of the northern white liberal” that characterized the experiences of many American blacks, particularly the poor black masses.<sup>403</sup> Malcolm X was critical of King’s insistence on “turn the other cheek” love as a means of social change because he kept harkening back to the experiences of violence and humiliation he experienced at the hands of “the good Christian white people” who preached about Christian love but treated his family, black people and himself as less than human.<sup>404</sup> He felt that the emphasis on agape love always necessitated that blacks focus on loving whites while ignoring the more important imperative of black self-love which is a prerequisite to black consciousness and black liberation<sup>405</sup>:

If the Negro preacher is going to disarm the oppressed black masses with a doctrine

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<sup>402</sup> Cone, *Martin and Malcolm*, 95.

<sup>403</sup> Ibid.

<sup>404</sup> Ibid., 153.

<sup>405</sup> Malcolm X, *Malcolm X: The Last Speeches*, ed. Bruce Perry (Atlanta, GA: Pathfinder Press, 1989), 120-21, 149.

of cowardice disguised as 'Christian love,' who is going to teach the white man to love his enemies, turn the other cheek, and peaceful suffering...or is the Negro clergy being paid to disarm our people with the slave master's one-sided religion?<sup>406</sup>

Malcolm contended that doctrine of Christian love was merely a strategy used by whites to disarm Negroes for the purpose of making them commit violence against themselves, a great harmful effect of Christianity on the African American community.<sup>407</sup> Malcolm's anger, rage and disappointment toward black preachers and churches was echoed by some, especially poor blacks. In fact, during one Harlem rally, King was jeered by a crowd that preferred to hear the fiery and confrontational message of Malcolm X rather than the reformist politics of leaders like King who, up to that point, was one among a few select leaders with whom the White Power structure felt comfortable engaging.<sup>408</sup>

Given the harsh reality of black struggle in the face of injustice, poverty and white violence, Malcolm contended that the Black Muslim's philosophy of separation and self-defense were better for promoting Black self-determination and freedom than the integrationist and nonviolent strategy of the CRM. This meant that blacks should feel completely free to use physical retaliation if the circumstances demanded it, even though Elijah Muhammad, Malcolm's spiritual leader, did not allow him to pursue retaliation.<sup>409</sup> He rejected the freedom songs of "We Shall Overcome" in favor of black nationalist strategies designed to prepare black people to fight until they have overcome.

According to Malcolm, the philosophy of Black nationalism meant that black people maintain control of the social, economic and political destiny of the black community. This philosophy of Black nationalism insisted that blacks could not change the minds of whites

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<sup>406</sup> Cone, *Martin and Malcolm*, 176.

<sup>407</sup> Ibid.

<sup>408</sup> John Lewis, *Walking with the Wind: A Memoir of the Movement* (New York: Simon & Schuster, 1998).

<sup>409</sup> Cone, *Martin and Malcolm*, 186.



by simply making moral appeals because America was morally bankrupt. He believed that the only thing that motivated whites to change was force. Thus, while Malcolm rejected the power of agape love to advance the cause of freedom, justice and equality, he believed that a more effective strategy was for blacks to prioritize self-love, cultural pride and self-respect with the goal of racial separation as central to promoting black liberation and racial uplift.

Despite constant opposition to agape love and its expression in nonviolent direct action from black radicals, segregationists, and conservative evangelicals, King and many other civil rights activists remained publicly committed to the primacy of Christian love.<sup>410</sup> “Man-made laws ensure justice, but a higher law produces love,” King proclaimed.<sup>411</sup> In joining the struggle for civil and human rights, King warned that the nonviolent resister must not yield to the temptation to return black hatred with white hatred, for such an approach would incite hate, consuming the entire human race. Even while seeking justice, King reminded activists that their goal, as Christians, was to redeem the soul of white racists. Justice sought to expand the boundaries of freedom and equality but agape love, “redeeming good will for all men,”<sup>412</sup> sought the redemption of white racists who thought too highly of themselves and blacks who thought too little of themselves.

Authentic, just, and loving human interactions between blacks and whites in America would not be completely realized until universal, dangerous, and neighborly love operate to liberate persons from “fears, prejudice, pride, and irrationality.”<sup>413</sup> King noted that the barriers to a fully integrated society would be removed when the “determined movement of

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<sup>410</sup> Taylor Branch, *Pillar of Fire: America in the King Years 1963–65* (New York, Simon & Schuster, 1998). Taylor Branch writes that, in certain contexts, “the national leader of the NAACP [Roy Wilkins]” committed to “join in a strategy of nonviolent protest.” *Ibid.*, 69.

<sup>411</sup> Martin Luther King Jr., “The Social Organization of Non-Violence,” in *The Eyes on the Prize Reader: Documents, Speeches, and Firsthand Accounts from the Black Freedom Struggle*, eds. Clayborne Carson et al. (New York: Penguin Books, 1991), 113–14.

<sup>412</sup> King, *Stride toward Freedom*, 104.

<sup>413</sup> Martin Luther King Jr., “Non-Violence”, 113–14.

people incessantly demanding their rights” crumbled the “old order.”<sup>414</sup> This became a dominant theme of the CRM: love of neighbor was an indispensable requirement for achieving a truly integrated society.

Embracing the love commandment, King distinguished Christian love from other types of love but resisted the view that agape love was incompatible with other loves. The commandment to “love your enemies” is embodied in the double love commandment. Jesus, in response to a lawyer’s question of what is the greatest commandment responds: “Love the Lord your God with all your heart and with all your soul and with all your mind.’ This is the first and greatest commandment. And the second is like it: Love your neighbor as yourself.’ All the Law and the Prophets hang on these two commandments.”<sup>415</sup> According to Jesus, the imperative to love comes from the fact that violence leads to destruction and love has the power to overcome all forms of evil. Self-love is only possible when we love God first who shows us how to love ourselves through the power of forgiveness, which empowers us to share God’s love with others.<sup>416</sup>

Forgiveness does not mean forgetting what has happened; rather, it removes the barriers to genuine relationship with the neighbor.<sup>417</sup> A person cannot love his or her enemies without performing the act of forgiveness, which may lead to reconciliation.<sup>418</sup> The only way for reconciliation and redemption to be achieved, King stated, is by placing agape love at the center of our lives. First, agape love is characterized by its commitment to loving our neighbors just because they are children of God. This means that we do not love people based upon what they have, what they do for us, what they will do for us, or how we feel

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<sup>414</sup> Ibid.

<sup>415</sup> Matthew 22:36–40 (New International Version).

<sup>416</sup> Ibid.

<sup>417</sup> Ibid.

<sup>418</sup> Ibid.

about them; we seek to do good for others without expecting anything in return. Second, agape love flows from the need of others for love, even if they do not readily admit it. According to King, blacks needed to love whites because white men needed their love to “remove [their] tensions, insecurities and fears.”<sup>419</sup>

Third, agape love is characterized by our willingness to bear the cross in order to restore, rebuild, and renew fractured communal relationships. There is no limit to how far we will go to preserve our brothers and sisters in the same way that Christ went to great lengths to save the church from the forces of sin and evil. Finally, agape affirms our need to show love because “all of life is interrelated.”<sup>420</sup> In other words, whites could deny blacks their right to the equal protection of the law but such actions harmed whites; we are all related and “[t]o the degree that I harm my brother, no matter what he is doing to me, to that extent I am harming myself.”<sup>421</sup> To be sure, love was the only force that could hold together a very fragile movement. By living out the love ethic of Jesus, King reminded nonviolent resisters that they possessed the power, working through the Holy Spirit, to rebuild community, fight for justice, and respond to human needs.

Next, King explained why it is necessary for Christians to love their adversaries.<sup>422</sup> Hate is discouraged because it leaves an indelible mark on the human soul “and distorts the personality.”<sup>423</sup> Love is the only power that can change an adversary into a friend.<sup>424</sup> We need to love our enemies because in so doing, King argued, can we come to know God and experience true holiness.<sup>425</sup> Repeatedly, King and others sounded the Christian mantra that

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<sup>419</sup> Martin Luther King Jr., *Stride toward Freedom*, 105.

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*, 106.

<sup>422</sup> *Ibid.*, 37.

<sup>423</sup> *Ibid.*, 37.

<sup>424</sup> *Ibid.*, 38.

<sup>425</sup> *Ibid.*, 39.

unearned suffering for the sake of resisting evil is redemptive and that a loving response of “turning the other cheek” and “loving your enemies” was the most Christian and the most effective strategy.<sup>426</sup> It requires that we suffer, not unwillingly or blindly, but for the sake of love and to the benefit of our neighbors. King was emphatic that love of God is the primary force used to overcome fear, bigotry, and willful ignorance and to love others. CRM protestors firmly believed that, until humans learned how to love others with the love of God, all attempts to end injustice and work toward the beloved community would fail.

Applying this principle to the racial segregation struggle, King affirmed that civil rights advocates would use every ounce of their being to destroy segregation, but they would not avoid their obligation to love their enemies in the process, because this is the only way that they would promote the common good. Throughout the CRM, King and others communicated the message that suffering for the sake of a divine purpose transformed and dignified the sufferer and the entire community. This philosophy espoused the view that with God’s love the agony of Good Friday would give way to the triumph of Easter.<sup>427</sup>

Faced with the reality of suffering for the sake of pursuing racial equality all of his life, King often remarked how his commitment to the love ethic of Jesus had roots in his religious context and childhood family environment:

It is quite easy for me to think of a God of love mainly because I grew up in a family where love was central and where loving relationships were ever present. It is quite easy for me to think of the universe as basically friendly mainly because of my uplifting hereditary and environmental circumstances. It is quite easy for me to lean more toward optimism than pessimism about human nature mainly because of my childhood experiences. It is impossible to get at the roots of one’s religious attitudes without taking in account the psychological and historical factors that play upon the

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<sup>426</sup> Martin Luther King Jr., “Suffering and Faith,” in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, ed. James M. Washington (New York: HarperCollins, 1991), 41-2.

<sup>427</sup> Burns, *Mountaintop*, 125.

individual.<sup>428</sup>

Although King was optimistic about human nature, he was not naïve about sin and evil. The leader found Reinhold Niebuhr to be a great resource in gaining a deeper understanding of human nature. King was intrigued by Niebuhr's insights into the behavior of individuals and social groups. In particular, King was especially intrigued by Niebuhr's understanding of complex human motives and the relationship between morality and power. Niebuhr helped King to see that, although humans have an enormous capacity for good, there is the very apparent reality of individual and collective evil that undermines our best attempts to achieve the Kingdom of God.

Despite constant opposition to agape love and its expression in nonviolent direct action from black radicals, segregationists, and conservative evangelicals, King and many other civil rights activists remained publicly committed to the priority of Christian love.<sup>429</sup> "Man-made laws ensure justice, but a higher law produces love," King proclaimed.<sup>430</sup> King noted that the barriers to a fully integrated society would be removed when the "determined movement of people incessantly demanding their rights" crumbled the "old order."<sup>431</sup> This became a dominant theme of the CRM: love of neighbor was an indispensable requirement for achieving a truly integrated society. That is, the love of God comes alive in a world that removes barriers that keep one from seeing both oneself and one's neighbor as a child of God deserving of one's love.

Although King's life and the safety of his family was threatened on several occasions,

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<sup>428</sup> Martin Luther King Jr., "An Autobiography of Religious Development" in *The Papers of Martin Luther King Jr.*, vol. 1, *Called to Serve*, ed. Clayborne Carson (Berkeley: University of California Press, 1992), 360–61.

<sup>429</sup> Taylor Branch writes that, in certain contexts, "the national leader of the NAACP [Roy Wilkins]" committed to "join in a strategy of nonviolent protest." Taylor, *Pillar of Fire*, 69.

<sup>430</sup> Martin Luther King Jr., "Non-Violence", 113–14.

<sup>431</sup> Ibid.

his willingness to rely on the police for protection and resist attempts by extremists to create conflict between police and protestors contributed to the success of the movement. The movement's commitment to nonviolence was put to the test throughout when opposition forces resorted to violence, intimidation and terror to derail nonviolent strategies. While King was at a mass rally, he received word that someone set a bomb off on his porch that rocked his house while his wife, daughter Yolanda and a member from church were in the back room.<sup>432</sup> Responding to many in the black community who wanted to use force and retaliate against the perpetrators of violence, King cautioned: "Jesus still cries out in words that echo across the centuries: 'Love your enemies; bless them that curse you; pray for them that despitefully use you.' This is what we must live by. We must meet hate with love." King concluded that, "if I am stopped, this movement will not stop, because God is with the movement. Go home with this glowing faith and this radiant assurance."<sup>433</sup> King believed that violent retaliation against white extremists, police officers or anybody else would lead to greater incidents of violence that would undermine the success of the movement.

While King and other civil rights activists accented love, he believed that the pursuit of justice was the other side of the Christian coin of faith. According to King, justice has two key components: an "ultimate referent," which includes God's universal law based on love and justice and a "penultimate referent," which advances human rights through legal tactics to change the political, social, and civil laws of society. The former refers to the undeniable rights that are guaranteed to each person because of the divine status of each human being. King said the following about love and justice. "And I want to tell you this evening that it is not enough for us to talk about love. Love is one of the pinnacle parts of the Christian faith.

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<sup>432</sup> King, *Stride*, 56.

<sup>433</sup> *Ibid.*, 57.

There is another side called justice. And justice is really love in calculation. Justice is love correcting that which revolts against love...Standing beside love is always justice. And we are only using the tools of justice. Not only are we using the tools of persuasion but we've come to see that we've got to use the tools of coercion.<sup>434</sup>

For King, "the gospel at its best deals with the whole man, not only his soul but his body, not only his spiritual being, but his material well-being. Any religion that professes to be concerned about the souls of men and is not concerned about the slums that damn them, the economic conditions that strangle them, the social conditions that cripple them is a spiritually moribund religion awaiting burial."<sup>435</sup> Following the Selma march in 1965, King advanced a more radical analysis of racial oppression and called for bolder approaches to achieve his vision of the just society.<sup>436</sup> He began to challenge the United States' capitalistic practices, in response to the economic disparities he observed in his travels across the country. He believed that what the nation needed to address the prevalence of discrimination and constant unemployment was to "create full employment" or "create incomes" in order to promote the "social good."<sup>437</sup> According to Robert Franklin, "he revised his vision of the just society from a mere participatory political democracy to a democratic socialist society in which America's highest values could be realized."<sup>438</sup>

However, King realized that some values, such as real racial equality, were not

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<sup>434</sup> Martin Luther King Jr., "Holt Street Speech," in *The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts From the Black Freedom Struggle*, eds. Clayborne Carson et al. (New York: Penguin, 1991), 60-61.

<sup>435</sup> *Ibid.*, 38.

<sup>436</sup> Robert Franklin, "An Ethic of Hope: The Moral Thought of Martin Luther King Jr.," in *Martin Luther King, Jr.: Civil Rights Leader, Theologian, Orator*, vol. 2, *Martin Luther King, Jr. and the Civil Rights Movement*, ed. David Garrow (Brooklyn, NY: Carlson Publishing, Inc., 1989), 349-50.

<sup>437</sup> Martin Luther King Jr., "Where do We Go From Here?" in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, ed. James M. Washington (New York: HarperCollins, 1991), 245-50.

<sup>438</sup> Franklin, *Ethic*, 349.

originally embraced by the founders of the American nation.<sup>439</sup> He also modified his “analysis and social vision” as he “realized that moral agents were obligated to engage in action far more militant than he had advocated earlier.”<sup>440</sup> Near the end of King’s life, he began calling for massive civil disobedience in the proposed Poor People’s March to Washington. Frustrated with the slow pace of racial reform, economic justice, and the financial and moral tragedy of the war in Vietnam, King increasingly lost confidence in electoral politics as a vehicle of social transformation, arguing that more dramatic and aggressive mass civil disobedience was needed to take the nation off of its destructive course toward “violent co-annihilation.”<sup>441</sup> Consequently, King shifted from calling for advancements in civil rights to advocating for human rights grounded in divine law. The key to transforming American society, according to King, entailed not merely democratic reform based on appeals to fairness and social cooperation, but a recommitment to the priority of love and the sanctity of human life. This goal was a transformation of values and a restructuring of society in line with the best of religious thought.

In sum, King surmised that a radical transformation of American racial relations required organized disobedience but that true social change required a radical reorientation of American society and social values that included, but was not limited to, a commitment to eliminate racism, dismantle economic exploitation, and end militarism. King’s passion for the least of these “led him to advocate basic structural changes in the capitalist system, a position equated in the minds of fundamentalist and evangelical clergy with the whole train

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<sup>439</sup> Lewis Baldwin et al., *The Legacy of Martin Luther King, Jr.: The Boundaries of Law, Politics and Religion* (Notre Dame, IN: University of Notre Dame Press, 2002), 127.

<sup>440</sup> Franklin, *Ethic*, 349.

<sup>441</sup> Martin Luther King, Jr., “A Time to Break Silence,” in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, ed. James M. Washington (New York: HarperCollins, 1991), 243-44.



of Marxist-Leninist-Stalinist thought.”<sup>442</sup> King explained that reforms in voting and civil rights laws were not sufficient to eradicate social injustice in a society that refused to address the cancer of poverty, war, and the persistence of racism. As King turned to Gandhi for a philosophy of nonviolent love, he also looked to Sweden as “an example of a fair and humane political economy.” By suggesting that America might need radical transformation along the lines of Sweden’s democratic socialism, King intended that “the best of America’s political tradition be preserved while supplementing that tradition with a more compassionate economic system.”<sup>443</sup>

King’s leadership provides a thorough and probing account of the Christian ethic of love, as a prescriptive account of norms of activity drawn from Christian principles of love and justice, accenting Christian love. There are strengths in King’s view that highlight the critical role of Christian love in advancing social justice. First, true self-love could never be achieved independent of love of God and neighbor. Self-love that is not rooted in the love of God and love of neighbor is self-centered, narcissistic, and breeds hatred in the face of conflict. Applying agape love, blacks can affirm their humanity, forgive their enemies, transform their enemies into friends, and create a society based upon the mutual cooperation of all for the common good.

Second, King’s vision of the good and just society provided a comprehensive paradigm for how to dismantle the structures of oppression and promote political inclusion and accountability within social and political institutions. Through a comprehensive poverty program, multiple levels of political involvement, a commitment to end racism, and Black economic development, King and advocates in the CRM took American democracy farther

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<sup>442</sup> Baldwin et al., *Legacy*, 96.

<sup>443</sup> Williams, *Eyes on the Prize*, 56.

than the founding documents—the Declaration of Independence and the Constitution—ever envisioned. Christian religion was not merely the handmaiden of secular politics. It was its judge and reformer. Civil rights advocates led by King affirmed that a commitment to the principle of agape love was essential to promoting social change. Agape even grounded King's appeals to legal tactics to change unjust laws that were combined with a philosophy of nonviolence to change the hearts of Americans. This basic philosophy guided the civil rights struggle as public-spirited activists applied the teachings of Jesus to a religious movement that challenged the nation to make good on its promise to protect the rights of all people. More than individual controversies, these protests were part of a larger religious movement to dismantle segregation and expand religious freedom to the most vulnerable in society.

While King was right in highlighting the necessary connection between love and justice and combating social evil, in some places, he seemed to go too far in terms of what love requires. First, King contended that unearned suffering is redemptive. This is not always the case. There are times when suffering perpetuates exploitation and the dehumanization of the most vulnerable. For womanist theologian, Delores Williams, the oppressive experiences of black women have been unfairly justified using a theology of the cross.<sup>444</sup> White Christians have often identified black women's suffering with Jesus' suffering on the cross to justify their exploitation. For this reason, the cross of a racial caste system, sexism and social stratification of the black women work force prevent them from realizing their full spiritual, social, political and human freedom.

Contrary to Williams' views, according to JoAnne Terrell,<sup>445</sup> the crucifixion of Jesus is

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<sup>444</sup> Delores Williams. "Black Women's Surrogacy Experience and the Christian Notion of Redemption," in *After Patriarchy: Feminist Transformations of the World Religions*, eds. Paula M. Cooley, William R. Eakin, and Jay B. McDaniel (Maryknoll, NY: Orbis Books, 1991), 1–14.

<sup>445</sup> JoAnne Marie Terrell, *Power in the Blood? The Cross in African-American Experience* (Maryknoll,

not designed to circumscribe black women's agency but rather it speaks to the violent tendencies of the world that are inimical to the divine will for human relations. Given the violent tendencies of the world, it is important to take up the cross but this does not mean that we seek after death, suffering and oppression. The call to take up the cross means that we must always be willing to suffer to the point of death for the sake of the Gospel. However, like Jesus who escaped many death threats on his life, there are moments when we must save our lives as a strategy of resistance to catalyze the movement for social justice.

Second, while King emphasized the importance of nonviolent struggle, too often, he discussed suffering as if it were the final word of the gospel. Suffering is not the final word, nor the central message of the Christian teaching about God, Jesus Christ or the world. The cross represents a State of disorder, which threatened to engulf the world until God reigns supreme. While creation is in crisis, the resurrection represents the redemptive power of God's love over the chaos in the world. The lesson to be drawn from the cross is not that God permitted evil institutions to reign indefinitely because God sanctioned them to preserve law and order. Rather, through Jesus Christ we have the power to overcome evil wherever it rears its ugly head in the world. According to King, the Christian love ethic is embodied within the context of the struggle for freedom when Christians love their enemies in order to know God and achieve the beloved community, and when human beings take a stand against all forms of injustice and equality that deny human dignity and limit human freedom.

### **III. Summary and Conclusion**

My concluding thesis on the centrality of Christian love is this: *Agape is loving our*

*neighbor with Jesus' self-giving love, despite how we might feel about ourselves and our neighbor, and taking a stand against all forms of injustice and equality that deny their worth and dignity under the laws of the State according to the laws of God.* I have critically examined several views on agape to show how each either fails to appreciate the central role of love in the Christian faith, and focuses exclusively on justice, or focus on justice at the exclusion of love. A. A. Niebuhr and Reinhold Niebuhr fail to develop theories that adequately balance the importance of love and justice in the Christian faith. Niebuhr's theory is indefensible because he places agape love at odds with justice, contending that Christians should avoid making rights claims and social justice appeals. While Niebuhr exclusively accents divine love, Niebuhr swings the pendulum in the opposite direction toward justice, seeing pure love of neighbor as "an impossible possibility" or even as unjust.

I have shown how King's theory of love and justice, while making love the priority, presents the best possible position for meeting love's demands and promoting social justice. King and the church-led CRM took the gospel of love and justice into society and provided hope and healing to the oppressed stymied by hatred and injustice. God's involvement in the struggles against oppression caused King to draw closer to God. King's concern for social justice was profoundly important to his religious commitments and convictions. In particular, his commitment to nonviolent struggle against injustice, rooted in the love ethic of Jesus, offered constructive possibilities for redeeming the soul of Americans and moving America one step toward the Beloved Community. For King, the love ethic of Jesus was not idle sentimentalism, but a powerful means and motivation through which persons could love themselves and others more fully based upon their love for God. Despite the weaknesses in King's position, he holds out the best alternative because suffering can be redemptive when taken on in the right context, love is distinct but correlated with justice, and the Bible

requires that we choose the way of love in all circumstances.

Civil rights advocates led by King affirmed that a commitment to the principle of agape love was essential to promoting social change. *Agape* even grounded King's appeals to legal tactics to change unjust laws that were combined with nonviolent acts to change the hearts of Americans. This basic philosophy guided the civil rights struggle as public-spirited activists applied the teachings of Jesus to a religious movement that challenged the nation to make good on its promise to protect the rights of all people. In the face of legal maneuvering and Congressional wrangling, preachers, spiritual leaders and grass roots activists reminded nonviolent troops that they were God's willing instruments. Movement campaigns reinforced this message, bringing it to life in the car pools, prayer meetings, soulful singing and persistent walking that gave them a renewed sense of dignity and encouraged their faith that Montgomery, Birmingham, Selma and the entire nation would soon see the dawning of a new and better day.

As disciples of freedom and justice, protestors believed that they had a moral mission to prick the conscience of the nation to inspire America to live up to its stated ideals. As disciples of Christ, protestors believed that they had a moral mission to go beyond those ideals to create a more just society. The CRM not only worked to change the law, but it developed detailed programs and proposals to promote civil rights consistent with Judeo-Christian principles, while staking out a middle way between the extremes of White Supremacy and Black Nationalism. As civil rights protestors increasingly took their religion to the streets, they worked with litigators to desegregate schools, buses, libraries, trains, hotels, restrooms, restaurants, and they expanded voting rights through the power of nonviolent mass civil disobedience. More than individual controversies, these protests were part of a larger religious, ethical and legal movement to dismantle segregation and expand

religious, civil and human rights to the most vulnerable in society.

## **Chapter 5: From Civil Rights to Human Rights: Lessons Learned from the Civil Rights Movement in the Enduring Struggle for Human Rights**

### **I. The Civil Rights Movement in the Context of a Broader Human Rights Struggle**

Throughout the Civil Rights Movement (CRM), African Americans advanced their claims to Constitutional rights that they had been denied previously. This dissertation has argued that the success of the CRM depended upon the perennial interaction between American law, Black churches, and local and national politics. A climate of religious freedom, sparked by changes in First Amendment Free Exercise and Establishment Clause law, provided inspirational fodder and legal precedent for nonviolent protest demonstrations during the CRM. Court battles, together with spirit-filled ecclesial activism on the streets helped the CRM to succeed in expanding constitutional rights.

In order to fully appreciate the legacy of the CRM, it is important to view it through the lens of the broader human rights struggle that became the focus of the CRM, especially after the passage of the 1964 Civil Rights Act. “Civil rights” encompass “rights of citizens and subjects” that are protected from violation by either State or private actors, so that all can participate freely in civil and political life. Human rights are universal and democratic rights that are the product of various philosophical, religious, positive, regional, and international laws.<sup>446</sup> Human rights extend beyond the liberty and participation in political life protected by civil rights. Human rights also include economic, social, and cultural rights that are recognized globally and “that provide normative ideals for persons and peoples, constitutional grounds for litigation and legislation, and diplomatic levers to press repressive

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<sup>446</sup> Charles Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), 1.

regimes to reform themselves.”<sup>447</sup>

This distinction is significant because it flags an important transition in the protest strategy of the CRM. During 1955-66, the movement’s primary focus was civil rights—particularly ending racial discrimination and protecting the right to vote through democratic reform. From 1967-68 onward, however, King and many other activists after his assassination shifted the focus to advancing the cause for broader human rights. These activists expressed increasing concern that the structures of American society were the root cause of oppression. Further, the thread that connected the sit-in cases and the religious freedom cases was their commitment to preserve certain fundamental human rights norms (i.e., life, freedom, equality, and fraternity). As I will argue in the balance of this chapter, efforts to enforce the constitution through court action served the CRM in important ways. However, the CRM’s legacy was anchored in its demonstration of the need for nonviolent protest, rooted in human rights norms that are grounded in values, traditions, and beliefs that spring from different communities. Framed in religious, ethical, and legal terms, prayerful protests and court cases provided a critical new way of advancing the cause of human rights and constitutional improvement; not since the abolitionist movement had the courts and Black Churches worked together in a concerted way to show how racial and religious discrimination and liberty are linked.

#### *Religious Freedom as Foundational to Civil Rights Movement*

While championing the cause of civil rights, in the face of increasing mistreatment, the leaders of the CRM also employed civil disobedience to protect human rights for housing, employment, food, and fraternity in the final phase of the CRM. The Black Church

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<sup>447</sup> John Witte, Jr. and Frank Alexander, eds., *Christianity and Human Rights* (Cambridge: Cambridge University Press, 2010), xiii-xiv.



tradition of campaigning jointly for civil rights and human rights began decades before the height of the CRM. As Gayraud Wilmore argued, from slavery to freedom, the Black church has functioned as a mini-government that provides power to its members, addresses social concerns and offers guidance and spiritual direction to the Black freedom struggle.<sup>448</sup> A.

Phillip Randolph, a pivotal figure in the black freedom struggle and formative influence on the nonviolent civil rights movement had strong connections to the black church. Randolph was a committed democratic socialist and prominent leader in the black labor movement. His father, a former slave, was a Baptist preacher in Jacksonville, Florida, who addressed the spiritual and social needs of poor blacks through his folksy preaching.<sup>449</sup> Because of Randolph's tireless work as a labor organizer, he eventually won recognition of his union, the Brotherhood of Sleeping Car Porters, in 1937. Subsequently, he organized a march on Washington in 1941 with tens of thousands of black workers against job discrimination, which melded Gandhian methods with mass organizing tactics used by labor unions. In his 1957 address at the Prayer Pilgrimage for Freedom, Randolph was emphatic in linking religion, civil rights and human rights:

It is written in the Declaration of Independence of our country that all men are created equal and possess the inalienable right of life, liberty and the pursuit of happiness. These are natural human rights. They are God-given, non man-made. Every organ of Government and official of the state are required by constitutional fiat and the moral law to uphold these rights, not to conspire with anti-democratic forces to deny, nullify, and destroy them. Thus, the civil rights have a moral and spiritual basis, for they are designed to implement and give reality and force to our human rights that exist as a result of our being human, and we are human because we have been created human beings by God. Since all men are the children of God, they are equal before God and should be equal before the laws of the state.<sup>450</sup>

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<sup>448</sup> Gayraud Wilmore, *Black Religion and Black Radicalism* (New York: Orbis Books, 1999), 193.

<sup>449</sup> Burns, *Mountaintop*, 56.

<sup>450</sup> Randolph Phillip, "Address at the Prayer Pilgrimage for Freedom," in *Rhetoric, Religion and the Civil Rights Movement 1954–1965*, eds. Davis W. Houck and David E. Dixon (Waco, TX: Baylor University Press, 2006), 249-50.

Faith in God, and a belief that all humans have divine rights and worth in the eyes of God, inspired a generation of freedom foot soldiers to fight to change discriminatory laws for the advancement of democracy and human rights for all. Because the American Declaration of Independence affirms natural rights to “life, liberty and the pursuit of happiness” and the United States Constitution protects the freedom of religion and speech, prayer-filled activists believed that they were standing up for their God-given rights that the State could not deny. In other words, the struggle for civil and human rights was motivated, in large part, by religious groups and individuals who advocated for equality under the laws of the State, as reflected under God’s law. Religious rights, such as the freedom to worship, provided a zone of liberty within which civil and human rights activists could anchor and validate their beliefs that they deserved freedom from religious and racial discrimination. The zone of liberty also helped to fuel their public protest demonstrations of the love ethic via civil disobedience.

*A Fundamentally Religious Cause with a Social Mission*

Because Christian faith of civil rights protestors affirmed the sanctity of life, human freedom, justice and equal rights, they, in turn, surmised that the laws of the State should protect these human rights norms. Rev. Duncan Howlett, a Unitarian minister and vocal supporter of the CRM, provided an interpretation of the meaning of the sit-in movement in Lynchburg.<sup>451</sup> The six students who were sentenced to jail on February 6, 1961 for demanding service at a segregated lunch counter in Lynchburg, offered a statement following their arrest that linked democratic ideals and high Christian principles as the motivation for their demonstrations: “Our cause was not the glory of martyrdom, nor was

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<sup>451</sup> Duncan Howlett. “The Untold Story of the Sit-Ins,” in *Rhetoric, Religion and the Civil Rights Movement 1954–1965*, eds. Davis W. Houck and David E. Dixon (Waco, TX: Baylor University Press, 2006), 422-23.

the action a mere publicity stunt. It was a different and far more real concern which moved us to involvement in what is a serious and potentially costly action....We have taken seriously the most basic principles of our Judeo-Christian heritage—the sacredness and worth of human personality. These, we believe, represent a Higher Law than the law of governments.”<sup>452</sup>

Rev. Fred Shuttlesworth, the fiery Black Baptist preacher who made his name for his reputation as pastor of working class Bethel Baptist Church and founder of the Alabama Christian Movement for Human Rights (ACMHR) in 1956, called on ministers to link their Christian faith to the civil and human rights struggle:

Our Ministers—the first line Soldiers of God---must now understand that Religion is concerned with the whole social, economic, and political structure involving man. The gospel is concerned with how and whether men eat as well as how they act. All hell in the form of Discrimination has overflowed its banks and is flooding our people out of jobs, homes, food. The front lines now are the picket lines around Krogers in Gary. And where are Heaven's Generals? In their studies or closed offices, or just busy, doing nothing? My brethren, the day is already come when common people desire bread, and homes today, while they are still willing to work for golden slippers and Pie-in-the-sky-by-e and bye.<sup>453</sup>

Shuttlesworth ended his speech by imploring his listeners to always be committed to Christian love and nonviolence in the struggle for civil and human rights: "Only let your actions be motivated by love, and never use violence as wrong weapons to gain your ends."<sup>454</sup> Thus, the role of "heaven's generals" was to "answer God's call" to lead the nonviolent struggle and provide the people with a vision to lead them toward 'this-worldly' and 'other-worldly' liberation.

Fannie Lou Hamer, another prominent activist in the strong tradition of the Black

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<sup>452</sup> Ibid., 427.

<sup>453</sup> Fred Shuttlesworth, "Speech at the Meeting of the Fair Share Organization," in *Rhetoric, Religion and the Civil Rights Movement 1954–1965*, eds. Davis W. Houck and David E. Dixon (Waco, TX: Baylor University Press, 2006), 311-12.

<sup>454</sup> Ibid., 312.

church, believed that Christian principles grounded human rights. Hamer took her faith to the streets in order to mobilize the black community around civil and human rights. Hamer's faith, which was rooted in her interpretation of scripture, her connection to her ancestors, and her personal faith in God, inspired her to leadership in the CRM. In August of 1962, she attended her first mass meeting in her hometown of Ruleville, Mississippi, where she heard James Foreman of the Student Nonviolent Coordinating Committee (SNCC) and James Bevel of the Southern Christian Leadership Conference (SCLC) speak on the importance of voting. Hamer was so inspired by the speeches that she signed up with seventeen other people to go to the county courthouse in Indianola to encourage voter registration.<sup>455</sup> Because of her activism, her family suffered daily harassment and her daughter and husband were both arrested and lost their jobs.<sup>456</sup> But, Hamer did not allow this intimidation to deter her as she continued to assist with voter registration and welfare programs based upon her belief that her God-given freedom entitled her to freedom as an American citizen.<sup>457</sup> "We can't separate Christ from freedom," she remarked, "and freedom from Christ. The first words of Jesus' public ministry were Luke 4:18, where freedom is the central theme."<sup>458</sup>

Further, Hamer contended that the central purpose of the church was not for socializing and disengaging from culture; the church was to remain situated in culture for the purpose of resisting social evil and promoting freedom (e.g., religious, political and cultural). This freedom fighter frequently quoted Luke 4:18 as the core message of the gospel text.<sup>459</sup>

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<sup>455</sup> Mammie Locke, "Is This America? Fannie Lou Hamer and the Mississippi Freedom Democratic Party," in *Women in the Civil Rights Movement: Trailblazers and Torchbearers 1941-1965*, eds. Vicki Crawford, Jacqueline Anne Rouse, and Barbara Woods (Bloomington: Indiana University Press, 1993), 28.

<sup>456</sup> *Ibid.*, 29.

<sup>457</sup> Jacquelyn Grant, "Civil Rights Women: A Source for Doing Womanist Theology," in *Women in the Civil Rights Movement: Trailblazers and Torchbearers 1941-1965*, eds. Vicki Crawford, Jacqueline Anne Rouse, and Barbara Woods (Bloomington: Indiana University Press, 1993), 44-5.

<sup>458</sup> *Ibid.*, 45.

<sup>459</sup> *Ibid.*, 47-48.

“The Church must be willing to risk active involvement in the struggles of oppressed peoples,” according to Hamer. She explained that “[T]his means taking a stand even when it is not expedient to do so even when personal security is threatened.” Like many activists in the civil rights movement, Hamer took her religion seriously as she applied the dictates of her faith to advance the cause of civil and human rights in keeping with the core message of the gospel.<sup>460</sup>

Through the social ethic of Jesus, Hamer, King and other civil rights leaders reaffirmed the notion of the kingdom of God, and affirmed the dignity of all people, the need to love the enemy, and the need to protect the rights of the poor and disadvantaged. Activists believed that freedom from oppression was foundational to the betterment of American democracy, and that individual rights as well as matters of personal conscience must be held sacred.

King helped the movement ground its nonviolent strategies in the Christian faith and democratic principles as the most influential prophet, priest, and pastor of the nonviolent struggle. King’s commitment to nonviolent protest sprang from his understanding of the role of the Baptist preacher as pastor, priest, and prophet as reflected in scripture and the Protestant Reformation. These words were a spin-off of the Protestant notion that every person is a “prophet, priest and king.”<sup>461</sup> According to Witte, this phrase was popularized in the early part of the sixteenth century by the great Protestant reformer, Martin Luther, who challenged the claim advanced by the Catholic Church that the office of the clergy was superior to non-clerical roles. In response, Luther drew upon Christian texts to advance the concepts of “priesthood, prophethood, and kingship of all believers—that everyone must

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<sup>460</sup> Ibid., 49.

<sup>461</sup> John Witte Jr., *Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 217.

preach and prophesy God's truth and justice to his neighbor, that everyone must do his part to help rule and govern the affairs of this earthly kingdom."<sup>462</sup> This idea was "revolutionary" not merely because it challenged the authority of the clergy but because it called all "traditional authority structures" into question, a crowning achievement of the CRM centuries later.<sup>463</sup>

King saw himself as a prophet in the tradition of the great biblical prophets of Moses, Joshua, Isaiah, Jeremiah, Ezekiel, Amos, and Micah who felt compelled to declare the truth of the Gospel message, point out wrongs and pronounce God's judgment.<sup>464</sup> As prophet, King believed that he had a protracted obligation to address social issues that threatened to undermine civil and human rights. He felt that every minister must be prepared to suffer courageously to advance a high calling and sublime principles. King spent much of his life teaching that "ministry without prophetic activity is less than ministry."<sup>465</sup> The civil/human rights leader believed that, as a prophet, his key role was to reconcile the entire church and community. In King's view, the church represents the entire family of God, united to teach the truth for God and be a prophetic leader. Each Christian is called to be a prophet to use his or her gifts to build unity in the church and the world Church House.

King called attention to the Emancipation Proclamation, because it advanced the promises of freedom and equality articulated in the Declaration of Independence and the Constitution that had heretofore been denied to blacks. King announced that, "This momentous decree came as a great beacon of light of hope to millions of Negro slaves, who had been seared in the flames of withering injustice. It came as a joyous daybreak to end the

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<sup>462</sup> Ibid.

<sup>463</sup> Ibid.

<sup>464</sup> Lewis Baldwin, *There is a Balm in Gilead: The Cultural Roots of Martin Luther King, Jr.* (Minneapolis: Augsburg Fortress, 1991), 298.

<sup>465</sup> Gilbert H. Caldwell, "Martin Luther King, Jr.: Ministry Despite the Contradictions," *The African American Pulpit* 2, no. 1 (Winter 1998–99): 10.

long night of their captivity.”<sup>466</sup> Although the Emancipation Proclamation was incorporated into the Constitution in the three war amendments that abolished slavery, extended citizenship and legal rights to blacks, and secured for black men the right to vote, the Emancipation embodied for King another instance of America’s “schizophrenic personality.” Although Lincoln publicly supported black emancipation, “he was for a long time unable to act in accordance with his conscience.”<sup>467</sup> For this reason, even though King believed that blacks should celebrate the signing of the Emancipation Proclamation, he deemed that the unfolding of freedom, and human rights more generally was far from fully realized for African Americans

King took on the role of priest because he embodied the principle of personal sacrifice for the sake of others. He sacrificed his time, energies, personal needs, and family to advance the civil and human rights struggle. He even laid down his life for the cause of freedom. Like a priest, King offered prayers and interceded on behalf of the people for divine power and favor to guide the civil rights struggle. He prayed religiously, he read God’s Word, applied it to his life, practiced the traditions of the Black church, and preached an empowering Word.

In addition, in his priestly role, King reminded nonviolent activists that their ultimate loyalty was to God, not the State. Any institutional practice, law, or man-made tradition that violated God’s command was unjust and needed to be disobeyed, for a person’s ultimate allegiance is to God. He believed that Christians had a duty to disobey any law that violated God’s higher law. As a model of fidelity to God, King believed that ancient Christians

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<sup>466</sup> Martin Luther King Jr., “I Have a Dream,” in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, ed. James Washington (New York: HarperCollins, 1986), 217.

<sup>467</sup> Martin Luther King Jr., *Where Do We Go From Here: Chaos or Community* (New York: Beacon Press, 1968), 77–78.

provided the best model for creative resistance because they endured persecution, personal pain, the threat of death, and the loss of life itself to stand up for truth.<sup>468</sup>

In sum, King's steadfast acceptance of his role as servant leader was due to his sense of moral duty and spiritual service. The more visible he became, the more dedicated he became to advancing civil and human rights. Garrow described King in the following way:

As [King's] symbolic role grew, as more and more praise rained down upon him, and as the opponents of justice increasingly targeted him, Martin King took it all—the fame, the prizes, the harassment—as a powerful, persistent reminder that selflessness was the highest goal to aspire to. The more recognition and rewards grew, the more and more burdened Martin King felt to dedicate himself completely to combating the full range of human evils—not just racial discrimination, but all forms of economic exploitation and militaristic violence as well. As his tributes and awards increased, hence also did the weight of his personal mission.<sup>469</sup>

Garrow stated that as King accepted this priestly role, he became more serious about his spiritual mission to resist social injustices. His demeanor “puzzled many who expected a charismatic leader, but found him remote and bland as the mantle of leadership lay on his shoulders.”<sup>470</sup> Yet, King remained driven by his clarity of purpose with respect to his own prophetic role; it wasn't about a personal campaign to become famous that propelled him to assume the mantle of leadership. It was his sense that he was part of a human rights movement that was much larger than he that inspired King to take on the cross, endure hardship and lay down his life for his neighbor.

As pastor, King led the CRM like a church without walls. King's first formal leadership role in the CRM was as head of the Montgomery Improvement Association (MIA), the group that spearheaded the Montgomery Bus Boycott of 1955-56. King was

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<sup>468</sup> Clayborne Carson, *The Autobiography of Martin Luther King, Jr.* (New York: Warner Books, 1998), 194.

<sup>469</sup> David Garrow, *Bearing the Cross: Martin Luther King Jr., and the Southern Christian Leadership Conference* (New York: HarperCollins, 1986), 462.

<sup>470</sup> *Ibid.*, 165.



chosen to lead this movement due to his perceived credibility as an educated, middle-class, black male Protestant minister who didn't have any local enemies because he was new to the area— characteristics that fit the mold of established civil rights leaders at that time. Given that most of the leaders and followers participating in the early stages of the CRM were preachers and church members, it was particularly important that one of the movement's key leaders emerge from the Black Church.

The leadership of MIA recognized that the bus boycott could not be accomplished without obtaining enthusiastic support from black clergy.<sup>471</sup> Rufus Lewis, a member at King's congregation, Dexter Avenue Baptist Church, described how King, the 26-year-old newly appointed pastor and Montgomery newcomer was said to 'look more like a boy than a man.'<sup>472</sup> Yet the fact that King was highly educated, very articulate, a minister and a product of a middle-class family meant that he would be able to draw wealthy, professional, and religious segments of the community into what had been primarily a secular movement. King would often remark that what motivated him to get involved in the Montgomery protest was a determined commitment to "refuse to cooperate with evil."<sup>473</sup> Whatever motivations the black leaders had for drafting King as president of the new protest committee, King eventually agreed to take on the role of leading the MIA. In so doing, King approached the movement as "an act of massive noncooperation" with evil for the purpose of putting "justice in business."<sup>474</sup>

Ironically, many argued that, if King had not had such a strong pastoral presence, the movement would have fallen apart due to fractures between the NAACP (Whitney Young)

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<sup>471</sup> Ibid., 20.

<sup>472</sup> Ibid.

<sup>473</sup> King, *Stride*, 51.

<sup>474</sup> Ibid., 52.

and the Urban League (Andrew Young) versus SNCC (Student Nonviolent Coordinating Committee) and the Black Power Movement in general. These oft-contentious leadership struggles impacted King physically, emotionally, and spiritually. Despite his exhaustion, stress, and depression, King insisted, “If I have to go through this to give the people a symbol, I am resigned to it.”<sup>475</sup> In a sermon to his Atlanta congregation of Ebenezer Baptist Church, in 1966, King said:

I choose to identify with the underprivileged. I choose to identify with the poor. I choose to give my life for the hungry. I choose to give my life for those who have been left out of the sunlight of opportunity. I choose to live for and with those who find themselves seeing life as a long and desolate corridor with no exit sign. This is the way I’m going. If it means suffering a little bit, I’m going that way. If it means sacrificing, I’m going that way. If it means dying for them, I’m going that way, because I heard a voice saying, ‘Do something for others.’<sup>476</sup>

Part of King’s success in the struggle for civil and human rights depended upon the influence of religious traditions on his pastoral ministry. Ebenezer Baptist Church, where King grew up and ultimately served as co-pastor with his father, had a long tradition of activism. Adam Daniel Williams, King Jr.’s maternal grandfather and the second pastor of Ebenezer meshed a “biblical-theological conservatism and fire-and-brimstone preaching with a reform, activist ethic.”<sup>477</sup> Highly regarded for his ministerial leadership, Williams led the church to fight against racism, bias, and injustice and provided a strong foundation for social activism.<sup>478</sup> In 1906, Williams was instrumental in founding the Georgia Equal Rights League, a group that spoke out against many issues, including black disenfranchisement, lynching, and segregation in jury pool and the military. Williams also served as one of the charter members and later president of the Atlanta branch of the NAACP in 1917. Williams

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<sup>475</sup> Garrow, *Bearing the Cross*, 428.

<sup>476</sup> *Ibid.*, 451.

<sup>477</sup> Lewis Baldwin, *The Voice of Conscience: The Church in the Mind of Martin Luther King, Jr.* (New York: Oxford University Press, 2010), 21.

<sup>478</sup> *Ibid.*

was a champion of social justice in the spirit of Ebenezer, and his efforts were instrumental in helping Ebenezer to become the spiritual cradle of the CRM.

Daddy King, Martin's father, also preached a distinctive black version of the gospel that was in line with the pastoral leadership of his predecessor, Rev. Williams. Similar to Williams, Daddy King served as the president of the local chapter of the NAACP, where he played a key role in the group's voter registration campaigns and efforts to promote educational equality. Daddy King continued to champion the cause for black enfranchisement through his ministry as he worked with Atlanta civic and political organizations to support voter-registration drives through negotiation and street protests.<sup>479</sup>

Daddy King was also influential in Martin's commitment to the love ethic as the chief Christian principle supplying the spirit of nonviolent direct action. Daddy King once remarked that he "refused to stoop low enough to hate anybody."<sup>480</sup> Over the course of his 85 years, he refused to let his own experience of pain, terror, and disappointment, blunt his ability to love, especially his white neighbors. Martin's father was a great model of forgiveness and reconciliation because he taught his son that love was redemptive and could be socially transformative. Shaped by a loving family and a Black Church that promoted a Gospel of regeneration and love, it was quite natural for young Martin to embrace a God of love and an inclusive community of peace.

While Martin Luther King Jr. faithfully discharged his duties as prophet and priest, he believed that, in the spirit of the Protestant Reformation, all Christians must take seriously their calling to carry out the three offices.<sup>481</sup> As *pastors/priests*, Christians are required

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<sup>479</sup> Ibid., 23.

<sup>480</sup> Quentin Bradford, "The Nation Celebrates Daddy King's 'Home Going,'" *The Southern Christian Leadership Conference National Magazine*, December/January 1984–85, 25.

<sup>481</sup> Witte, *Reformation of Rights*, 217.

to spread the liberating gospel message that seeks to eliminate all forms of evil in the world in accordance with the will of God. In addition, Christians are called to love others, pray for others, struggle with others and be prepared to die for others so that all might be free. As *prophets* or kings, in the words of King, we must be guided by “the highest principles of law and order” and be co-laborers with Christ in nonviolently resisting unjust systems that imperil “the freedom of the whole human race.”<sup>482</sup>

The Black church involvement in human rights issues was highly contested during the CRM. Many insisted that nonviolent direct action was merely a strategy to resist racial injustice, and that other issues like poverty, the war, and political economy were beyond the sphere of that cause.<sup>483</sup> Despite criticism, many movement leaders insisted that nonviolent civil disobedience was necessary where the social and economic conditions for the establishment of justice and equality were not present for all concerned, and the structures of government resisted efforts to press for democratic reform.

King’s global stature as a “civil rights leader” may have served to constrain his ability to expand his call for social change beyond issues of racial segregation.<sup>484</sup> King’s public statements on poverty and the Vietnam War made some activists and supporters of the CRM uncomfortable. Yet, King argued that the church provided a biblical framework to contest for the expansion of racial and human freedom broadly. King’s opposition to the Vietnam War rested on the concept that each person has worth because he or she bears the image of God, which is a foundational tenet of human rights. Because each person bears the

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<sup>482</sup> King, *Stride*, 62, 221.

<sup>483</sup> Burns, *To the Mountaintop*, 311, 316–317.

<sup>484</sup> Darryl D. Roberts et al., “The Invisible Work of Managing Visibility for Social Change: Insights From the Leadership of Reverend Dr. Martin Luther King Jr.,” *Business and Society* 47, no. 4 (December 2008): 425–456.

imprint of God, war is unjust because it denies the worth and dignity of every human life.<sup>485</sup> Further, because King recognized the devastating personal, social, and economic effects of violence on both the national and international level, he felt that nonviolence, as a principle, should be adopted in the sphere of politics. Thus, he began to speak out against all forms of violence, especially war globally, during the mid-1960s in favor of more peaceful methods and strategies. In his words, King “knew that America would never invest the necessary funds or energies in rehabilitation of its poor so long as adventures like Vietnam continued to draw men and skills and money like some demonic destructive suction tube.”<sup>486</sup> Blacks were being drafted into war in greater numbers in proportion to whites, and King “could not raise his voice against violence in the ghettos without doing the same against one of the greatest purveyors of violence in the world,” the American government.<sup>487</sup> The Southern Christian Leadership Conference (SCLC), under King’s leadership, also spoke out against the Vietnam War.

Another civil rights organization joined in speaking out against the war: the Student Nonviolent Coordinating Committee (SNCC). SNCC began protesting the war in 1965 when staff members were drafted. Those field staff that refused to go to war received up to five years of imprisonment. By 1966, SNCC members could no longer contain their anger and were compelled to make a public statement opposing the war and condemning the government for professing to promote democracy abroad while at the same time interfering with efforts to advance civil rights and broader human rights at home.<sup>488</sup> Shortly after the debacle in Atlantic City, where Mississippi Freedom party activists – including Fannie Lou

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<sup>485</sup> Jeremy Waldron, “The Image of God: Rights, Reason, and Order,” in *Christianity and Human Rights*, eds. John Witte Jr., and Frank Alexander (Cambridge: Cambridge University Press, 2010), 226.

<sup>486</sup> King, “Break Silence,” 233.

<sup>487</sup> Ibid.

<sup>488</sup> Garrow, *Bearing the Cross*, 445.

Hamer – were unsuccessful in extracting political power from Democratic Party bosses, SNCC came under increasing attacks by mainstream media and politicians for its fierce opposition to the Vietnam War.<sup>489</sup> Bob Moses, a SNCC leader, was derided as a draft dodger because of his conscientious objector status to the war. Ella Baker, previous executive director of SCLC and co-founder of SNCC, was attacked by conservative columnists in the New York Herald Tribune for her efforts to link civil rights with educational opportunities. When Ella Baker addressed the annual convention of the United Electrical Workers in September 1964, issuing the call for a greater alliance between civil rights and the labor movement, she was labeled a communist and a cause for concern.<sup>490</sup>

King also spoke out against poverty, proposing a link between joblessness and violence. He maintained that joblessness and poverty fueled black rage, and thus advocated for programs to combat these social ills and buffer against retaliatory violence. King was even more emphatic that the number of riots that would take place would decrease dramatically if the President and Congress would spend less "resources and energies in Vietnam" and, instead, improve the domestic challenges of high unemployment and income inequality. King painted the picture as dire in the Black community. "The fact is, there is a major depression in the Negro community. The unemployment rate is extremely high, and among Negro youth, it goes up as high as forty percent in some cities." Thus, King surmised the best way to address the crisis was for Congress to pass a bill to promote jobs for the poor.<sup>491</sup> King sought to persuade Americans to choose nonviolence means for solving domestic problems and avoiding another civil war.

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<sup>489</sup> Barbara Ransby, *Ella Baker and the Black Freedom Movement: A Radical Democratic Vision* (Chapel Hill: The University of North Carolina Press, 2003), 343–344.

<sup>490</sup> *Ibid.*, 344.

<sup>491</sup> Martin Luther King Jr., "Showdown for Nonviolence," in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, ed. James Washington (New York: HarperCollins, 1986), 67-8.

Unlike King, black militants believed that nonviolence was too weak and sentimental. The Black Muslims and the Black Panthers contended that blacks should be able to develop whatever response they found appropriate to dismantle racial oppression. They traced the explosion in Black anger to the dashed hopes and broken promises of Blacks, in response to a White power structure that denied Black equal treatment. They lamented how politicians received the Black vote, and how their social and political status remained virtually the same. Black militants argued that it was hypocritical for whites to expect Blacks to be nonviolent, because whites continued to use violence against Blacks, and the American government was the biggest purveyor of violence in the Vietnam War.

King rejected this thinking as a gross underestimation of the power of nonviolent action. He prophesized that America would face doom and gloom if it did not attend itself to addressing the problem of racism and poverty nonviolently. "The discontent is so deep, the anger is so ingrained, the despair, the restlessness so wide, that something has to be brought into being to serve as a channel through which these deep emotional feelings, these deep angry feelings, can be funneled. There has to be an outlet, and I see this campaign as a way to transmute the inchoate rage of the ghetto into a constructive and creative channel. It becomes an outlet for anger."<sup>492</sup> In King's mind, the anger was so deep and the pain was so pronounced that the nonviolent strategy was the only way to save the soul of the nation. It was the only way to channel the rage and anger of whites and blacks, who would direct their emotions destructively. Thus, nonviolent direct action was both justly threatening and creatively transformative because it worked to expand the democratic possibilities of America. Despite disagreement over tactics, many shared the view that all organizations, especially the church, needed to link religious, ethical or moral principles to the broader

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<sup>492</sup> Ibid., 69.

cause of advancing civil and human rights.

## II. Expanding Religious Expression and Human Rights Through the Courts

As this study has argued, religious freedoms that protect the rights of individuals and groups to express their religious views publicly were critical to the development of ideas and principles that advanced civil and human rights. The success of the CRM in advancing the cause of human rights dovetailed with court decisions that expanded legal definitions of religious liberty. Modern First Amendment scholars have paid little attention to the historic connection between the rise of religious freedom under the First Amendment and the rise of the religiously-inspired CRM. One of the goals of this dissertation has thus been to show that there is an interrelationship between religious freedom and the quest for human rights. This interrelationship allowed religious groups, who were protected against religious discrimination, to speak out against social evils as messengers of God and the moral conscience of the State. In the course of my research, I have sought to demonstrate the mechanisms behind this powerful convergence of two forces for change. Court cases that expanded the scope of protected religious conduct to entail exclusions to safeguard a petitioner's way of life (i.e., business practices, school choice, and public witness)<sup>493</sup> provided a legal premise for civil rights advocates to take religious freedom and freedom of expression one step further to include the right of persons (the non-religious as well) to resist laws that denied freedom of expression and full equality.<sup>494</sup>

### *The Lessons of Sherbert*

First Amendment religious freedom reached its zenith in the *Sherbert* revolution of

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<sup>493</sup> *Cantwell v. Connecticut*, 310 US 296, 302 (1940); *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943); *Marsh v. Alabama*, 326 US 501, 506 (1946); *Sherbert v. Verner*, 374 US 398 (1963).

<sup>494</sup> *Hamm v. City of Rock Hill*, 379 US 306 (1964).



the 1960s, created by the strict scrutiny regime introduced by the Supreme Court in *Sherbert v. Verner* (1963).<sup>495</sup> In the two decades before *Sherbert*, the Court had already strengthened legal protection for religious rights in a series of cases in the areas of proselytism, public education, government benefits, corporate rights, and test oaths.<sup>496</sup> While the Court affirmed liberty of conscience and freedom of expression in principle, it was not always consistent in applying First Amendment principles.<sup>497</sup> Moreover, while the Court defended the absolute right to believe freely, not all religious conduct received constitutional protection, particularly in the case of minority religious expression:<sup>498</sup> for instance, the rights of certain religious minorities, like Jewish people who wanted to observe the Sabbath and conduct business on Sunday, were not accommodated. The *Sherbert* case did make it much harder for Federal, State, and local governments to discriminate against or deny the religious freedom rights even of despised religious minorities in that day.<sup>499</sup> This was critical preparation and motivation for the CRM and the ensuing human rights revolution because religious groups and individuals found legal justification for protests against discrimination and injustice as protected liberties.

#### *Implications of Religious Freedom Jurisprudence to the Advancement of Human Rights*

Significant evidence demonstrates the important implications of First Amendment religious freedom jurisprudence for the advancement of human rights. First, the Jehovah's Witnesses successfully resisted laws mandating the flag salute, because their faith dictated that such hand gestures were prohibited. Their religion dictated that the law of God is

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<sup>495</sup> *Sherbert*, 398. See Kent Greenawalt, *Religion and the Constitution*, vol. 1, *Free Exercise and Fairness* (Princeton: Princeton University Press, 2009).

<sup>496</sup> *Cantwell*, 302; *Marsh*, 506; *Everson v. Board of Education*, 330 US 1 (1947); *Zorach v. Clauson*, 343 US 306 (1952).

<sup>497</sup> *Minersville School District v. Gobitis*, 310 US 586 (1940); *Poulos v. State of New Hampshire*, 345 US 395 (1953); *Braunfeld v. Brown*, 366 US 599, 605–06 (1961).

<sup>498</sup> *McGowan v. Maryland*, 366 US 420 (1961).

<sup>499</sup> *Sherbert*, 398.

superior to the law of State. This, too, is a central tenet of nonviolent civil disobedience powerfully expressed in the CRM. Because groups like the Jehovah's Witnesses appealed to divine law to justify civil disobedience and finally prevailed,<sup>500</sup> there was a climate of religious freedom that made it possible for civil rights protestors to appeal to divine law to abolish legalized racial segregation, combat poverty, and end the war in Vietnam.

The limits of judicial tolerance for religious freedom were reached when perceived threats to national security loomed large in the face of increasing religious pluralism. The court showed a dominant concern for national unity as the prerequisite for keeping America safe. The desire to protect national cohesion often came at the expense of protecting the constitutional freedoms of politically powerless minorities.<sup>501</sup> In the CRM context, the court held similar concerns about protests eroding law and order and threatening public safety. Many automatically assumed that civil disobedience encouraged anarchy and exacerbated religious and cultural division. This fear was misplaced; in fact, activists believed that their nonviolent protests to protect civil and human rights were consistent with the deeply held tradition of nonviolent activity, undertaken to realize the goals of American democracy and expand constitutional interpretation.

As a further mechanism of support, the Supreme Court's First Amendment cases affirmed the right of individuals to speak their mind without compulsion.<sup>502</sup> This theme resurfaced in the later protest cases wherein protestors sought to change the law by challenging public opinion about segregation, the war, food, shelter, housing, and work. The fullest expression of individual freedom, according to the court, is when an individual has

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<sup>500</sup> *Cantwell*, 296; *Minersville*, 586; Grosghal, "Reinventing Civil Liberties," 283-84.

<sup>501</sup> *Minersville*, 586.

<sup>502</sup> *Cantwell*, 296.

the right to differ on things that “touch the heart of the existing order.”<sup>503</sup> Protestors challenged discriminatory law because a higher law—not just the Bill of Rights and the Constitution; but also the Word of God—inspired them to offer an alternative vision that challenged the existing order.<sup>504</sup> Freedom of religion also prohibited officials from proscribing what shall be orthodox in politics, nationalism, and religion or from confessing their faith in something. Like the Jehovah’s Witnesses, the protestors believed that the laws of God were more exacting than the obligations imposed by the State. The State could not force them to confess their faith in a tradition or practice that violated their own beliefs.

The example of the sit-in cases during the Civil Rights era illustrates how such means of protest were directly impacted by a climate of free expression and religious freedom. In general, the movement’s protests were nonviolent, and many of the actors were either religious or committed to the Christian and moral underpinnings of nonviolent direct action. As King remarked, many movement participants may not have embraced nonviolent direct action as a philosophy of life, yet, because they believed in their leaders and in the Christian principles that were presented as the foundation of the nonviolent struggle, they were committed to using it as a technique in the civil rights struggle. As King put it:

It is probably true that most of them did not believe in nonviolence as a philosophy of life, but because of their confidence in their leaders and because nonviolence was presented to them as a simple expression of Christianity in action, they were willing to use it as a technique. Admittedly, nonviolence in the trust sense is not a strategy that one uses simply because it is expedient at the moment; nonviolence is ultimately a way of life that men live by because of the sheer morality of this claim.<sup>505</sup>

The commitment of movement participants to nonviolence, born of their Christian faith, inspired many to employ it as a strategy for ending racial discrimination. The hope was

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<sup>503</sup> *Barnett*, 624, 642.

<sup>504</sup> Burns, *Mountaintop*, 322.

<sup>505</sup> King, *Stride*, 89.

that participants would experience the strong connection between nonviolence and their Christian faith, and would embrace it as a way of life that would have the potential to transform all areas of American civic life.

While the Court acknowledged that the government should not advance, inhibit, instruct, or compel others to believe in a religious tenet, at the same time it recognized the value of religious worship and instruction. The law permitted students to engage in religious exercises during the school day and reimbursed parents for the cost of transportation to religious and secular schools. This form of support for religious freedom played a role in fostering attendance at protests throughout the South, particularly among high school students. Adults frequently declined to participate in church-led protests for fear of losing their jobs, facing white supremacist threats, and enduring abuse in jail. High school students were allowed to miss school for church functions, and their families used this religious liberty to excuse their participation in church-led protests. Youth participation was pivotal in awakening the conscience of the nation; television and news media captured vivid images of school children being attacked by dogs, hoses and police officers during nonviolent demonstrations. The climate of religious freedom was an invisible agent that helped facilitate broad participation in church led protests.

Additionally, these early First Amendment cases bore the message that religious institutions perform both secular and religious functions. According to the court, the State can and should assist religious institutions in carrying out these roles; the fact that a school is run by a church does not necessarily mean that the primary effect of the education is to advance religion. In like manner, the State's reimbursements of transportation expenses to parents who send their children to religious schools does not mean that the State is directly supporting religion. By extension, the emphasis on promoting spiritual development in the

church does not preclude churches from promoting peace and social justice at the same time. Certain churches proselytize their faith publicly by passing out tracts, while other religious persons proselytize their faith by passing out flyers to remind blacks not to ride segregated buses and to oppose and unjust war.

What is important here is that, in the three decades leading up to the CRM, there was a climate of religious freedom that was encouraged by First Amendment cases that protected the religious liberty, to a limited extent, of both mainstream and marginal groups, placed limits on government regulatory powers, prohibited religious discrimination, prevented prior restraints on religious freedom, and permitted reasonable accommodation. This environment reminded protestors that religious and political speech enjoyed constitutional protection; it affirmed the right of groups to follow the dictates of their faith even if the higher law conflicted with State law; and, it opposed all forms of religious discrimination meant to target religious groups because their beliefs did not conform to the status quo. This climate of religious freedom provided an important stimulant to civil and human rights activists who were committed to pursuing diplomatic options and nonviolent action to press for democratic reform.

### **III. A Global Ethic of Human Rights and Implications for the Religion & State**

#### *The Contours of a Global Ethic of Human Rights*

The former discussion featured the interrelationship between civil rights, human rights, and religious freedom. In the remainder of this chapter, I will discuss the implications of this dissertation research for a global ethic of human rights, implications for the US courts, and implications for the church.

A global ethic of human rights must be grounded in theological understandings of

the nature of rights, duties, and obligations to individuals, States, and societies. Rawls' account of human rights as derived from basic minimum standards of well-ordered political institutions is commendable because he attempts to extend the law of all peoples to well-ordered hierarchical and liberal societies that are guided by a common good conception of justice.<sup>506</sup> But Rawls' insistence on bracketing truth claims fails to appreciate the moral virtues that make it possible for persons to treat others with equality, and that enable democracies to maintain social harmony. Even the political philosopher, Richard Rorty's appeal to universally shared sentiments and sentimental stories falls short, because it dismisses the moral foundations of religious beliefs that give sentimental stories meaning and provide them with persuasive power over human imagination and purposive action.<sup>507</sup>

What is needed is a conception of human rights that seeks to move beyond purely sociological and philosophical principles, by attending to important theological convictions that ground human rights. Any theory of human rights must both appreciate the distinctive and interrelated contributions of dignity and sanctity. An exclusive focus on human dignity prioritizes individuality, materiality, and relativism and leaves out persons who are not free, autonomous agents, possessing full human capacity to reason through no fault of their own.<sup>508</sup> An account of human rights that prioritizes human sanctity and subordinates human dignity recognizes persons as rational agents with will and intellect, while maintaining that human capacities, needs, and potentials are a gift from God. Thus, persons who are not fully autonomous and feel that they do not possess dignity or freedom have rights, needs, and potentials that ought to be nurtured and protected because all people are made in the image

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<sup>506</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 43.

<sup>507</sup> Richard Rorty, "Religion as Conversation Stopper," in *Philosophy and Social Hope* (London: Penguin, 1999).

<sup>508</sup> Timothy Jackson, "The Image of God and the Soul of Humanity: Reflections on Dignity, Sanctity, and Democracy," in *Religion in the Liberal Polity*, ed. Terence Cuneo (Notre Dame, IN: University of Notre Dame Press, 2005), 4-5.

of God.<sup>509</sup> As Nussbaum points out the category of excluded or subordinate persons should thus also include women, disabled, and the “least well off.”

While acknowledging the importance of valuing the dignity and worth of all people including women, Timothy Jackson responds that any framework for human rights that depends solely on the notion of dignity is flawed because it leaves out persons who are not already autonomous, elevates the lowest common denominator human values, and undermines human dignity by focusing solely on human freedom.<sup>510</sup> For these reasons, Jackson persuasively argues that sanctity provides a more expansive framework for human rights because it guarantees full human rights to all persons irrespective of merit, achieved status, etc. It has an origin in the species based upon its needs and given potentials and it is not based upon a particular action in time. A human rights framework based in sanctity inspires or should inspire awe and wonder in others. It is closely related to agapic love, defined above as willing the good of other without regard to merit.

The embodiment of agape in civic life is represented by political agape. This virtue is the love of souls, which is the forgotten civic virtue of our time. Political agape is a Christian and Judaic virtue in the sense that lives possess sanctity because they are made in God’s image<sup>511</sup> and have the capacity to act in the world on the basis of sanctity in love as a gift from God. The Judeo-Christian virtue of love, as Jackson states, is commanded by the second great love command to love God fully. Political agape is a democratic virtue that is most apparent in the demos where it is concerned with the common needs and potential of

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<sup>509</sup> Ibid., 4.

<sup>510</sup> Ibid., 4-5

<sup>511</sup> Ibid. See also Desmond Tutu, “The First Word: To be Human is to be Free,” in *Christianity and Human Rights*, eds. John Witte Jr., and Frank Alexander (Cambridge: Cambridge University Press, 2010), 2-3; Jeremy Waldron, “The Image of God: Rights, Reason, and Order,” in *Christianity and Human Rights*, eds. John Witte Jr., and Frank Alexander (Cambridge: Cambridge University Press, 2010), 236-37. Tutu, *Christianity and Human Rights*.

“the least of these” such as the poor, blacks, women, religious minorities, the physically challenged and immigrants. Recognizing the priority of sanctity and grace requires subordinating the democratic goods of individual freedom and majority rule, while at the same time elevating other democratic goods such as equality and universality.

The affirmation and priority of love as foundational to other liberal virtues has profound implications for liberal democracy and human rights. The tenets of civil rights have traditionally been based on a commitment to the liberty and equality of all citizens. If democratic citizens include only autonomous persons then liberty weakens equality. The Church should not, as a result of such flaws in the institution of democracy, advocate Church & State separation or condemn democracy as the tool of corrupt rulers. Rather, the church must emphasize the importance of repentance and reform, while encouraging a return to the virtue of moral responsibility. Thus, any violation of human rights or God-given rights must be condemned and redressed out of love for our neighbors and God, and we must be committed to protecting and safeguarding human rights as the highest expression of religious duty.

John Witte argues that we can condemn violations of human rights as a denial of our God-given rights because Christianity, and religion more generally, are the foundation of modern rights. The explosion in human rights has fueled a widespread rebirth in religion around the world. In parts of the world where democracy and human rights are flourishing, age-old faiths and marginal religions are emerging as major players in promoting an expansion in cultural practices and human rights.<sup>512</sup> We see this in the rise of minority religions like “Adventists, Bahi’as, Hare Krishnas, Jehovah’s Witnesses, Mormons,

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<sup>512</sup> John Witte Jr., “Introduction,” in *Christianity and Human Rights*, eds. John Witte, Jr. and Frank Alexander (Cambridge: Cambridge University Press, 2010), 8.



Scientists, Unification Church members, among many others.”<sup>513</sup> Certain of these groups have amassed “ample material, political, and media power.” The significance of this point cannot be overstated, as this places the rise of the CRM in a larger socio-political context, where religions were becoming major international players in advancing civil and human rights.

According to Witte, this expanded role of religion and religious groups in the civil and human rights cause in the American and international context was due, in large part, to a climate of religious freedom. Witte points to the passage of over 150 important statutes and constitutional provisions dealing with religious rights—from safeguards for liberty of conscience to free exercise, from protection of religious pluralism to the promotion of religious equality, from the prohibition of discriminatory laws to special benefits and entitlements for religious groups. These increased constitutional protections have been coupled with an expanding body of regional and international safeguards.<sup>514</sup>

Further, Witte asserts that, while a human rights movement is taking shape in the developed world where democracy and human rights are embraced, the same human rights revolution has led to unprecedented ethnic conflict, racial and class oppression, and abuse of power on the international context.<sup>515</sup> This points, Witte maintains, to the fact that the success of social movements to expand human rights depends upon societies developing adequate political systems that provide the means and processes for expanding democratic reform. That is, talk of human rights without expanding democracy has little value to persons who “lack basic rights to security, succor, and sanctuary” or are denied

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<sup>513</sup> Ibid., 8–9.

<sup>514</sup> Ibid., 9.

<sup>515</sup> Ibid., 9.

constitutional rights.<sup>516</sup> This is one of the lessons of the CRM: nonviolent street protests and litigation led to democratic reform that changed political systems. The enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1985 expanded civil and political rights to African Americans and other minorities. Current challenges to these laws demonstrate that, when minority groups don't continue to apply pressure to political representatives to maintain majority support, democratic reforms can be repealed.

Finally, key to the success of efforts to expand civil and human rights is acknowledging the necessary relationship between religious rights, civil rights and human rights. According to Witte, “Christianity and religion” (more broadly) are the foundation for modern civil and human rights. The examples of the Christian foundations of women's rights and children's rights make this abundantly clear. M. Christian Green's *Christianity and the Rights of Women* presented Renaissance, Early Modern, Enlightenment and Modern feminist writers and activists, who articulated women's rights within a Christian framework.<sup>517</sup> During the Renaissance period, Christine de Pisan's (1363-1434) works contested male misogyny in such works as *The Book of the City of Ladies* and *The Treasure of the City of Ladies* (a.k.a. *The Book of the Three Virtues*) in which she celebrated the contributions of women and provided a roadmap for nurturing Christian virtues to challenge male supremacy. Pisan maintained, "The man or the woman in whom resides greater virtue is the higher; neither the loftiness nor the lowliness of a person lies in the body according to the sex but in the perfection of conduct and virtues."<sup>518</sup>

Pisan's work encouraged men and women to perfect virtues and moral conduct to

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<sup>516</sup> Ibid., 11.

<sup>517</sup> M. Christian Green, “Christianity and the Rights of Women,” in *Christianity and Human Rights*, eds. John Witte, Jr. and Frank Alexander (Cambridge: Cambridge University Press, 2010), 302–30404.

<sup>518</sup> Ibid., 304.

advance gender and religious equality and liberty.<sup>519</sup> The religious underpinnings of women/human rights were also apparent in the writings of Catholic thinker Marie de Gournay (1565-1645) who wrote two treaties, *The Equality of Men and Women* (1622) and *The Ladies' Grievance* (1626).<sup>520</sup> The Christian framework for her human rights appeals was based upon the idea that 'the virtue of man and virtue of woman are the same thing, since God bestowed on them the same creation and the same honor.'<sup>521</sup> These early feminist/activists argued that there was a necessary relationship between Christian faith and human rights for the expansion of their religious and secular education, spiritual salvation and equality under the laws of the State.

In the twentieth century, religion was utilized to link women's rights struggles to efforts to promote "indigenous, environmental, and land rights at the local and global levels."<sup>522</sup> Rigoberta Menchu, winner of the Nobel Prize in 1992 for her work in Guatemala to advance the rights of indigenous people during its civil war, based her human rights concerns in liberation theology: 'We began to study the Bible as our main text...The important thing for us is that we started to identify that reality with our own...We began studying more deeply and we came to a conclusion. That being a Christian means thinking like our brothers around us, and that every one of our Indian race has a right to eat.'<sup>523</sup>

While the Christian faith has been one of the most vocal advocates of women's rights, human rights activists have also given voice to concerns about the status of women in the organized church and its support of the subordination of women in both the church and

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<sup>519</sup> Ibid.

<sup>520</sup> Ibid., 305.

<sup>521</sup> Ibid.

<sup>522</sup> Ibid., 311.

<sup>523</sup> Ibid.

society.<sup>524</sup> Green pointed out how Christian conservative groups have, at times, resisted attempts to expand women's rights, starting with the Committee on the Elimination of Discrimination Against Women (CEDAW) because of concerns about reproductive rights, definitions of gender, the authority of parents over children, difference vs. equality as the proper framework for talking about women's rights and the unnecessary intersection of women's rights with other groups and concerns globally.<sup>525</sup> Unfortunately, Christian opposition groups have received more media attention than the vigorous support of Christian mainline and progressive groups who largely support women rights conventions. Likewise, Christian contributions to the development of international human rights are often deemphasized.<sup>526</sup>

With respect to the human rights of children, Don Browning argued that the link between Christian faith and human rights "helped to define the rights of the child in modern international human rights law."<sup>527</sup> As the authoritative international document on children's rights, the 1989 UN Universal Declaration of Human Rights (UNCRC) was shaped by the 1948 Universal Declaration of Human Rights (UDHR).<sup>528</sup> Both of these documents were, in turn, shaped by the Christian faith. In fact, Browning pointed out that Charles Malik, a renowned Lebanese Christian philosopher and statesmen, promoted the view of the family as 'the natural and fundamental group unit of society.'<sup>529</sup> His goal, although partly unsuccessful, was to convince the body to adopt the words '[T]he family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator

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<sup>524</sup> Ibid., 309.

<sup>525</sup> Ibid., 313–319.

<sup>526</sup> Ibid., 313.

<sup>527</sup> Don Browning, "Christianity and the Rights of Children," in *Christianity and Human Rights*, eds. John Witte, Jr. and Frank Alexander (Cambridge: Cambridge University Press, 2010), 285–86.

<sup>528</sup> Ibid. 285.

<sup>529</sup> Ibid. 286.

with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society.<sup>530</sup> Malik hoped that the insertion of these sentences would affirm that the family is ordained by God and protected by a higher law that could not be compromised by capricious State laws or uncertain public opinion. In his proposal, Malik emphasized various key Christian principles concerning the rights of the family and children: the idea that parents have natural rights; the importance of marriage in procreation, the rights of children to be raised by their natural parents and the notion that the family has rights preexisting in the order of God's creation. These few examples focus on the wider international context to show how “Christianity and religion” emerged as “the foundation for modern civil and human rights.”

In the American context, perhaps no movement or era demonstrates this better than the CRM and the African American Christian tradition that fueled its prophetic ethical and theological vision. Thus, the success of the modern human rights struggle will depend largely upon the ability of societies and movements to build upon the examples of African Americans, women, children and others to link human rights and religious liberty to offer the public and the State a model of liberty and equality for all.

*Implications for the Role of the Court in Advancing Civil/Human Rights*

In addition to expanding and reframing a theory of human rights that appreciates the distinctive contribution of Christianity to grounding human rights, the Court must continue to protect and preserve constitutional rights of religious minorities. The Free Exercise Clause protects both majority religions and marginal religions. Suggesting that courts should play a greater role in protecting the free exercise rights of both insiders and outsiders means that,

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<sup>530</sup> Ibid.

when States interfere with any group's ability to observe its religious practices, traditions, or rituals, the group should be entitled to an exemption or accommodation from general laws. Where government activity regulates religious beliefs, interferes with their dissemination, impedes the observance of religious practices, or discriminates in favor of one religion or another, the government must show that the law is essential to accomplish a compelling State interest in the spirit of *Sherbert*. The Court, in line with *Sherbert*, should also inquire as to whether the law represents the least restrictive alternative of achieving some important State interest. An approach that requires that the government be neutral with respect to religious matters, does nothing to favor or disfavor religion, treats religion as a matter of personal choice and private practice that others are not required to tolerate, respect, and value is problematic. This has the effect of infringing on the free exercise of a human right.

While neutrality theory mandates that religion receive no special benefit, accommodation requires that the law treat religion as both an individual and collective activity. This view requires that we acknowledge that the function of religion is to reflect upon its symbols and rituals in order to offer a radically different vision from the current social order that treats certain individuals and groups as outsiders for the purpose of securing greater liberty and justice for all. A policy or law that interferes with individual or corporate worship violates the free exercise of religion because it frustrates the deeply spiritual, political, and social functions of religion.

The difficulty that the Court has had in developing a concise and consistent approach to Establishment Clause jurisprudence makes it all the more necessary to develop a theory that provides greater coherence, uniformity, and logic to Establishment Clause cases. One possible approach that the Court could take in deciding Establishment Clause cases is to hold that the government should provide equal treatment both to religious and

nonreligious groups, and that the government violates the Establishment Clause when government intrusions into religious life are not trivial: that is, they have the effect of establishing a religious institution, permitting the government to use its power and influence to advance religion or a particular religion, coercing religious political involvement, or preferring one religion or sect over others.<sup>531</sup>

Moreover, the future of Establishment Clause jurisprudence must recognize the autonomous roles of religion and the State in society but also acknowledge their necessary relationship. In *Everson v. Board of Education*, in upholding a State law to provide free bus service to school children, including those attending parochial schools, the Court ruled that, “Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>532</sup> Moreover, the Court held that “[N]either a state or the federal government may, openly or secretly, participate in the affairs of any religious organization or groups or vice versa.”<sup>533</sup> The Court summarized these views with the metaphor that the First Amendment Establishment Clause was designed to create “a high and impregnable wall of separation between the church and the state.” The absolutist approach to Establishment Clause doctrine, envisioned by this metaphor, has been roundly rejected by the modern Court “whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas.”<sup>533</sup> Besides invalidating governmental conduct that confers a benefit on a specific religion “as an absolutist approach,” the Court now evaluates conduct “to determine whether, in reality, it establishes a religion or religious

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<sup>531</sup> Erwin Chemerinsky, *Constitutional Law Principles and Policies*, 2nd ed. (New York: Aspen Law & Business, 2002), 1154. See *Lee v. Weisman*, 505 US 577, 587 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>532</sup> *Everson*, 16.

<sup>533</sup> *Lynch v. Donnelly*, 465 US 678 (1984).

faith, or tends to do so.”<sup>534</sup> Moreover, the Court in modern Establishment Clause jurisprudence has abandoned an absolute “wall of separation between church and state” and has recognized a “blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”<sup>535</sup> Thus, given the Court’s evolving understanding of Establishment Clause doctrine, it is important for the Court to be clear about what a “blurred, indistinct and variable barrier” is, so that the Establishment Clause is not interpreted in ways that trivialize religion and encourage State hostility toward religious expression.

Finally, the Establishment Clause would guard against government actions that make certain groups feel unwelcome or allow the government to use the machinery of the State to establish religion by providing a multi-principled approach to Establishment Clause jurisprudence. Under a multi-principled philosophy of jurisprudence, Courts would recognize and encourage a degree of interaction between the church and the State. It recognizes that legal structures can shield religion from governmental endorsement, but it also acknowledges that religious structures and values are fundamental to the ordering and maintenance of the American polity and grounding basic human rights.<sup>536</sup> Thomas Jefferson, while an ardent supporter of the separation of Church & State, believed that, despite America’s pluralism, there was a “common core of religious belief” that was important to preserve harmony and stability in society.<sup>537</sup>

Moreover, this expanded view of First Amendment jurisprudence should recognize that the Establishment Clause has a dual purpose. First, it affirms that the purpose of the

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<sup>534</sup> Ibid. See *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970).

<sup>535</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

<sup>536</sup> Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids: Eerdmans 2000, 1993), 210.

<sup>537</sup> Ibid.



Establishment Clause is to protect individual liberty interests from the controls and constraints of government. Second, the Establishment Clause recognizes that an essential goal of government is to create a society where secular and religious values can “freely interact, so that law will not degenerate into legalism but will serve its fundamental goals of justice, mercy, and good faith; and religion will not degenerate into a private religiosity or pietism but will maintain its social responsibility.”<sup>538</sup> This dynamic interaction between the church and State ensures that religion does not degenerate into pietistic tradition devoid of social and political involvement and it ensures that law is not so individually focused that it forgets the higher purposes of freedom, justice, and human dignity that all citizens have a right to enjoy.

*Implications for the Church Today*

As we step back and examine the present context in relationship to the CRM, the current human rights struggle can learn many valuable lessons from the movement. The Black Church has always played a central role in the Black community as one of the few institutions owned and controlled by Blacks. Thus, it was understood and expected that the church should play a leadership role in the civil and human rights struggle. All too often, the religious foundations of the CRM are attacked or dismissed by persons who are concerned that religious groups are trying to impose their beliefs on others.<sup>539</sup> In a contemporary environment that seeks to secularize the CRM, civil rights activists need to better understand the important ways that the church served as an anchor and stabilizing force in the movement. What is lost is the moral vision that animated and inspired prophetic protest. Unfortunately, when the CRM is understood as a social movement devoid of its religious

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<sup>538</sup> Ibid., 219.

<sup>539</sup> Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic, 1993), 9–10.

foundations, we fail to appreciate the forces that made the movement possible.

Recent events in this country call for a 21<sup>st</sup> century campaign that pursues the protection of civil and human rights. Today, with so much hostility toward religious groups by liberals, atheists, and leftists, the human rights movement risks alienating itself from one of its most vocal and powerful advocates for human rights: the Black Church and other religious groups. The future continued success of the human rights struggle will depend upon the ability of religious groups and individuals to link Christian beliefs and moral vision to efforts to expand liberty and justice for all. While certain religious groups continue to play a pivotal part in the human rights struggle, what is most disturbing is the failure of Christians to reaffirm the prophetic and social justice character of the church in the face of modernization. Christian fundamentalism, which is threatened by tolerance of differences and openness, has historical roots in the Roman Empire, where the State used the church to legitimate its power and stamp out prophetic voices that challenged the legitimacy of the State. As West (2004) asserted, “[t]he Roman emperor Constantine’s incorporation of Christianity within the empire gave Christianity legitimacy and respectability but robbed it of the prophetic fervor of Jesus and the apocalyptic fire of that other Jew-turned-Christian named Paul.”<sup>540</sup> West believes that the majority of Americans are unaware of the connection between a form of Constantinian Christianity and a broader understanding of social justice. Constantinian Christianity crucified Jesus and its contemporary expression in American life, where fundamentalists seek to silence Christian voices that promote nonjudgmental language, empathy, embrace of persons outside the Christian faith, and a broader understanding of social justice, which West believes is critical for sustaining any democratic innovation. West

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<sup>540</sup> Cornell West, *Democracy Matters: Winning the Fight Against Imperialism* (New York: Penguin Books, 2004).

stated that the church needs to reappropriate the Social Gospel critique, which exposes the ways in which industrialization and capitalism created the conditions for social and economic inequality. Unlike contemporary Christians, adherents of this movement believed they had a Christian duty to protect worker rights, employment, liberty, and equality rights.

According to West, some of the strongest strands of this prophetic tradition are found in the Black Church led CRM. In contemporary efforts to advance human rights, church leaders need to challenge white supremacy, while emphasizing the need for grounding action in Christian and social justice. This is an invitation for the church to engage in a prophetic Christianity defined as “not to be against the world in the name of church purity; it is to be in the world but not of the world’s nihilism, in the name of a loving Christ who proclaims the this-worldly justice of a kingdom to come.”<sup>541</sup>

The challenge is for civic action groups and prophetic Christian organizations to assume a more prominent role in advancing the cause of human rights in American society, given the deep roots of the prophetic tradition in the Christian Church. Organizations like the SCLC, the Progressive National Baptist Convention, World Council of Churches, the Sojourners, and Black Prophetic Churches have an important role to play in accenting Christian ideals and sustaining self-critical and open dialogue with all Americans who are committed to the human rights norms. As the CRM makes eminently clear, religious groups offered the public and the State a model of liberty and equality that ultimately transformed American society and brought greater equality and liberty for all.

Certain critical race scholars like Kimberlé Crenshaw have excluded a discussion of Christian beliefs and moral vision altogether in discussions of the CRM. These discussions present the CRM as a contest between the subordinate class and the dominant class, who

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<sup>541</sup> Ibid., 162.

used racist ideology and the rule of law to legitimate white supremacy. “Racist ideology” perpetuates the status categories of whites representing the dominant class, while blacks represent the subordinate class.<sup>542</sup> Formalized structures of control and domination like “separate restrooms, drinking fountains, entrances, parks, cemeteries, and dining facilities” perpetuated a White Supremacist ideology that asserted Black inferiority. Thus, it was natural for Whites to exclude Blacks from the American vision of equality.<sup>543</sup> However, according to Crenshaw, it was not merely the practice of separation that made segregation a subordinating activity, but the fact that it was legitimized and sanctioned by State power, and reinforced by White Superiority.<sup>544</sup>

The Church-State model developed by the Black Church post-Civil Rights Movement will do well to address the larger issues of State power and racist ideology that perpetuated racism and discrimination. However, to talk about these issues in exclusion of the Christian moral vision of the church is unwise, because it was the Christian beliefs of the protestors that gave them courage, conviction and persuasive moral power to challenge the racist ideology and legalized racism.

Religiously inspired protestors used the sacred and public space of the church to structure their religious identity and engage in practices designed to win greater rights and liberties, such that traditionally marginalized groups could participate in the public sphere on equal footing with other groups. In addition, a theory of Church-State relations that seeks to understand the source of religion’s strength should see pluralism as a resource that motivates people to develop religious movements and relational worlds that help to make sense of

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<sup>542</sup> Kimberlé Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,” *Harvard Law Review* 101 (1988): 1351-1352.

<sup>543</sup> *Ibid.*, 1377.

<sup>544</sup> *Ibid.*, 1378.

their lives, while also teaching people of faith how to engage with the State in a way that is meaningful and constructive.

Further, the differentiation, segmentation, and fragmentation of religious groups within and outside of mainline churches is not the fault of liberals, secularists, women, immigrants, or blacks who are fighting for democratic reform. The causes of the fissures within Christianity predate the establishment of religion and the breakdown in unity is, in part, the failure of the religious traditions to develop a normative vision and social ethic that embraces genuinely different individuals and groups with all of their different perspectives, values, and voices. This was, in part, the genius of the CRM; it was able to bring together various groups for the purpose of offering a distinctive Christian and democratic vision of freedom and equality that transformed American society.

Real religious freedom will never be won at the price of religious identity, prophetic witness and social traditions. Racial liberty will remain an elusive goal until we reflect on the implications of the understanding that God created human beings equally and that each person is to be treated equally by the State. A religion that is "in the world and of the world" is predisposed to mimic and conform to culture, not critique it and challenge it to live up to its highest ideals. Individuals can only help religious traditions avoid the tragedies of religion when citizens see religion as a force for good in society, understand human rights as grounded in traditions, beliefs, and cultures that give life meaning, and view modernity as a resource that better enables religious communities to contribute to the achievement of genuine democracy. The future of religion, or, for that matter, society, may very well depend upon the ability of the State and the church to work together to expand human rights in American society and the international context for the good of all.

#### **IV. Summary and Conclusion**

In this dissertation, I have demonstrated how the example of the CRM provides an important model of how religion serves as more than a mere handmaiden of the secular State; religion offers a radical critique of the socio-political order, by appealing to sacred religious and cultural principles. Despite views to the contrary, religion can be creative and justly threatening through non-violent means. The Civil Rights Movement reveals how a religious movement can robustly contribute to the public good, protect civil rights, and advance the cause of human rights, where prophetic ministers committed to democratic principles built broad democratic coalitions with persons who differed religiously in a highly contentious environment. The CRM also points to how religious and moral principles can inspire persons to work toward a better society, despite violent threats, judicial ambivalence, executive indifference, and legislative impasse.

I further examined how the new legal climate of religious freedom leading up to the actual CRM—sparked by new Supreme Court cases that protected the free exercise of religion, even of culturally vilified minorities in the day (e.g., Jehovah’s Witnesses, Seventh Day Adventists, Jews, and others), helped to foster the success of the prayer-filled and church-backed witness of the movement by providing a legal basis and Christian justification for nonviolent protest. Buoyed by the expansion of free exercise rights, activists fought to end racial discrimination by linking racial and religious liberty and equality to the quest to expand equality to all, especially African Americans.

While scholars have examined the role of traditions of black protest, grassroots leadership, the personality of Martin Luther King Jr., and the power of the 1954 *Brown v. Board* decision in the CRM, prior research has not given sufficient attention to the importance of the expansion of religious freedom as an important catalyst to the efficacy of the movement. This new climate of religious freedom inspired black church congregants to

take their faith to the streets for a cause that had legal and, at least for them, divine significance and that ultimately yielded broader civil and human rights, not just for African-Americans. This, as I have argued, makes the CRM an interesting case study in the intersecting relationship between religion and human rights, religious freedom, and civil freedom. It was the religious inspiration and message of the CRM that helped drive its effective advocacy for broader civil and human rights for all. In turn, the religious freedom that the State provided enabled this movement to pursue its civil rights agenda without unduly bracketing its religious convictions. Religious ideas that helped to fuel the CRM were critical to the development of ideals and principles that expanded civil and human rights.

Further, my analysis was intended to reveal that the conditions that led to the eventual expansion of civil rights were not without legal consequence. While the legal climate of religious freedom helped to create the ripe conditions for a historic moment of expanding civil rights, there was a backlash effect in sit-in cases.<sup>545</sup> As legal concerns increased over the expansion of the Black Power Movement and riots in southern and northern cities, there was a presumption that civil disobedience undermined the rule of law, encouraged widespread civil disorder, and was unjustifiable even in religious terms. The increasing backlash to prayer-filled protests fostered an environment that discouraged religious groups from taking their cause to the streets and the courts to transform American society. At present, religious groups find it increasingly difficult to be agents of social change.<sup>546</sup>

In conclusion, this dissertation is rooted in the historic presumption that religion provides a positive benefit to society by creatively projecting alternative centers of meaning,

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<sup>545</sup> *Ford v. Tennessee*, 377 US 994 (1964); *Jones v. Georgia*, 379 US 935 (1964); *Walker v. City of Birmingham*, 388 US 307 (1967).

<sup>546</sup> *Lemon v. Kurtzman*, 411 US 192 (1971); *Stone v. Graham*, 449 US 39 (1980); *Wallace v. Jaffree*, 472 US 38 (1985); *Lyng v. Northwest Indian Cemetery Protection Association*, 485 US 439 (1988); *Employment Division of Oregon v. Smith*, 494 US 872 (1990); *Lee v. Weisman*, 505 US 577 (1992); *Santa Fe Independent School District v. Doe*, 530 US 98 (2001).

providing a zone of liberty, and expanding the reach of democracy. It is true that prayer-filled nonviolent resistance was key to sparking judicial and legislative victories.<sup>547</sup> However, court victories were also critical to the success of the movement.<sup>548</sup> The research presented here overcomes this dichotomy between church and State, in part, by showing how the courts and churches, together, were catalysts to advancing civil and human rights.

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<sup>547</sup> James Cone, *A Black Theology of Liberation* (New York: Orbis, 1999), 1–16; Luther Ivory, “Towards a Theology of Radical Involvement: The Continuing Legacy of Dr. Martin Luther King, Jr.” (PhD diss., Emory University, 1994); Noel Erskin, *King among Theologians* (Cleveland, OH: Pilgrim, 1994), 141.

<sup>548</sup> Cone, *Black Theology*, 1–16.



## Appendix: Case List

1. *Barr v. City of Columbia*, 378 US 146 (1964).
2. *Barrows v. Jackson*, 346 US 249 (1953).
3. *Bell v. State of Maryland*, 378 US 226 (1964).
4. *Bouie v. City of Columbia*, 378 US 347 (1964).
5. *Boynton v. Virginia*, 364 US 454 (1960).
6. *Braunfeld, v. Brown*, 366 US 599 (1961).
7. *Brown v. Board of Education*, 347 US 483 (1954).
8. *Brown v. Board of Education*, 349 US 294 (1955).
9. *Brown v. State of Louisiana*, 383 US 131 (1966).
10. *Cantwell v. Connecticut*, 310 US 296 (1940).
11. *Carolina Amusement Co. v. Martin*, 236 S.C. 558 (1960).
12. *City of Boerne v. Flores*, 521 US 507 (1997).
13. *City of Darlington v. Thompson*, 234 S.C. 89 (1959).
14. *City of Sumter v. Lewis*, 241 S.C. 364 (1962).
15. *Commonwealth v. Anderson*, 308 Mass. 370 (1941).
16. *Commonwealth v. Pascone*, 38 Mass. 591 (1941).
17. *County of Allegheny v. ACLU*, 492 US 573 (1995).
18. *Cox v. State of Louisiana*, 374 US 536 (1965).
19. *DeJonge v. Oregon*, 299 US 353 (1937).
20. *Edwards v. South Carolina*, 372 US 229 (1963).
21. *Employment Division of Oregon v. Smith*, 494 US 872 (1990).
22. *Engel v. Vitale*, 370 US 421, 422 (1962).
23. *Everson v. Board of Education*, 330 US 1 (1947).
24. *Ex parte Luehr*, 159 Tex. Crim. 566 (1954).
25. *Fiske v. Kansas*, 274 US 380 (1927).
26. *Ford v. Tennessee*, 377 US 994 (1964).
27. *Fowler v. State*, 93 Ga. App. 883 (1956).
28. *Gallagher v. Crown Kosher Super Market*, 366 US 617 (1961).
29. *Garner v. State of Louisiana*, 368 US 157 (1961).
30. *Gastelum-Quinones v. Kennedy*, 374 US 267 (1963).
31. *Gitlow v. People of State of New York*, 268 US 652 (1925).
32. *Griffin v. State of Maryland*, 378 US 130 (1964).
33. *Hamm v. City of Rock Hill*, 379 US 306 (1964).
34. *Hannan v. City of Haverhill*, 38 F. Supp. 234 (1941).
35. *Heffron v. International Society of Krishna Consciousness, Inc.*, 452 US 640 (1981).
36. *Heilberg v. Fixa*, 236 F. Supp. 405 (ND Cal. 1964).
37. *Henderson v. United States*, 339 US 816 (1950).
38. *Herndon v. Lowry*, 301 US 242 (1937).
39. *Home Telephone and Telegraph Co. v. Los Angeles*, 227 US 278 (1913).
40. *Jones v. Georgia*, 379 US 935 (1964).
41. *Judefind v. State*, 78 Md. 510 (1896).
42. *Lee v. Weisman*, 505 US 577 (1992).
43. *Lemon v. Kurtzman*, 411 US 192 (1971).
44. *Lombard v. State of Louisiana*, 374 US 267 (1963).
45. *Lovell v. City of Griffin*, 303 US 444 (1938).

46. *Lugar v. Edmondson Oil Co.*, 457 US 922 (1982).
47. *Lupper v. Arkansas*, 379 US 306 (1964).
48. *Lynch v. Donnelly*, 465 US 678 (1984).
49. *Lynn v. Northwest Indian Cemetery Protection Association*, 485 US 439 (1988).
50. *Marsh v. Alabama*, 326 US 501 (1946).
51. *McGowan v. Maryland*, 366 US 420 (1961).
52. *McLaurin v. Oklahoma State Regents for Higher Education*, 339 US 637 (1950).
53. *Minersville School District v. Gobitis*, 310 US 586 (1940).
54. *Morgan v. Commonwealth of Virginia*, 328 US 373 (1946).
55. *Murdock v. Pennsylvania*, 319 US 105 (1943).
56. *People v. Douglas*, 29 N. Y. S. 2d 206 (1941).
57. *People v. Northum*, 41 Cal. App. 2d 284 (1940).
58. *People v. Woody*, 35 Cal. Rptr. 708 (1963).
59. *Peterson v. City of Greenville*, 373 US 244 (1963).
60. *Plessy v. Ferguson*, 163 US 537 (1896).
61. *Poulos v. State of New Hampshire*, 345 US 395 (1953).
62. *Quiner v. Quiner*, 59 Cal. Rptr. 503 (1967).
63. *Reid v. Borough of Brookville*, 39 F. Supp. 30 (1941).
64. *Reynolds v. United States*, 98 US 145 (1878).
65. *Robinson v. State of Florida*, 378 US 153, (1964).
66. *Santa Fe Independent School District. v. Doe*, 530 US 98 (2001).
67. *Schneider v. State of New Jersey*, 308 US 147 (1939).
68. *Sheldon v. Fannin*, 221 F. Supp. 766 (1963).
69. *Shelley v. Kraemer*, 334 US 1 (1948).
70. *Sherbert v. Verner*, 374 US 398 (1963).
71. *Shuttlesworth v. City of Birmingham*, 373 US 262 (1963).
72. *Sipuel v. Board of Regents of University of Oklahoma*, 332 US 631 (1948).
73. *State ex rel. Hough v. Woodruff*, 147 Fla. 299 (1941).
74. *State v. Cade*, 244 La. 534 (1963).
75. *State v. Chaplinsky*, 18 A. 2d 754 (N.H. 1941).
76. *State v. Edwards*, 239 S.C. 339 (1961).
77. *State v. Fass*, 36 N.J. 102 (1961).
78. *State v. Solomon*, 245 S.C. 550 (1965).
79. *Stave v. Lefebvre*, 20 A. 2d 185 (1941).
80. *Stone v. Graham*, 449 US 39 (1980).
81. *Sweatt v. Painter*, 339 US 629 (1950).
82. *Taylor v. State of Louisiana*, 370 US 154 (1962).
83. *Tinder v. Clarke Auto Co.*, 238 Ind. 302 (1958).
84. *Torcaso v. Watkins*, 367 US 488 (1961).
85. *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961).
86. *Van Orden v. Perry*, 545 US 677 (2005).
87. *Walker v. City of Birmingham*, 388 US 307 (1967).
88. *Wallace v. Jaffree*, 472 US 38 (1985).
89. *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970).
90. *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943).
91. *Wisconsin v. Yoder*, 406 US 205 (1972).
92. *Wright v. DeWitt School District No. 1 of Arkansas County*, 238 Ark. 906 (1965).
93. *Wright v. State of Georgia*, 373 US 284 (1963).

94. *Zimmerman v. Village of London*, 38 F. Supp. 582 (1941).
95. *Zorach v. Clauson*, 343 US 306 (1952).

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