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Religion in the Workplace: Faith, Action, and the Religious Foundations of American Employment Law

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RELIGION IN THE WORKPLACE: FAITH, ACTION, AND THE RELIGIOUS FOUNDATIONS OF AMERICAN EMPLOYMENT LAW

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INTRODUCTION

It is a great honor and a great pleasure to be with you today. I thank my friend and colleague, Marty Malin, as well as the distinguished members of the Piper Endowment Advisory Board, for the invitation to hold this lecture and for the wonderful hospitality which they have shown me. I especially want to thank them, however, for asking me to address this tremendously interesting, if challenging topic, *Religion in the Workplace*.

For most of us, the phrase "religion in the workplace" probably brings to mind the knotty sorts of problems associated with the accommodation of religious practice or belief under Title VII of the Civil Rights Act of 1964, related statutes, or the Constitution. Of course, there are plenty of good reasons for this. There has been a substantial growth in charges alleging religious bias and unlawful failure to accommodate, while problems of religion and the Constitution seem like a running sore on the body politic, and one unlikely to be healed anytime soon.

In my remarks today, however, I want to go beyond a consideration of the doctrinal issues raised by accommodation of religious practices or a discussion of the Supreme Court's religious freedom jurisprudence. Instead, I want to consider my topic more broadly, and in light of a larger research project in which I presently am engaged, involving the notion of solidarity. The theses I wish to address are, I think, relatively straightforward. They are three-fold.

Firstly, I will suggest that, while relatively few of us realize it, our labor and employment discrimination law has a strongly religious foundation. In fact, without that foundation, we would have little of the

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structure with which we are familiar. I will suggest that we can only fully comprehend the dynamics and development of this law in light of the religious influences that gave our law its form and that illuminate its true significance.

Secondly, I will suggest that the crisis that employment law finds itself in—and not just in the United States, but around the entire world—only will be resolved through a willingness to consider anew the insights religion has to offer us on the nature and dignity both of work and of the humans who perform it.

Lastly, I will suggest that, as uncomfortable as we may be with the topic, religion will force us to confront it in the workplace, in law, in politics, and in every other aspect of life. It is a deeply-rooted part of human personality, and we can ignore it ultimately only by ignoring ourselves.

There is little question that presently, religion is both one of the most neuralgic and one of the most discussed of issues. Books like Christopher Hitchens's *God Is Not Great: How Religion Spoils Everything*, Richard Dawkins's *The God Delusion*, or Sam Harris's recent *Letter to a Christian Nation* serve as just three reminders of how controversial and how divisive any discussion of and any reliance on any religiously-based proposition can be in our culture. Yet, try as we might, we cannot duck the issue. It pervades the public square and beyond. Like the stray dog that followed you home as a kid, religion keeps showing up, no matter how many corners we turn and alleys we cut through or how fast we run from it. After decades of studiously having been avoided or ignored in its sheltered groves, as Stanley Fish recently observed, religion has become the "center of intellectual energy in the academy."[1]

Now, when it comes to currents in thought and ideas, law schools typically stand to the rest of the university as high schools do to colleges in relation to trends in styles, music, and other aspects of popular culture. In other words, it often takes a while for things to filter down to us. Even in law schools, however, the topic is beginning to ooze through the joints. So let us turn and engage the subject face on. Just how is it that religion has anything whatever to do with our labor law?

1. Stanley Fish, *One University under God?*, CHRON. OF HIGHER EDUC., Jan. 7, 2005, http://chronicle.com/jobs/2005/01/2005010701c.htm.

I. RELIGION AND THE FOUNDATIONS OF LABOR LAW

Speaking about the relationship between religion and labor law launches us into something of a retrieval effort. As I have written elsewhere,[2] the National Labor Relations Act (NLRA) has a secret history, one that mysteriously has gone missing. Some understanding of this secret history not only explains the unusual characteristics of the NLRA, but it also helps to explain the decline of collective bargaining and the decline of mediating institutions generally.

Writing in the early 1930s, and some years before the enactment of the NLRA, the labor economist and historian, David J. Saposs, declared:

> The significant and predominant role of the Catholic Church in shaping the thought and aspirations of labor is a neglected chapter in the history of the American labor movement. Its influence explains, in part at least, why the labor movement in the United States differs from others, and why it has become more and more reactionary.[3]

In the mid-1990s, the Swedish comparative law scholar Reinhold Fahlbeck published a provocative essay in which he reflected on "the un-American character of American labor law."[4] This law, argued Fahlbeck, with its emphasis on collective action and on the formation of associations, stands in such stark contrast to the attitudes of the "archetypal American" as to make the law appear, as Fahlbeck put it, "somehow un-American."[5] From the viewpoint of the average American, Fahlbeck observes, "[t]hose people who want and need concerted action and unions are not quite reliable. They are not like Americans-at-large."[6]

Fahlbeck is onto something, and that something was spoken about by Saposs six decades earlier. Our labor law and the institutions that support it do rest on understandings that lie outside the American mainstream, and precisely for the reasons that Saposs so long ago noted. Exact numbers are difficult to determine. Historically, however, rates of union membership among Catholics (and Jews) have been vastly out of proportion to their representation in the American popu-

2. *See, e.g.*, Thomas C. Kohler, *The Notion of Solidarity and the Secret History of American Labor Law,* 53 BUFF. L. REV. 883 (2005).

3. David J. Saposs, *The Catholic Church and the Labor Movement*, 7 MOD. Q. 225, 225 (1933).

4. Reinhold Fahlbeck, *The Demise of Collective Bargaining in the U.S.A.: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307 (1994).

5. *Id.* at 323–24.

6. *Id.* at 326.

lation. This disproportionality becomes even more pronounced when the representation of these groups in union leadership positions is considered. For much of its history, in the United States at least, the labor movement has been largely a Catholic phenomenon.

What accounts for this strange fact? One explanation that comes to mind is that, as largely poor and marginalized immigrant groups, Catholics and Jews readily organized themselves to improve their economic standing. Without doubt, there is something to this. Until 1965, for example, when these trends reversed themselves, Catholics did have lower average incomes, held lower status jobs, and were less likely to receive college educations than their Protestant fellow citizens.

At the same time, however, Catholics always have constituted a relatively small minority of the American populace. At the time of the passage of the NLRA, Catholics made up less than 15% of the population of the United States. Even today, and after unprecedented rates of immigration, much of it Hispanic, the Catholic population of the United States remains under 25%.[7] Assuming, as typically is assumed, that economic advantage counts as the chief motive for joining a union, Catholics hardly constituted the only portion of the population with a substantial self-interest in unionization.

So, if economic interest alone does not explain the traditionally Catholic character of the American labor movement—and of the shape of the Wagner Act itself—what does? Three factors, I believe, played a critical role.

The Catholic understanding of community—one that they inherited from and that is closely shared with the Jews—constitutes the first of these explanatory factors. In their traditional self-understanding, Catholics and Jews see themselves as inextricably part of a community, one that transcends time to unite the living and the dead—hence, for instance, the Kaddish of Mourning and the celebration of Masses for the dead.[8] Edmund Burke captures this understanding in his observation that society "becomes a partnership not only between those who are living, but between those who are dead, and

7. THEODORE CAPLOW, LOUIS HICKS & BEN J. WATTENBERG, THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900–2000, at 110–11 (2001) (collecting data sources, noting that in 2000 the Catholic population in America was 23%).

8. For some further reflections on this point, see PHILIP RIEFF, MY LIFE AMONG THE DEATHWORKS: ILLUSTRATIONS OF THE AESTHETICS OF AUTHORITY 106–07 (2006).

those who are to be born."[9] Thomas Paine, in criticizing Burke, states the more typical American view that "[t]hose who have quitted the world, and those who are not yet arrived at it, are as remote from each other as the utmost stretch of moral imagination can conceive: What possible obligation then can exist between them . . . ?"[10] In its self-understanding, the Catholic Church is a "communion of saints,"[11] which includes both the living and the dead. As "one body, the good of each is communicated to the others."[12] The living and dead are bound in ties of intercessory prayer, so "that the union [between them] . . . is in no way interrupted."[13]

Catholics, but particularly those raised in a pre-Vatican II world, would never imagine themselves as being entirely alone. Accompanied by one's guardian angel,[14] united by ties of continuous prayer with the faithful dead (both to those in purgatory and in heaven) and with a special intercessor (one's patron saint), and bound to Catholics around the world by communal and regular observance of rituals like Friday abstinence from meat, the Lenten and advent fasts, recitation of the rosary, regular Mass attendance—all of these practices embedded in a well-demarcated liturgical year with its own rhythms, special obser-

9. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (Thomas H.D. Mahoney ed., The Bobbs-Merrill Co. 1955) (1790).

10. THOMAS PAINE, *Rights of Man*, *in* COLLECTED WRITINGS 439 (1995).

11. The term is not a triumphalist denomination. Instead, it includes "all honest believers in Christ and honest seekers after God who may be said to be members of the Church 'in desire' only." JOSEF PIEPER & HEINZ RASKOP, WHAT CATHOLICS BELIEVE 39–40 (Christopher Huntington trans., Pantheon Books 1951). This represents something of the rough equivalent of non-Jews who are "Noahide," or observers of the seven laws that God gave to Noah and that were reaffirmed by Moses and the Jewish people at Mount Sinai (which prohibit idolatry, blasphemy, murder, theft, illicit sexual relations, eating of live meat [cruelty to animals], and which require the establishment of courts of justice) as well as recognizing the priesthood of the Jewish people. According to Maimonides, those who follow these laws "will have a portion in the world to come . . . ." MAIMONIDES, MISHNEH TORAH, *Book Fourteen: Judges* 8:11, *reprinted in* A MAIMONIDES READER 221 (Isadore Twersky ed., 1972). For further discussion on this point, see Eugene Korn, *Gentiles, the World to Come, and Judaism: The Odyssey of a Rabbinic Text*, 14 MOD. JUDAISM 265, 266 (1994).

12. CATECHISM OF THE CATHOLIC CHURCH 247 (2d ed. Libreria Editrice Vaticana 2000).

13. *Id.* at 249.

14. Following Jewish tradition and scripture, Catholic teaching states that the "existence of the spiritual, non corporeal beings that Sacred Scripture usually calls 'angels' is a truth of faith." *Id.* at 85. "From its beginning until death, human life is surrounded by their watchful care and intercession." *Id.* at 87.

> By essence, angels are not the playmates of little children as popular imagination persists in picturing them . . . [w]hat puts the angles on a higher level than man is that they are bodiless spiritual beings completely independent of sense perceptions, who perceive and grasp the whole of creation much more directly and much more thoroughly than it is possible to the human mind.

PIEPER & RASKOP, *supra* note 11, at 15.

vances, feasts, and symbolic vestment colors—Catholics typically have taken an entire world with them wherever they go. The "single, sole self" of the American Protestant world and the communal self of the Catholic world gaze at one another in mutual incomprehension. It might be crowded in the Catholic boarding house and lacking a certain "privacy," but it is never lonely. Belief in direct and personal revelation permits Protestants to judge matters of faith and morals for themselves; Catholics rely on tradition. The former meet God—or any other sort of authority—alone and face-to-face, in a direct encounter; the latter only through the mediation of the whole Church. Protestants walk alone with God; Catholics, in processions.

Obviously, real and substantial differences exist between Catholics and Jews. Nevertheless, I would suggest that their similar attitudes toward community, the importance of ritual, and the role of tradition to both groups results in Catholics and Jews being closer to one another in their ways of thinking about these matters than are Jews and Protestants, or for that matter, than Catholics and Protestants.

The emphasis in Catholic theology on the body represents the second factor that helps to account for the traditionally Catholic character of the American labor movement. In Catholic thought, the body and the soul—it being, in classical terms, the "first act" of the body, or what we might call today our identity—are the co-principals in the constitution of the human person. Body and soul, body and our conscious and unconscious identity, stand in a mutually-conditioning, mutually-dependent relationship. There is a real "earthiness" in Catholic thought, one that never overlooks the fact that humans are embodied consciousness.

The corporeality of Catholic thought accounts in part for the emphasis on ritual, on physical disciplines like fast and abstinence, and an overall concern with habit. By habit, I mean an acquired and steady disposition, a manner of being, such as that Tocqueville suggests in his lovely but powerful phrase, "habits of the heart." Catholic thought understands humans as self-constituting beings. Every act in which we engage constitutes us, makes us to be in a certain way, and when done perpetually shapes our characters, orients and fixes our understandings, and determines our identities. We are what we do.

This framework sees humans as creatures of polyvalent desires and unlimited potency, although of decidedly limited act. This means, among other things, that unlike the case with other animals, there are

untold ways to be a human, and our judgments about how we will do it play a major role in what we eventually become. Now, one of the funny things about potencies is that once we've kicked one of them off, once we "enact" one of our potencies, it wants to stay in action. Consequently, every time we do an act, we make its repetition more likely. We train ourselves through these acts: they become our habits, acts we eventually do virtually automatically, without reflection. As Aristotle described it, our habits cut a groove in us, something brain researchers have confirmed. Our habitual actions carve themselves into and shape our personalities, thereby determining the range of other actions which we likely will undertake. To take one quick example that illustrates the range and subtlety of our habits: language is a habit. We live in language; it literally mediates the world to us, conditions our understandings, and immerses us into the history that it embodies. Language foregrounds how we experience ourselves and our world. It creates an undertow that subtly steers us, and whose influence we really cannot escape.

What all this means is that little things really matter. As humans, we make ourselves through our judgments, but doubly so by our acts. For this reason, Catholic thought and practice historically has paid a lot of attention to the day-to-day details of life, because this is where we truly live and truly make ourselves to be what we are.

The third factor brings these other two together: the Catholic social thought tradition, a body of teachings that has its roots in the early Nineteenth Century and which began as a reaction to the extreme and doctrinaire individualism of the Enlightenment. From the start, the Catholic social thought tradition has concentrated on two things: work, and its impact on the humans who perform it; and the creation and maintenance of what we today call "mediating institutions," those bodies that stand between the individual and the large institutions of the state or the market.

The concern of the social thought tradition with work grew out of its efforts to address what Napoleon Bonaparte early referred to as the "social question." In the wake of the French Revolution, the ancient feudal arrangements that once had given society its terms and relations were swept away and ruthlessly suppressed. For example, the exceptionally long-lived *Loi de Chapelier*, enacted in 1791 and not repealed until late in the Nineteenth Century, outlawed guilds and all

other forms of workers' associations, since they offended the notion of free and individual agreement between the worker and the master.

As this revolutionary order spread across Europe, individuals found themselves emancipated from the bonds that once determined their place in life. At the same time, the weak found themselves placed outside the web of duties that once sheltered them through the obligations they imposed on the strong. Freed from the land and other customary strictures and obligations, but loosed into a world increasingly governed by the rules of supply and demand and the terms of individual agreement, a new mass of people without property, place, legal status, or protection arose—the working class. Finding ways to give this newly forming class legal status, a voice in society, and some sort of security early became core aspects of the social question.

The first person to use the word "proletariat" to describe this body of the dispossessed and marginalized was not Karl Marx, but rather Franz van Baader, one of the earliest Catholic social theorists, who employed the term at least a decade before Marx adopted it.[15] The word itself referred to the lowest class in the Roman state, whose sons (*proles*—offspring) constituted their only wealth and whose status was the equivalent of the helots in Sparta.

In the social tradition, the term "proletariat" always has signified far more than a condition of material poverty. It refers to a condition of inner impoverishment as well, which can be brought about by social, political, or economic orders that instrumentalize human work and that teach humans to understand their worth, purposes, and activities simply in instrumental terms. In his 1981 social encyclical, *On Human Work* (*Laborem exercens*) John Paul II reviewed the development of the social tradition and emphasized that "the proper subject of work [is] man."[16] Insisting on the priority of labor over capital and the priority of persons over things, he also condemned every form of "what we can call the error of economism, that of considering human labor solely according to its economic purpose."[17] This encyclical, incidentally, was written to mark the ninetieth anniversary of the first papal social encyclical, Leo XIII's *On the New Things* (*Rerum Novarum*), which also

15. THOMAS NIPPERDEY, DEUTSCHE GESCHICHTE 1800–1866: BÜRGERWELT UND STARKER STAAT 242 (1983).

16. JOHN PAUL II, ON HUMAN WORK: LABOREM EXERCENS 12 (1981). For a fuller account, see Thomas C. Kohler, *The Fragile Relevance of Laborem exercens*, 5 J. CATHOLIC SOC. THOUGHT (forthcoming 2008).

17. JOHN PAUL II, *supra* note 16, at 29.

concentrated on work and championed both the right of employees to form unions and the social necessity of unions and other forms of worker associations.

In recognizing that "work is 'for man' and not man 'for work'"[18] the social thought tradition reflects the Church's long-standing concern with habit. It realizes that in performing work, we literally are performing ourselves. Work "bears a particular mark of man and of humanity, the mark of a person operating within a community of persons,"[19] the tradition teaches. Through work, as the Rabbis framed it, humans are given the unique privilege of participating in the completion of creation, an insight the social tradition adopts. Deliberating, judging, and choosing constitute the most human of acts. Consequently, in its reflections on the organization of work, the social thought tradition long has supported the creation of opportunities for employees at all levels of an organization to participate in decision making, within and outside of the workplace. For example, social theorists and activists supported the creation of works' councils (*Betriebsräte*) as early as the 1840s. Some activists even attempted to add provisions to the proposed constitution produced by the Frankfurt Parliament of 1848 that would have required the erection of works' councils in larger workplaces.

Throughout its development, three elements have formed the programmatic character of Catholic social thought. It has emphasized the creation and maintenance of what Edmund Burke would have called "little platoons"[20]—efforts to ground individuals in groups, bodies, sodalities, or associations of some sort. These mediating institutions seek to enhance individual status by providing the means to engage in effective self-determination and governance, both within and without the workplace. Lastly, these groups tend to dovetail or overlap with one another, building up a new ecology of autonomous social institutions that stand free of the state and the market. We might appropriately call these institutions "structures of solidarity."

These elements reveal themselves in the constant support for unions and other forms of worker associations announced in the social teaching tradition. From the 1860s onward, the social tradition has

18. *Id.* at 14.
19. *Id.* at 1.
20. BURKE, *supra* note 9.

steadfastly supported the formation of unions and the support of collective bargaining.

As Marc Karson observed nearly fifty years ago, "the political philosophy advocated for labor by the Roman Catholic Church was quite similar to the philosophy followed by" the labor movement in the United States.[21] This is not a surprise. Catholic social thought was mediated to Catholic workers and union members in numerous ways. These means included Catholic publications like diocesan newspapers,[22] a cascade of books, pamphlets, studyguides, and similar works that were widely distributed to the faithful, better than 100 labor colleges, many led by the Jesuits, and the remarkable and widespread tradition of labor priests like Peter Dietz, John Ryan, Charles Rice, John Corridan, Clement Kern, Francis Haas, George Higgins, Mort Gavin, Edward Boyle, and a great many others who had close contacts with union members, union leadership, and with politicians, including Senator Robert Wagner.

How much was Senator Wagner, the framer of the NLRA, directly influenced by Catholic social thought? This is difficult to say. Nevertheless, among Wagner's papers pertaining to the framing of the NLRA are two heavily annotated copies of the 1941 social encyclical, *Quadragesimo anno*. Wagner also corresponded with Fr. Ryan, and he had extensive contacts with Fr. John Haas, a leading Catholic social theorist and activist, who among many other things served as a member of the National Recovery Act era's National Labor Board (the "old Board") and on the Advisory Board on Labor with Senator Wagner. Wagner, incidentally, became a Catholic convert in the late 1940s, some years before his death.

I should note that Fr. Haas was very discreet about his relations with politicians and very cautious about drawing public attention to what he called in one letter, written in August 1933, the "parallels between the Encyclicals and the N.R.A."[23] "No attempt should be made," he warned one correspondent who had proposed publishing a pamphlet to this effect, "to put a Catholic imprimatur, so to speak, on what

21. MARK KARSON, AMERICAN LABOR UNIONS AND POLITICS: 1900–1918, at 239–40 (1958).

22. Boston's Catholic newspaper, *The Pilot*, published since 1826, serves as a good example. In addition to newspapers, a seemingly-endless array of periodicals, pamphlets, and books produced by religious and lay groups alike also carried discussions of the social teachings.

23. Letter from Francis J. Haas to the Rev. Edward Lodge Curran, President, Int'l Catholic Truth Soc'y (Aug. 31, 1933) (on file with The Chicago-Kent Law Review).

a good many people regard as a political policy."[24] Haas asserted that his hesitancy was not "a surrender to the idea that the Church should not speak on industrial and economic questions."[25] Rather, he feared that attacks on the Roosevelt administration would extend to the Church and compromise the Church's ability to speak on social issues, while animosity toward the Church would imperil the legislation.[26]

The NLRA embodies many influences and represents the product of many hands. Nevertheless, the philosophy embodied in the social thought tradition helps to illuminate and explain its provisions. It also helps to elucidate the predominately Catholic character of the American labor movement. The Act marks the only place in our otherwise highly individualistic legal system where the law attempts to enhance individual status through the defense and maintenance of groups.

The influence of the religious voice has not been limited to activists. Not surprisingly, numerous labor scholars also come from rather strong religious backgrounds or have a demonstrated interest in the ties between religion and law and in the insights into human character that religion provides. Francis Sayre might appropriately serve as our first example. A professor at the Harvard Law School, Sayre published the first labor law casebook (in 1922) and taught the first labor law course in an American law school. A deeply committed Episcopalian, Sayre's faith suffused all his many life's undertakings, which included missionary work in post-War Japan.[27] His labor law casebook contains material from the World Interchurch Movement (which made important contributions to the American Protestant "social gospel" movement) on income levels necessary to support families.

Sayre hardly stands alone. Clyde Summers, generally regarded as the Dean of American labor and employment law scholars, seriously considered entering the ministry before going to law school. I think it fair to say that through a lifetime of scholarship and teaching, the effect of Clyde's "ministry" has extended far beyond the confines of the law school world. Manfred Weiss, one of Germany's pre-eminent comparative labor scholars, likewise seriously considered entering the Jesuits before deciding upon the law. Incidentally, Weiss maintained a long

24. *Id.*

25. *Id.*

26. *Id.*

27. For a further discussion, see generally FRANCIS BOWES SAYRE, GLAD ADVENTURE (1957) (discussing the impact of his faith on his professional life).

working relationship with Oswald von Nell-Breuning, a German Jesuit often referred to as the "Nestor" of Catholic social thought. As a relatively young priest, Nell-Breuning had an important hand in the drafting of the 1931 Papal social encyclical, *Quadragesimo anno*. He also played an important role in promoting co-determination and works councils and in the debates over the 1972 Works Councils Act. Julius Getman, one of the field's most innovative scholars, has maintained a long-standing interest in the influence of the religious voice in labor, while Howard Lesnick, another leading scholar who has made numerous important contributions to the area, now concentrates his work on the relation of religion to legal thought and practice.[28]

I do not mean to suggest that those with religious commitments or interests make up a majority among academic labor lawyers, or, for that matter, practitioners in the field. Nevertheless, I have a hunch that, traditionally at least, there is something in the field that attracts persons out of the sorts of backgrounds that I have described here. As one English scholar has remarked, labor law distinguishes itself from other fields of legal study through the "sense of vocation" that it evokes.[29] A German colleague similarly observes that "labor law has its peculiarities" because it represents "a legal discipline with heart."[30] Few areas of law touch people more directly or deal quite as intimately with issues pertaining to human personality and its daily unfolding than does the law of work. In this field, moral issues and questions about human purpose always lurk just below the surface of any issue, a point that the relationship between Title VII and religion makes especially clear.

II. TITLE VII AND RELIGION

The first thing to be observed here is a fact that students and scholars alike often forget: were it not for the leadership of the African-American Protestant Churches, there would have been no Title VII and no Civil Rights Act of 1964. I was astounded recently when a political scientist speaking at an event in which we both participated said that it was the thought of Thomas Jefferson that illuminated the drive for the

28. *See generally* Thomas C. Kohler, *Lost Foundations: The Religious Voice and Employee Participation in the United States and Germany*, in ARBEITNEHMERMITWIRKUNG IN EINER SICH GLOBALISIERENDEN ARBEITSWELT (EMPLOYEE INVOLVEMENT IN A GLOBALIZING WORLD): LIBER AMICORUM MANFRED WEISS 527 (Armin Höland et al. eds., 2005).

29. *See* Hugh Collins, *Labour Law as a Vocation*, 105 L.Q. REV. 468, 473 (1989).

30. Bernd Rüthers, *35 Jahre Arbeitsrecht in Deutschland*, 48 RdA RECHT DER ARBEIT 326, 326 (1995).

Civil Rights Act of 1964. The Southern Christian Leadership Conference was not, so far as I know, a Jefferson-reading circle.

Sadly, if anything, Jefferson stands as an example of what Aristotle called moral impotence. Jefferson knew very well what he should have done concerning the slaves he held. His personal behavior in this matter edifies us, but on this point, only as an example not to be followed. His conscience troubled him. Even as he proposed powerful legislation to end or limit the practice of slavery, however, Jefferson could never quite bring himself to release more than a few of those whom he held in chattel servitude, and those few only late in his life. We might remember that this was the same man who produced for himself a version of the Bible with those passages that offended his reason removed.

For a quick illustration of the language that moved this country, I would suggest a re-reading of the Rev. Martin Luther King's Letter from a Birmingham Jail.[31] The letter is not couched in the language of rights so much as it is in biblical language and imagery. The claims that letter makes—and the claims the civil rights movement made on the United States—were morally and religiously based.[32] As Dr. King suggests, the equal rights embodied in the law are derived from our obligation to recognize that we are all children of God.

In defending his activities in Birmingham and the campaign of peaceful resistance to segregatory laws, for example, King explained the difference between unjust and just laws in the following terms:

> A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statues are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the

31. Martin Luther King, Jr., *Letter From Birmingham Jail*, *in* WHY WE CAN'T WAIT 64 (Signet Classic, 2000) (1963).

32. For further thoughtful explication, see generally Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (arguing that Dr. King drew upon the specific religious and cultural experiences of African-Americans to create his vision of a reconstructed society).

> status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful.[33]

Later in the letter, King wrote that he had heard "numerous southern religious leaders admonish their worshipers to comply with a desegregation decision because it is the law," which left him disappointed because he "longed to hear white ministers declare: 'Follow this decree because integration is morally right and because the Negro is your brother.'"[34] The entire Christian Church, "the body of Christ," had been "blemished and scarred . . . through social neglect and through fear of being nonconformists."[35] Instead of acting as a "thermometer that recorded the ideas and principles of popular opinion," King recalled that the Church had acted as "a thermostat that transformed the mores of society."[36] From a divided and unjust society, King aimed to build a "Beloved Community."

The tremendous power of the civil rights movement's demands came far less from the language of Blackstone than it did from the language and imperatives of the Bible. To the extent that Title VII and other civil rights legislation has become a bare contest of rights, I think they have lost much of the moral force that once illuminated them.

Dr. King's approach to his arguments was hardly idiosyncratic. For example, as part of my research, I ran across a letter written in March, 1945, from the Michigan Catholic Welfare Committee directed to the Committee on Labor of the Michigan State Senate, in support of a bill to outlaw job discrimination, as the letter has it, "against Negroes and other minority groups." As the Welfare Committee explained:

> We do not rest our argument for the need of legislation such as the present Bill proposes on considerations of utility or even public order. It could be argued and with no little plausibility—that the Bill should become law in order to prevent race tensions and race violence. But to us such reasoning smacks of smug selfishness on the part of those of us who do not happen to belong to minority groups. This reasoning does not meet the issue squarely that a great wrong is permitted to be done to many Negro men and women solely because they are Negroes. It overlooks the important fact that their souls are no less dear to Jesus Christ than are those of other men and

33. King, *supra* note 31, at 70–71.
34. *Id.* at 79.
35. *Id.* at 80.
36. *Id.*

> women, and that they stand before our Constitution on equal footing with all other Americans.[37]

The transformative possibilities of religion on racial division—and on personal failings and biases of all sorts—were made clear in the recent hit film, *Amazing Grace*, which tells the story of William Wilberforce, a committed evangelical Protestant who spearheaded the effort to outlaw slavery and the slave trade in Britain, and John Newton, a reformed slave trader turned abolitionist, Anglican cleric, and author of the famous and very personal hymn.[38] Once again, religious conviction and an understanding that humans stand subject to an intelligible and normative order provided the motive force that changed hearts and minds.

Now, it is true enough, as the distinguished legal historian Helmut Coing has observed, that the common law and the civil law represent the only two legal systems that world has known that are not direct expressions of a religious system. It is also true, however, as he notes, that both systems throughout their history have been in a constant conversation with religious sources and insights. "No one knows better than the jurist the weaknesses of a social system in which the law prevails. No one knows better that the law only can function in a framework of moral and religious relations."[39]

Law alone is a hollow structure; without more, it is only an expression of power. Raw power may for a time oppress, but it does not serve as a stable basis for the ongoing cooperation that a social order requires and that a legal order should regularize.[40] As Stalin is famously said to have asked, "How many divisions does the Pope have?" More, it turns out, than he thought, and they operated in a way and with an effectiveness that he could not imagine. The Solidarity union movement in Poland, the "People Power" Revolution in the Philippines, Gandhi in India, and Martin Luther King in the United States all demonstrate the authentically human demand for living in reasonable orders. They also reveal the extraordinary changes that friendship around the

37. Letter from Rev. Jerome V. MacEachin, Sec'y, Mich. Catholic Welfare Comm., to the Chairman and Members of the Comm. on Labor, Senate of the State of Mich. (Mar. 14, 1945) (on file with The Chicago-Kent Law Review).

38. AMAZING GRACE (FourBoys Films et al. 2006).

39. Helmut Coing, *Das Recht als Element der Europäischen Kultur,* 238 HISTORISCHE ZEITSCHRIFT 1, 15 (1984).

40. On this point, see Thomas C. Kohler, *A Rock on Which One Can Build: Friendship, Solidarity, and the Notion of Authority*, *in* CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH 99, 99–100 (Patrick McKinley Brennan ed., 2007).

good can produce, a condition that one can describe as a "solidarity of consciences."

Particularly as lawyers, we should not forget Tocqueville's insightful admonition that the mores of a people are more important than their laws. I might note further that when the mores collapse, the law is impotent to hold an order together. We might wish it otherwise. But, as Ernst-Wolfgang Böckenförde, the German constitutional scholar and former member of Germany's constitutional court, has rather starkly reminded us, "the liberal, secularised [sic] state is nourished by presuppositions that it cannot itself guarantee."[41]

Religion really is that hound from which we just cannot seem to flee. Religion is that for the sake of which one does everything else. Just as no one gets away without a religion, no legal system ever can escape raising religious questions: What do we most value? What are our lives for? How should we live? What sort of social, political, legal, and economic orders shall we have, and why are they more desirable than others? What is the character of my relation to others and what, if anything, do I owe them? Our answers to these questions determine who we are, and we constantly are in the process of responding to them.

III. RELIGION AND THE FUTURE OF EMPLOYMENT LAW

Labor and employment law systems everywhere are in crisis. Well-established orders are breaking down, and nothing has appeared to replace them but simple contractual ordering. Across the world and in varying degrees, we are edging back, at times by default and at times by design, to the legal framework of the Nineteenth Century, one that finds it true roots in the doctrinaire individualism that informed Enlightenment thought.

Plainly, changes in society and economy preclude us from any simple-minded return to regimes of the past. They may be comforting in their familiarity, but they represent responses to conditions that have radically changed. At the same time, to borrow phraseology from the authors of the Federalist Papers, we cannot blindly stumble forward and allow "accident and force," rather than "reflection and choice," to determine our future.[42]

41. ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularisation*, *in* STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 26, 45 (J.A. Underwood trans., 1991).

42. THE FEDERALIST NO. 1 (Alexander Hamilton).

It is time for a new conversation between the law and religion about the character of work and its impact on the human that performs it, as well as renewed thinking about the kind of economic and work relationships that will sustain democracies and allow humans to flourish. Our present orders and ways of thinking chiefly portray humans in instrumental terms, as "profit centers" or means to an organizational end, mostly fungible and fully disposable.

We might start this new conversation from the perspective that "work is for man and not man for work," and with the realization that work is a transitive activity that may start with some limited task or goal, but that ends in the constitution of the person who performs it and thereby in the society itself. The transitive nature of work points to its inherently social and moral nature as well. A religiously-informed understanding of ourselves invites us to take our humanity and ourselves seriously, in light of our authentic dignity and our unique, unrepeatable identity, which can only be expressed and understood in properly-ordered relationships, both in the workplace and beyond.

Bringing about a proper order for working life—which is, after all, where the majority of us spend the majority of our lives—constitutes the special task of labor and employment lawyers. The founders of this field of legal endeavor consciously embraced this task, and as a collaborative effort with many, including religiously-influenced thinkers and activists—left it to us as an inheritance. The changes wrought, by conscious choice, in our world require us to re-work and re-imagine their solutions. We can close our eyes to what truly is at stake in the challenges that face us, but we cannot avoid the consequences. We can attempt to evade the questions and the issues that give our work its true significance and importance. Ultimately, however, try as we might, we cannot escape ourselves.

For this invitation and for your kind consideration of these ideas, I thank you.