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BOOK REVIEW

Roundtable on Eve Darian-Smith, Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law

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At the Law & Society Annual Meeting in San Franciso (2011) Renisa Mawani organised an Author-Meets-Readers roundtable on Eve Darian-Smith's latest book, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*.

The comments of the roundtable presenters are reproduced here (with minor revisions), along with a response from Eve Darian-Smith.

Commentary by Jon Goldberg-Hiller

As I read this powerful book I began to think of Eve Darian-Smith as the new Howard Zinn of legal studies. Zinn (2010) wrote what he called a people's history

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of the United States from the perspective of those who were slaughtered, abused and often forgotten. Zinn made us think critically about what political institutions actually did, regardless of their commitment to something called democracy, and how this history told the story of something called the people. The title of his memoir, *You can't be neutral on a moving train* (Zinn 2002), captures a kind of motile energy that feels much like Darian-Smith's popular legal history with its incessant pull against neutral principles of law. *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*'s purposeful disequilibrium spans hundreds of years, moving through time and global space a bit like Hegel's Geist, doing something important to our thought about law and rights along the journey. The book offers us an invitation to think through these spaces and times—beyond a nation's experience with rights or one era's dominant struggles—to ask what is the popular terrain that these landmarks map out?

Dominating this topography is the Protestant construction of the legal subject, its conception forged in Martin Luther's efforts to discredit canon law by associating the Roman church with racist fears of Muslim invasion that opened a path for a popular coalition supporting "secular" legality. Darian-Smith shows the triangle of race, religion, and rights emerging in Luther's struggle with the Roman church reproduced in other landmark cases, providing a matrix for thinking about western legality. But the interrelationship of these three R's is reproduced in various permutations in a manner not amenable to the usual forms of legal historical analysis. Moving into different historical periods and different national legal systems, it is not the internal formality of precedent that tells a story here, nor do we follow causal or developmental tales in which one event has set the stage for the next. Indeed, the matrix illuminated in this book tends to undermine the usual accounts about law and Western legal development. It isn't really a Hegelian story of reason's self-unfolding, nor Maine's liberal-individualist contract eliminating the vestiges of status, nor Marxist and Weberian narratives of economic necessity depending upon a legal superstructure. Neither is it a communitarian rejection of the legal form as impedence to social cohesion. All these more common stories about law and rights attempt to circumvent the event, to make the event speak to a larger "history," one that stresses a lesson about law more than about the people who invest themselves in it. Rather, Darian-Smith ties law to the event and never allows it to stray far from the early religious impulses in whose name violence and rights are simultaneously justified. This is a fusion that breeds and relies tightly upon its own ideas of race, and that is haunted by the universalist overtones increasingly attached to rights, a resonance that produces a persistent fear of democracy (its disorder, its pluralism, its poetic claim on the commons) that creates one sense of right: who has it, what its limits might be. Religion, overtly repressed in the rise of secular society, returns in a new guise: the belief in and desire for law.

This book develops a novel form for thinking about legal meanings and it seems to demand a novel form of reading, one that analogizes this modern and sacred expression. Reading from event to event, I found myself puzzling over what exactly persisted in the spaces between these chapters, spaces that seemed to hold the place of this desire for law that persisted over time and space into the next encounter. As a reader able to hold the book at arms length, to see these colorful events drawn

contingently from history (Darian-Smith tells us that she could have chosen other landmarks, and that those examined are merely "symptomatic" (p. 2), I found myself pondering whether these integuments of the scholarly assemblage didn't reveal this binding power of law and rights, and whether there was something that persevered beyond xenophobia, violence, and a vital hatred of others' claims that seemed to animate many of the events that filled the chapters. Rights might be produced in irrational ways, transubstantiated from passionate antagonism, but would this mean my students would exclusively read this book as a cynical exposition of law's violent underbelly? Darian-Smith suggests that taking such a perspective ought to liberate us from our imperialistic law-mindedness; we should ethically recoil from the imposition of law as a "transferable commodity" (p. 292), embargo our attempts to impose human rights and the rule of law in the same ways we might avoid forcing a given religious creed onto (racially different) non-believers. Darian-Smith ends her book with this observation: "The difficulty we face in acknowledging this truth is that it forces us to confront the enduring need of citizens of western nations to *believe in* the impartiality of the rule of law" (p. 292).

Law's allure is more than the sum of its parts, but is this faith all tied imperialistically to this xenophobic imagination of legal autonomy? The chapter on Thomas Paine perhaps demonstrates something else. Darian-Smith examines the ways that Paine's fealty to rights as a human condition led him to reject a weak notion of religious tolerance circumscribed by race (one that had excluded Jews, Muslims and other non-Christians from its tenets), and to advocate the extension of tolerance and rights to African slaves as well as New World Indians. Darian-Smith writes, "in a profound sense, [Paine's] Rights of Man represents a turning point in the development of modern Anglo-American law by opening up the minds of ordinary people to thinking about new possibilities and opportunities with respect to representational government and suffrage" (p. 106). The events subsequent to Paine's enunciation explored in this book demonstrate the efforts to police these new possibilities, to close what Paine worked hard to open. Yet, the fear of democracy—of this openness and its poetic call—works as something of an anti-principle, covering over what remains latent in the universalism of rights.

It is not, I think, that this universalism should be taken in its Kantian transcendental form (ventriloquated by the historian E. P. Thompson (1975, p. 267) who declared law to be an "unqualified human good"), an idea that Hegel first and now Darian-Smith demonstrates to unjustifiably avoid the meaning of the event. Rather, it is in its post-Kantian aesthetic form that this possibility is most clear, a possibility that lurks underneath and buoys the landmarks that this book sets out. The fear of democracy is experienced so often in history because democracy is so insistent, consistently disruptive. As the French philosopher Jacques Rancière (2006, p. 297) argues, "government is always practiced by the minority on the majority. The 'power of the people' is thus necessarily heterotopic to inegalitarian society as well as to oligarchic government." This heterotopic imagination is the essence of politics. It draws upon notions of equality in efforts to be heard by those whose voice does not count, to change the sensibility of who counts. "Politics consists in reconfiguring the distribution of the sensible that defines the commonality of a community, in introducing subjects and objects, in rendering visible those who were not, and in

making understood speakers who had only been perceived as noisy animals" (Ranciere quoted in Ferris 2009, p. 43). If politics is not intrinsic to democracy that has forever perpetuated this uncounted other, but remains interstitial to various schemes of governance—if it lives in the gap between the rights of man and the rights of the citizen, "in the infinite of their separation and…the uncertainties of [their] conjunction" (Rancière 1994, p. 94), we see one of the powers of the spaces between these chapters that capture these political events. To draw disparate events together is to declare their commonalities—the historically long concerns with faith, with racial and other exclusions, and the democratic promise of law in the form of rights—while simultaneously pointing to the changing sets of opportunities to demand new ways to count those who remain uncounted, to give voice to something always more than rights as they exist, always surplus, in events yet to come.

The implication of this assemblage, as I read it, is not that politics and its creative play with equality is what law is all about; it isn't, ever. Nonetheless, it is not only Westerners who sometimes think that securing equality (which is democracy's only principle, according to Rancière) and equality's promise of counting the uncounted, may sometimes take the form of rights and sometimes yield justice. This faith is both proper and thoroughly misplaced: law never quite gets us there, in the same way that modern law never quite gets us to justice (Constable 2006). But this long making of a legal religion is not explicable as an historical narrative, nor is it amenable to anthropological ideas of a culture that can explain law's enduring potency. Both history and social scientific understandings of events must dispel the excess of language through which the people give voice to their own inclusion; these scholarly projects invent narrative plots and discern proper places in ways not unlike the denouements of events providing the landmarks of this book's terrain. Neither scholarly alternative sufficiently pays attention to the vitality and sensation of efforts to be heard, to be counted, to be recognized as one deemed worthy to hold rights.

Darian-Smith's landmarks thus reveal the people through the repetitive exclusions of those who could be included and granted their rights. This people lives, imaginatively, in the gaps between these chapters, in Darian-Smith's own refusals to provide a tightly-bounded legal history, or a transcendental framework for thinking about the promise of rights. Darian-Smith's rejections of these handy alternatives echo Nietzsche's insistence that we understand the irrationality of history as well as the morality that strives to police and foreclose possibilities. When we teach this book in an effort to understand our own temporalities and social expectations for law, we should heed Nietzsche's call to rely upon both mourning and hope: mourning what was secured in the events we study in this book, as much as what was not achieved and at what expense. Perhaps, this is another humanity that will always lie between remembrance and forgetting. Nietzsche (1983, p. 62) writes,

> There is a degree of sleeplessness, of rumination, of the historical sense which is harmful and ultimately fatal to the living thing, whether this living thing be a man or a people or a culture. To determine the degree, and therewith the boundary at which the past has to be forgotten if it is not to become the grave

> digger of the present, one would have to know exactly how great the plastic power of a man, a people, a culture is: I mean by plastic power the capacity to develop out of oneself in one's own way, to transform and incorporate into oneself what is past and foreign, to heal wounds, to replace what has been lost, to recreate broken moulds.

Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law shows us broken moulds and begs us now to think how we can understand and harness them for legal critique in the spaces we individually and collectively now occupy.

Commentary by Renisa Mawani

In a recent and insightful essay focused on reactions to the Danish cartoons that depicted Prophet Muhammed in disparaging ways and drew angry and even violent protests from Muslims globally, anthropologist Saba Mahmood argues that the religious and secular are not "immutable essences" or "opposed ideologies" but are concepts that have emerged contemporaneously and have gained currency through their historical and contemporary interdependence (Mahmood 2009, 836). Despite ongoing debates over the seeming incommensurability between Islamic beliefs and practices and putative secular values in Europe and North America, the liberal democratic state, she argues, has been historically produced through the regulation and appropriation of religious edicts and observances and not in opposition to them. Thus, the secular state, Mahmood claims, "has not simply cordoned off religion from its regulatory ambitions but [has] sought to remake it through the agency of the law" (Mahmood 2009, 858–859). The Danish cartoons, first published by Jyllands-Posten in 2005 and again by numerous media outlets in Denmark, Europe, and the US in 2008, is "exemplary of the standoff between religious and secular worldviews—particularly in liberal democratic societies," (Mahmood 2009, 838, emphasis mine) she writes. In critical and conservative responses to the cartoons, the Muslim protests they generated in Europe and globally, and the Islamophobic reactions to these demonstrations, freedom of speech, Mahmood (2009) observes, was frequently positioned as opposed and even antithetical to religious beliefs and practices. This polarization between religion and secularism some have argued, have raised critical questions regarding the acceptable practice of religion in European societies, especially the place of Muslims and the future of Islam (see Geoffrey Brahm Levy and Tariq Modood 2009). Of particular interest to Mahmood is the meaning of "injury" that emerged from the cartoon controversy (was it religious? racial?) and how the resulting grievances might be rendered more clearly intelligible beyond the limiting frames of juridical and legal languages. Recognizing the importance of racism in the cartoon controversy but not fully developing a conceptualization of the secular, religious, and racial as mutually constitutive, what Mahmood urges is the production of a new vocabulary, one that avoids the familiar opposition between these three forces and instead traces their connectivities and interrelations.

Contemporary and ongoing struggles over secularity, religion, and racism that are apparent in the Danish cartoon controversy as Mahmood (2009) examines it, and

also in struggles over Islam in Europe and in North America, point to the timeliness and urgency of Eve Darian-Smith's most recent book, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*. Writing across five centuries, Darian-Smith traces the dynamic, contested and vexed relations between religion, race, and rights, three themes that have figured unevenly in socio-legal studies and have not often been analyzed together. Whereas rights have retained a central and significant focus in law and society scholarship, generating an expansive and voluminous literature, religion and race, as Darian-Smith notes in her introduction, have each garnered significantly less attention in comparison. Rather than pursue these themes individually, which has often the case when religion, race, and rights have been the subject of socio-legal scholarship, her book is an ambitious attempt to address the interconnections between religious faith, racist practices, and the growth of legal rights in the history of modern Anglo-American law (Darian-Smith 2010, 1). Law and religion have not drawn enough scholarly or critical attention in socio-legal studies Darian-Smith points out. Nor have the relations between religion and race, I would add. Thus, *Religion, Race, Rights* addresses persistent gaps in law and society scholarship and offers important contributions to contemporary debates over Islam and/in the West. Only published last year, Darian-Smith's book has already generated interesting questions regarding the constitutive relations between religion, race, and the rule of law, precisely the type of investigation that Mahmood views as necessary for unsettling the secularity/religious divide (see Naomi Stolzenburg 2011).

Religion, Race, Rights is an expansive work that draws its reader not only across time but between and across continents. One of its strengths is precisely the broad spatio-temporal strokes with which Darian-Smith writes and through which she invites her readers to take a bird's eye view of the dynamic but obstinate relations between religion and race in Anglo-American law. Beginning with Martin Luther's critique of the Catholic Church and his On War Against the Turk, and taking us through to the contemporary "war on terror," what many have described as the "contemporary crusades," Darian-Smith argues that "the ebb and flow of religious practices, fluctuating racial tolerances, and the emergence of a rights-bearing individual are overlapping forces that together shape and have been shaped by legal processes" (Darian-Smith 2010, 4–5). Darian-Smith pursues this argument by focusing on eight significant moments comprised of trials, people, and major historical events that have been identified by historians and others as turning points in the development of Anglo-American law. Each chapter is centered on one landmark moment and read together takes readers through a complicated history of struggles and contestations over slavery, colonialism, and neoliberalism, pointing to the ways in which conflicts and contestations surrounding racial and religious in/exclusion have profoundly shaped legal concepts, meanings, and practices.

In many ways, the last chapter most clearly demonstrates the expansive breadth of the book as well as the organizing themes and conceptual investments that inform and animate Darian-Smith's approach. Entitled, "Democracy, Neo-liberalism, and the New Crusades," Darian-Smith suggests that while religion, race, and rights share a long and interrelated history, one that she carefully traces in earlier chapters, the relationality and entanglements between these forces, as evident in the twentieth

century, have never been linear or straightforward, nor have they been clear or predicable in their influences on either law or on democratic struggles. Instead, what she highlights are the amorphous, uncertain, and ambiguous links between neoliberalism, imperial pursuits, religious struggles, and racial in/exclusion. While the connections between these forces have been potent, resulting in the persistence and intensification of racial coercion and violence in an increasingly globalized world, their interrelations, Darian-Smith tells us, are not easily explainable or understandable in causal terms. If we look more discerningly, as the book forces us to do, it becomes apparent that one condition that tightly binds the American corporatism of Wal-Mart and the aggressive militarism of the US war on terror is the politicized struggle over women's rights.

It is in this final substantive chapter, where Darian-Smith connects "'Saving Brown Women' Overseas" (Darian-Smith 2010, 268) to the "Abuse of Women at Home," (ibid, 271) that the feminine body becomes most clearly materialized as a site of struggle over race, religion, and rights.[1] The chapter may seem too broad and wide-ranging for those seeking causality but this is not Darian-Smith's objective. Rather, her interest lies in highlighting the contradictions between domestic and global policies, those tensions and inconsistencies upon which imperial pursuits often gain traction. For instance, Darian-Smith points to the difficulties in reconciling George and Laura Bush's "media campaign to 'save brown women' with the neoliberal policies of unregulated markets that have allowed Wal-Mart and other corporations to participate in widespread mistreatment of women in the United States and around the world" (Darian-Smith 2010, 276). It is precisely through her close attention to these inconsistencies and seeming incommensurabilities, the ways in which they emerge and reemerge, that makes her argument here and throughout the book so persuasive.

Books that challenge ways of thinking and break new ground, as this one clearly does, inspire questions amongst their readers. Darian-Smith's book raises several important questions but the one I will raise here centers on how we conceptualize law. What exactly is law and what is its role in the production of religious and racial truths that have clearly organized the troubled global present, especially struggles over Islam? In many ways, this question follows from the conceptual and methodological choices that Darian-Smith makes, her focus on big historical events such as revolutions and rebellions and her conceptualization of law as trials and statutes. In the first few pages, she acknowledges the potential limits of mapping of law in this way:

> Some readers may feel that I have missed or ignored equally if not more important legal events, and it is true that other landmarks might serve just as well to illustrate my argument….Other readers may argue that the discussion presented is too superficial – after all, each landmark could be the subject of a book or several books in its own right…..I hope that the breadth of historical narrative conveys an expansive outlook, one that prompts the reader to see links and connections across time. (Darian-Smith 2010, 2–3)

[1] These quotes are subtitles in this chapter.

As I suggest above, Darian-Smith has accomplished her goal of drawing connections between seemingly disparate events and across both time and space. But what do we gain and lose conceptually by focusing on law in terms of the monumental and spectacular rather than the quotidian and banal? What sorts of histories are made (im)possible?

Legal historians of empire have insisted on defining law in its broadest terms, ones that exceed and escape imperial and state institutions, and that imagine law beyond trials and statutes. In *Law and Colonial Cultures*—also an expansive book that spans five centuries—Lauren Benton argues that colonial legal historians must move beyond thinking of law in its conventional sense as either doctrine and/or jurisprudence and must approach law more capaciously (14). In her more recent book, *A Search for Sovereignty*, Benton challenges prevailing views of early maritime journeys as "travel narratives" and instead argues that "many accounts of early voyaging are better understood as legal writing" (Benton 2010, 26). Here, she conceives of law as "an important epistemological framework," one that arranged and evaluated "evidence of all kinds, and of geographic information in particular" (ibid, 26–27).[2] In other words, for Benton and others, the micro-practices of law rendered it to be a truth-producing machine that not only influenced early trans-oceanic voyages but also shaped and continues to shape how we think of geography and sovereignty.

Charting law through big events and on a large scale, Darian-Smith convincingly argues that "the discourses surrounding issues of religion, race and rights should be considered together in mapping the foundations and emerging characteristics of modern law." The "trio of forces," she writes, "challenges the enduring Enlightenment narrative of modern law embodying rationalism, pragmatism and objective universality" (Darian-Smith 2010, 287). By focusing on law in its grandest and most spectacular moments however, Darian-Smith tells us little about law as an epistemological framework that informs, organizes, and is produced through the most mundane aspects of everyday life. What Mahmood's reading of the Danish cartoon controversy and the polarization of the secular, religious, and racial reminds us is how law itself deeply informs common sense understandings of these as distinct and immutable forces. *Religion, Race, Rights* makes a significant contribution to these debates; it will be left to others to pursue law's production of religious and racial truths on a micro-scale.

Commentary by Didi Herman

In commenting on Eve's book, I am partly speaking from my own context of living and working in England, for over 22 years now. *Religion, Race, Rights* is very much about English processes of racialisation, and also American of course, but my comments here focus on the British context. In particular, I'm going to relate some of my comments to my own recent work on Jews and Jewishness in English judicial discourse as Eve's book prompted me to come back to some of the choices I made there.

[2] On Law's epistemology see also Mawani (2009) and Valverde (2003).

There was much I appreciated in this book, but I will highlight just two themes that were key for me. First, the emphasis on historical continuities. Much of what we read today as academics is situated in frameworks of exceptionalism and rupture—as if we are living through unique experiences of catastrophe. I have never been drawn to these ways of thinking, and what I liked about Eve's book is her emphasis on the quotidianness of racism, its everyday, routine character. This is perhaps an odd thing to say in light of the book's organisation around 'landmarks'—key events in English and American histories of race and religion. Yet, Eve's narrative promotes an understanding of racial and religious thinking that insists on its continuities and embededness. The book takes us out of an 'exceptionalist' mind-set—it maintains that we can better understand dynamics of race and religion today if we situate our understandings in the histories of these concepts and practices.

The second theme I want to mention is the book's highlighting of Christianity as an organising framework. Eve adamantly insists on the 'intrinsic cultural affiliation between legal and Christian practices' (14). In my view, this is a very important, and yet highly undeveloped area of critical legal studies. *Religion, Race, Rights* makes a very significant contribution here.

There are other ideas in the book I would have liked to hear more of Eve's thinking about. First, Eve argues that American and English identity was forged through these landmark events. She emphases many similarities in English and American processes of racialisation, and this is important. But these processes also, at times, took quite different shapes in these two contexts. When I first immigrated to England from Canada, I was struck by how different it seemed to 'be Jewish' in the UK, and how odd (to me) 'the English' were about Jewishness. I was struck by both what I perceived to be an element of Anglican English 'distaste' for things perceived to 'be Jewish' (this was different to the sort of antisemitism I was familiar with in Canada), but I was also intrigued by particular forms Jewish assimilation has taken in England. I was interested in what seemed to be the somewhat oxymoronic idea of the 'English Jew'. I understand now, more than I did then, some of the cultural and historical reasons why Jewishness takes on the particular meanings it does in the UK, as opposed to North America, and I would have enjoyed more discussion of some of these differences in relation to racialisation processes more generally.

Second, I wonder whether more could have been made of the concept of conversion. Eve discusses conversion briefly in her chapter on the Dawes Act, but it is relevant to the other 'landmarks' as well. Again, this relates to some differences in the American and English contexts, in terms of the forms Christianity takes. The UK is a nation with an established church, and while Eve does a lot of good work in the book showing how anti-Catholicism has played out in England, conversion is also a very important trope historically.

Third, I was very interested in the book's 'methodology', including, most obviously, what was involved in the process of 'landmark' selection? Eve notes some aspects of her thinking here, but the book is full of other intriguing authorial choices. One example that particularly struck me was the chapter on the Nuremberg trials. Eve uses this landmark to show a certain triumph of human rights law. However, elsewhere in academia, Nuremberg stands for a huge 'rule of law' failure

orchestrated by the war's victors, as an abject failure of Enlightenment values. I would have liked to know more about Eve's choice to gloss over this aspect and, as I read that chapter, to endorse the Tribunal as a path-breaking, progressive initiative.

Fourth, I wondered whether Eve agonised at all over the use of the terms 'racism' and 'racist'—this is of particular interest to me as I went through some angst in a recent project over whether to use the term 'antisemitism'. Antisemitism is a term much criticised in critical Jewish studies in Britain, for a number of reasons, including: it's seen as unnuanced, as implying too stark a dichotomy—for or against 'the Jews'—as involving too much baggage to do with 'malice'; and as positing a continuity of 'hatred' where there are so many discontinuities that need exploring. Instead, critical Jewish studies scholars in the UK have argued that the relationship between dominant English Christianity and Jewishness is one of 'ambivalence', and the term 'antisemitism' obscures this. So, I wondered about Eve's use of 'racism' and 'racist' to describe such a wide range of ideas and practices and on two different continents. On this theme, I also wondered about the concept of 'orientalism', something I've come back to in my work (for strategic reasons as much as anything else). Eve mentions orientalism briefly, but it's clearly not an organising concept for the book, and I'd be interested in knowing how Eve thought that through.

Fifth, the relationship between race and religion is at the heart of this book, I was impressed by how Eve managed to keep both these balls in the air with such clarity. But—and I would say this given work I've been doing over the last few years—the example of Jews and Jewishness so complicates keeping 'race' and 'religion' under separate headings. Eve's very brief mention of Benjamin Disraeli—such a complex figure in English history and politics—was one of my few disappointments in the book. She suggests that Disraeli was responsible for re-shaping the 'basis of anti-semitism in English society'(162) and I don't think this is correct. But my point isn't to quibble with what is just an aside in the book (and one based on another scholar's work), it's just to perhaps challenge a shift that Eve identifies—from religion to race—may not be as clear as she suggests. The case of 'the Jews' does complicate this aspect of her narrative. The UK Supreme Court's 2009 decision in the case about the Jewish Free School's matrilineal descent admissions policy is a very telling illustration of this (for further discussion see Herman 2011).

Finally, as an 'outsider' myself, I was curious what impact, if any, Eve feels her 'Australianness' had on this project. With my own work on Jewishness in Britain, I have felt—and it has been said to me—that an English person could not have done this work, or at least, not in this way—so I was interested in how the author's 'outsider' status may have both facilitiated and/or perhaps constrained aspects of this project.

Commentary by Denise Ferreira da Silva

Reading Eve Darian-Smith's (2010) book, I could not but find in it a text about time. Now, I know that she says that, or kind of says it, when she states, in the Introduction that "this book does not represent a conventional legal history", that it is "a cultural study of the law that explores, and she quotes Kahn, the 'conceptual

conditions that make possible that practice that we understand as the rule of law'" (3).[3] So, although the book is not a conventional legal history, it is indeed historical in a very conventional sense: in the sense that the concept of culture informing our particular intellectual craft has become a historical tool—a tool that necessarily works on that material that belongs to/in time/space, that is, in existence.

The discourses on religion, race, and rights Eve chases in the legal landmarks that compose the body of the book emerge in Anglo-America (Europe and America) 'in time'. From the early 1600s, with Martin Luther's charges to the pope and the catholic church, the beheading of Charles I, Thomas Paine's articulation of a radical liberalism … all the way to her analyses of the Nuremberg Trials and the examination of the strategies of the War on Terror, he labour practices of Walmart, and the religious rhetoric deployed in both. Each, she shows, devises a mode of being human and a version of the secular ethico-political agenda of the mode of governance—the one expressing the signs of universality (rationality, neutrality, and objectivity)—that would and could be claimed as exclusive to Europe and North-America modernity. I read Eve's tracking in these very discourses their failure to actualize universality, that which they also claim as the marker of Anglo (Euro-American) uniqueness, as the exposure of that intimacy between Law, the Human, and Rights, which unsettles any claims to universal applicability of each. Why? Precisely because of how these claims to exclusivity pose universality as that which distinguishes Euro-American modernity as a cultural (historical, and as such spatial/temporal) moment—that is, a political (ethico-juridical-economic) formation or, a bit more explicitly, a collective characterized by a given ethos, modality of governance, and mode of production.

(A disclosure: A concern with of how human rights and rule of law—the markers of Euro-American uniqueness—have become, in the global political assemblage, the measure for the viability of any given non-European or postcolonial polity is guiding extra-textual determinant of this mis-reading).

Evidently, I don't have enough time to extricate from Eve's text the moves in her argument—which I would have to then situate in context formed by numerous texts from a variety of disciplines—that also enticed this mis-reading of her analyses of the Anglo-American landmarks she has selected. I cannot show how she identifies and analyses and then weaves the statements on religion, race, and rights in order to design the terrain onto which these landmarks draw the context of applicability of the 'rule of law'. Something they accomplish, she tells us, when deploying racial difference and religious difference to distinguish between these human beings who have the attributes that correspond to a 'proper' (I couldn't find a better term) mode of being human and those who don't. —All such attributes, we learn reading her book, can be contained in the phrase being Christian, of a certain kind of course, which also suggests that that 'kind' is also a certain kind of being human.

Now this which, I think, is just a slight misreading of Eve's book has as its main intra-textual determination what she says in the Conclusion, which I also think is the heart of her argument: "In the twentieth century the lofty goals promoted in the UN Universal Declaration of Human Rights have not been fully achieved" (291). Here

[3] Darian-Smith, Eve (2010).

I think resides the clue for mis-reading Eve's book as a charge to the west, a denunciation of its failure to live up to its self-attributed cultural (hence also historical) uniqueness. I will not go as far as to say that this is in fact a charge she poses before Law itself, not only Anglo-American common law, which would be its failure to live up to its claim of universal application. Ok. I have just said that but this is not my argument. I will not try to show that this is the case. For I am mis-reading Eve's book because I think that I share with her a concern with the relationship between Law, the Human, and the notion of Rights that emerges with both concepts.

Each legal landmark, each statement she has selected to highlight the particularities of the confluence of discourses on human difference (religion, race, rights) at a particular point in time, in the time of modernity, I think, articulates a vision of the proper political (ethico-juridical) subject and, along with it, of course, a certain sense of how political existence should be fashioned. For instance, in the early 1600s, for Martin Luther, this proper kind of being human is the subject of faith. In a crucial moment of the long process of displacing the Catholic Church from human affairs, his articulation of faith against the churches' claims to exclusivity (as far as access to God, the divine ruler, and his grace is concerned) collapses the distinctions between Christians and Turks. Not in a celebration of the enemy, but in the statement that attributes to the king (the earthly ruler) the task of protecting the subjects of the Holy Roman Empire. For Luther, Eve tells us, people "should not blindly follow the directions of the papacy, which has no business exerting physical force on others. Rather, they should obey the temporal leadership of the emperor Charles V" (40). This is, as she demonstrates, a significant statement that marks the emergence of a new legal consciousness (not determined by cannon law) and (secular) modality of governance. I find this reading of Martin Luther's articulation of the Protestant plan compelling because it is a thread that can be followed to the next chapter—in which the beheading of Charles I is the chosen landmark (where the divine right of the king rolls down along with his head), through Chapter Three (which describes Thomas Paine's radical democratic agenda, which seduced but did not flourish on either side of the Atlantic). In each of them there is this ghostly promise of a modality of governance, ruled by law and guaranteed by the state, which never quite lands.

The reason for its not taking off, she suggests, is because that image of a political existence ruled by neutrality, universality, rationality was consistently articulated in other statements that made exclusive claim to it—statements on racial difference and religious difference, which were intertwined with articulations of the idea of rights. Nowhere is that exclusivity made more explicit than in the statements covered in Chapters Four, Five, and Six—the ones about the Morant Bay Revolt of 1865, of the Chicago Haymarket Riots of 1886, and the Dawes Act of 1887, respectively. In each, a juridical and economic figure—The Slave, The Worker, The Native—refers to that particular kind of human being to whom the rule of law and the rights its sustain would not apply. In each, the failure of the promise of a democratic polity ruled by law cannot be missed. There is no universal application. We know that. For Eve, I think, this failure, which she chases through time (for about five hundred years), does not seem to be a failure of law itself. There never is application. Rights, legal rights in this case, are available. To repeat, for Eve, the

failure is not in Law itself; it is in/of the context of its application, in the polities, which have been designed in the Eighteenth Century, which are 'of time'—temporal, that is, secular. For what I read in Eve's argument against the secularization thesis is not only that, I quote, "it is clear that the widespread popular assumption that the rule of law epitomizes the secularism of modern society does not stand up" or that "Anglo-American law cannot be simplistically characterized as a legal system premised on the separation of church and state" or that "the rule of law is [not] entirely rational, logical or pragmatic; law is not devoid of religious impulses either in the formation of its foundational concepts and myths of legitimacy" (12). I think that she is also describing how secularization, as a thesis or a promise, and not as an event, has rendered law a thing of this world—of time and, of course also, of space. In this sense, I read her book as a historical account of Anglo-American law, an account that shows how it cannot be separated from the onto-epistemological 'truths' deployed and produced in the description of the political context of its application. Being of this world, law is an affair of humans, she shows. It is appropriated by, called to, arrested in political discourse, in particular when its time to decide on the application of that upon which the state's legitimacy rests, namely the notion of rights. Every arrest of law (of its rule) seems to require a delimitation of those to which it applies, in this case, of those kinds of humans whose rights must be upheld.

On various occasions, over centuries, Eve Darian-Smith's book shows us religious difference and racial difference—both of which also produced in onto-epistemological 'truth' statements as indexes of cultural difference—were consistently called forth in description of the kind of humans the law protects, which are also the ones the state should then also serve. However—and here is where my misreading of the thread I find in Eve's book gets stuck in my own investments in, and meditations on, failed promises—Eve does not seem ready to let it go. She seems to resist secularization, the temporalization (and concomitant spatialization) of Law and Rights (their realization in time/space, in existence, which is the realm of difference) and their situation as tools of the modalities of governance—the 'modern state' and now the global political assemblage—both are deployed to produce/legitimate. For when I read the third part of the book, in particular the chapter on the Nuremberg Trials, I found in the already mentioned statement on the failures of the promises of the Universal Declaration of Human Rights the hope that Law as Right holds a force that is mightier than any formulation of the proper Human that successfully arrests it—for the time being. Here, I think that in this resides the 'cultural' (in the sense of articulations of the ethos of the time/space of European-American modernity as the moment under law's ethical grip) force of law, that which, I think, responds to why even its most fierce critics can never quite let go of it. Parting ways with Eve perhaps, I wonder … it may be about time we do.

Response: Eve Darian-Smith

I am indebted to my four reviewers (Denise Ferreira da Silva, Jon Goldberg-Hiller, Renisa Mawani, and Didi Herman) and their insightful and provocative comments.

As the author of *Religion, Race, Rights: Landmarks in the History of Anglo-American Law* my hope was that it would open up opportunities to engage with long-admired expert colleagues and on this front I am both satisfied and entirely grateful.

Religion, Race, Rights seeks to show the continuities between narratives of religion and race and how these connected across time to influence the development of modern western law. It explores legal landmarks that span five centuries beginning with Martin Luther and the Reformation and ending with the current Wars on Terror. Together these landmarks underscore the limits of Anglo-Euro-American law to create social and political equality, and how these limits are always infused with racially charged justifications. My aim in spanning this enormous historical period is to show the continuities and links between events, as well as how the terms "religion", "race" and "rights" are not fixed signifiers but themselves change in meaning and institutional arrangements over time. I do not suggest a causal or determinative relationship between these narratives, but rather argue that they are overlapping constitutive forces that "together shape and have been shaped by legal processes" (Darian-Smith 2010:4). As one reviewer notes, "although the book is not a conventional legal history, it is indeed historical in a very conventional sense" in that it conforms to chronological time and is a product of modernist thinking (Denise this issue). Other reviewers, to varying degrees, are concerned with my historical methodology in that it leaves out ordinary human understandings and sensibilities that inform legal consciousness and shape the wider linking contexts in which each legal landmark is situated.[4] To this charge I concede, and hope others will rise to the challenge and turn their attention to these in-between spaces, helping to fill in 500 years of human experience.

Typical histories of western law focus on the impact of the Enlightenment and law's progressive secularism demonstrated by an increasing divide between church and state. Against this trend, my argument is that these histories preclude recognizing the role Christianity has played in shaping the concepts and institutions and social relations embedded within contemporary western legal practices. Conveniently, this lack of recognition of religion sustains the rhetoric that modern western law is neutral, objective and value free, and as a consequence universally applicable. What I argue is that recognizing the embeddedness of religion in western law—and accepting that it can never be truly secular—may provide ways to move

[4] Renisa Mawani argues that too little attention is given to "law as an epistemological framework that has dramatically influenced and shaped our common understandings of secularity, religion, and race" (Renisa this issue). Clearly more nuanced attention should be given to the ordinary and the mundane, to issues of religious formation, distinction, and conversion inside and outside Christianity, as well as to various degrees of racism as they manifest in different spatial contexts over time. This more nuanced reading would also help locate the variety of racisms that Didi Herman points to with respect to attitudes towards Jews in England and elsewhere that ranged from explicit anti-semitism to varying levels of ambivalence (see Didi this issue, also Herman 2011). And a more nuanced reading of epistemological frames would speak to the different ways religious institutions and racist hierarchies and practices coalesced in the old and new worlds, and highlight why there exists different understandings of their overlap and distinction between contemporary Europeanists and Americanists (see Stolzenberg 2011). Together my reviewers' comments suggest more work could be done by choosing alternative landmarks and by exploring the people and the conceptual conditions of their existence within the times and spaces in-between the landmarks I did choose as they developed on different sides of the Atlantic.

past its intrinsic limitations. In other words, there is first a need to acknowledge the uncomfortable relationship between western law and Christianity and the legacy of racial discrimination such a relationship has historically engendered. Only then can we turn to forging a new space for a more inclusive legal pluralism that is not entirely informed by legal concepts such as "state", "rights", "sovereignty" and the "individual" which have their conceptual roots in the practice of Christianity (Darian-Smith 2010, 14; see also Taylor 2007).

The time I spent musing on how to respond to my four reviewers was punctuated by two events that in many ways function as the most recent legal landmarks in my historical account. These events were the carefully orchestrated shootings of 77 people in Oslo by a single Norwegian gunman, Anders Behring Breivik, and the spontaneous mass riots by thousands of disaffected people across England resulting in unprecedented vandalism, looting, and random violence. In commentaries on the Oslo massacre and the British riots there has been much discussion about race as a central element in explaining both events. The anti-Muslim tirade espoused by Breivik in his 1,518 page manifesto was vehemently denounced by Norwegian media.[5] In Britain, explanation for the riots was polarized.[6] In contrast to left-wing commentators, the issue of racism was downplayed by conservatives but it is hard to ignore that the wave of riots began in protest against police killing a young black man, Mark Duggan, under questionable circumstances.[7]

Unlike the focus on race, religion did not feature in analysis of either the Oslo massacre or British riots. There was passing commentary on Breivik's relationship to Christianity, though the initial characterization of him as a Christian terrorist was subsequently discredited (Brown 2011). Breivik himself stated in his manifesto that he is not a very religious person. Rather, for Breivik, Christianity and Christendom stand in as markers of white European culture and in defense of such culture he declared the need to again crusade against Islam. In Britain, religion did not feature in analysis of events. Like Norway, Britain considers itself a secular society and social and cultural conflict is predominantly read through the lens of social inequality that may include issues of race rather than through any conflict between faiths, lack of faith, or result of religious discrimination.

However, as I argue in my book, issues of both racial and religious conflict are invariably present in the domestic policies of western nations. In the case of Norway and Britain, non-Christian religion is silenced and that silence resisted in what are deemed the failed secular policies of multiculturalism. On the issue of multiculturalism, David Cameron had declared his position earlier in the year when he

[5] Breivak was also explicitly anti-feminist (see Jones 2011).

[6] On the one hand, liberals blamed austerity measures, the closing of healthcare and community centers, and increasing unemployment and education costs that have led to a growing disaffection among the country's youth. Liberals also pointed to the disproportionate impact of the recession on urban racial minorities. On the other hand, conservatives—including the UK Prime Minister David Cameron—blamed widespread lawlessness on inner-city subcultures and a "broken society" where "too many children grow up not knowing the difference between right and wrong".

[7] In the case of Britain, Arab democratic movements in countries participating in the Arab Spring found it an occasion to reprimand the West for its "lawlessness" and "uncivilized" behaviors, labels historically leveled at people living in the Middle East and Africa. See "For Egyptians, Riots in Britain Offer a Chance to Scold the West" New York Times 13 August 2011.

condemned "state multiculturalism" for promoting Islamist extremism. According to Cameron:

> Under the doctrine of state multiculturalism, we have encouraged cultures to live separate lives…We've even tolerated these segregated communities behaving in ways that run completely counter to our [British] values… Frankly, we need a lot less of the passive tolerance of recent years and a much more active, muscular liberalism (Cameron 2010).

Cameron's speech aligned him with German Chancellor Angela Merkel who in 2010 had publicly declared that multiculturalism has "utterly failed",[8] and politically positioned Cameron firmly with the European far right.[9]

Across Europe and the United States, critics of multiculturalism are expressing what Jon Goldberg-Hiller calls "a persistent fear of democracy" (Jon this issue; on the contested concept of multiculturalism see Santos et al. 2007, xxi–xxviii; Lentin and Titley 2011). These critics help foster a growing sense that countries have been too lenient in receiving immigrants and as a result have now become "too diverse". The argument pushed by conservative politicians is that European nations are at fault, if at all, for being too accommodating of racial diversity and in the words of PM David Cameron, Britain has failed "to stand up to them".[10] Cameron's response to the riots was to call for policies that ensure immigrants believe in universal human rights and the rule of law—what Denise Ferreira da Silva calls the "markers of Euro-American uniqueness" (Denise this issue). For Cameron, and the right-wing constituents that he represents, if migrants can be forced to believe in British law then peace may be restored.

The problem I see in these debates over multiculturalism, and in analysis of events such as the Oslo massacre and British riots, is that no one is asking why migrants in cities such as London, Paris, and Berlin do not openly embrace the rule of law in the first place. If law is value-free and ensures equality and respect to all members of society, then why do migrant communities often experience the rule of law as oppression and discrimination? Why do they tend to congregate in closed-off inner city neighborhoods where they can speak their own language, practice non-Christian faiths, and socialize according to non-western traditions? These enclaves of socio-political separateness—often imposed on migrant communities by discriminatory state practices just as reservations were imposed on native peoples in the United States and Canada—are precisely what PM David Cameron now declares cultivate "lawlessness" and as a threat to society must be dispersed.

[8] http://uk.reuters.com/article/2010/10/16/uk-germany-merkel-immigration-idUKTRE69F19T20101016. Retrieved 12 August 2011.

[9] Cameron's speech was immediately praised by Nick Griffin, chairman of the right-wing British National Party, and by Marine Le Pen, leader of France's National Front whose political platform rests heavily on extreme nationalism and anti-immigration/anti-foreigner policies. See David Batty "Marine Le Pen praises Cameron stance on multiculturalism" (Guardian 10 February 2011).

[10] Against this assumption of inclusivity, minorities—immigrant and otherwise—are chastised for pointing to racial discrimination in an era that prides itself on being "post race" (Lentin 2011; see also Goldberg 2008).

In the context of my book *Religion, Race, Rights* I would urge us to think about the Oslo massacre and British riots as the latest moments in a long history linking centuries of colonialism, cultural imperialism and religious and racial domination. As my book reveals again and again, for migrant/indigenous/slave communities in both old and new worlds evoking the rule of law was often experienced as an imposition of patriarchal European values at gunpoint. Today, Anglo-Euro-American law, which people living in the global north insist is secular and value-free, may still be felt by migrants and other minorities as value-laden and a denial of their spirituality, social relations, and fundamental ways of being. In short, when politicians demand the submission of "foreigners" to the rule of law, migrant communities often interpret such declarations as a reification of western values and concurrently a violation or debasing of their different value system. And when migrants resist such impositions, Anglo-European societies respond, often violently. The "clash of civilization" rhetoric espoused for years by scholars such as Samuel Huntington and right-wing US populists such as Pat Buchanan are warmly embraced by masses of people who buy into the fear of a "climactic conflict between a once-Christian West and an Islamic world that is growing in numbers and advancing inexorably into Europe for the third time in 14 centuries…" (Buchanan 2011; see Huntington 1996; Said 2001; Sen 2002).

Against the backdrop of cultural conflict, it is important to remember the writings of Brenna Bhandar who reminds us that secularism, like policies of multiculturalism, is a mechanism for exerting control over non-conforming citizens:

> Despite their ostensible differences as political ideologies, both multiculturalism and secularism are deployed as techniques to govern difference. This difference is at once cultural, religious, gendered, and mired in the history of colonial encounters that shaped the emergent political consciousness of the subject in Enlightenment Europe. Differences that challenge the boundaries of the sovereign political subject are perceived as a threat to be contained and managed (Bhandar 2009a, b, 304; see also Moore 2010).

In other words, secularism, like multiculturalism, is not so much about learning to live with cultural, religious and legal differences and allowing people to behave and operate in ways that are other. Today's secular societies are not truly pluralistic. Rather, under the guise of secularist objectivity, people in the global north seek to assimilate others so they come to resemble versions of their own bourgeois individualized selves (see Collier et al. 1995; Dumont 1986). Hence secular states will typically tolerate religious pluralism so long as minorities practice their different faiths behind closed doors, reinforcing the notion of a public/private divide. Yet religious thinking, be it grounded in Christianity or otherwise, informs an array of social and legal values that cannot be neatly delegated or contained within private domestic realms.[11]

[11] The link between law and religion in all societies was recognized by Harold Berman years ago in a lecture he wrote in 1971:

> we must start with an anthropological perspective on law and religion—a perspective which takes into account the fact that in all known cultures there has been an interaction of legal and religious

This brings me to the first main argument in *Religion, Race, Rights*, which is the need to move beyond the constructed secular/religious divide posited by theories of secularization and acknowledge the sacred dimensions of law. As I write in the Introduction, Anglo-American law:

> cannot be simplistically characterized as a legal system premised on the separation of church and state. Nor can it be argued that the rule of law is entirely rational, logical or pragmatic; law is not devoid of religious impulses either in the formation of its foundational concepts and myths of legitimacy, or in the religious battles and conflicts that have shaped its development over the centuries…I seek to recover some of the sacred dimensions of Anglo-American law that –for much of the modernist era – have been effectively silenced. This is an important platform from which to acknowledge that western law and its spiritual underpinnings may not be entirely appropriate or applicable to non-Christian cultures and their own religiously inspired systems of governance (Darian-Smith 2010, 12–13).

Acknowledging the sacred dimensions of western law underscores the limits of its applicability to non-Christian communities within state boundaries (as the failings of state multiculturalism suggest). So whether one lives in the United States, Britain, Norway, Germany, France or Australia, it is important to appreciate that migrants, native peoples, and other minorities are often being forced to think and behave in certain ways and accept certain conditions of citizenship that may not be entirely appropriate or applicable (see Darian-Smith 2004; Park 2004; Razack 2007; Elver 2012). The most obvious of these conditions is to conceptualize the self as a discrete rights-bearing individual. Individualism is the cornerstone of western legal practice, and yet many legal cultures base notions of self in collective identity, collective responsibility, and collective ownership. For instance, early European settlers recognized the existence among native peoples of different constructions of self based on community membership. Using this knowledge, colonial governments forced natives into a western legal polity in order to break up their concept of collective ownership of land, dismantle tribal social organizations, and undermine their community-based sense of identity (Darian-Smith 2010, 180–88). Today, some indigenous people continue to resent having to don the mantle of individualized citizenship and participate in a social system that they regard as intrinsically racist and spiritually exclusionary, and which positions traditional native culture and

Footnote 11 continued
values. In a sense everything is religion; and in a sense, everything is law—just as everything is time and everything is space. Man is everywhere and always confronting an unknown future, and for that he needs faith in a truth beyond himself, or else the community will decline, will decay, will fall backward. Similarly, man is everywhere and always confronting social conflict, and for that he needs legal institutions, or else the community will dissolve, will break apart. These two dimensions of life are in tension – yet neither can be fulfilled without the other. Law without faith degenerates into legalism; this indeed is what is happening today in many parts of America and the western world. Faith without law degenerates into religiosity. We must begin with these basic cross-cultural truths if we are to succeed in understanding what history requires of us here and now (Berman 1993, 20).

collective rights with respect to land as pre-modern and uncivilized (Borrows 2010; see also Davies 2007).[12]

Acknowledging the sacred dimensions of western law also underscores the limits of law's transferability and transplantation to non-European regions of the world (as the failings of the current wars in Iraq and Afghanistan suggest). Above all, recognizing western law has developed within the context of Christianity indicates that people in the global north should be hesitant in proclaiming a rational superiority vis-à-vis the supposedly emotional irrationality of Sharia law or any other non-western legal system that is more explicitly based within religious practices. As the Arab Spring has so clearly demonstrated, Euro-descended societies do not have a monopoly on concepts such as justice, rights, and democracy (see Asad 1993; Sen 2011). My general point is that by refusing to openly discuss how Christianity is embedded within the foundations of so-called secular western countries we will be unable to think more creatively about what would constitute plural multicultural strategies that are truly inclusive.

The second main argument in *Religion, Race, Rights* is the historical and contemporary importance of a western crusading logic. A crusading logic sustains the secular/religious divide discussed above, and concurrently reinforces orientalist assumptions of racial inferiority between us v them (rational v irrational, civilized v barbaric and so on). In Europe, the crusading logic first emerged with the crusades or "holy wars" that were waged upon the Islamic world for hundreds of years beginning in 1095 (Darian-Smith 2010, 36–41). Despite the common roots of European and Islamic peoples in the traditions and heritage of ancient Hellenic Greece, the crusades effectively created oppositional racial stereotypes that positioned good white Christians against barbaric darker-skinned Muslims.[13] This crusading logic of superiority and triumphalism, underpinned by the orientalizing of the other, justified both pre-modern and modern European wars. Today a crusading logic continues to inform right-wing European conservatism that demands immigration policies stop in order to prevent an Islamic "invasion" (Darian-Smith 2010, 267). Such sentiment has been most recently and violently expressed in the Oslo slayings of 77 young people by a gunman who described himself in his manifesto as a "modern-day crusader".

In the United States a dominant crusading logic and the racializing of others took a slightly different form from that expressed in Europe. In seventeenth century America the crusading logic morphed into an historical narrative that spoke deeply to the country's evangelical roots and nationalist spirit. As I argue in *Religion, Race, Rights*, crusading evangelicalism informed settler westward expansion across the North American continent under the banner of manifest destiny as well as the colonial policies of racial genocide against native peoples. Moreover, this crusading logic was a central impulse in US foreign policy throughout the late ninetieth and early twentieth centuries and again surfaced in the context of the Cold War (Darian-Smith 2010, 259–62). Today, evangelical righteousness and orientalist imagery continue to

[12] This opens up conversation about what flexible forms of citizen may look like in a post-national era, and goes beyond the parameters of my book. See Tambini (2001) and Sasssen (2003, 2004).

[13] Diarmaid MacCulloch has argued, "western Christianity before 1500 must rank as one of the most intolerant religions in the world" (MacCulloch 2003: 676).

frame events of 9/11 and the wars on "evil" Muslims, at the same time conveniently (and I suggest not coincidentally) justifying the exploitative dimensions of neoliberal capitalism (Darian-Smith 2010, Chapter 8). As Edward Said argued with respect to a crusading orientalist rhetoric, its "most damning characteristic is that it has been used before, not just once (by Spain and Portugal) but with deafeningly repetitive frequency in the modern period, by the British, the French, the Belgians, the Japanese, the Russians, and now the Americans" (Said 1993, xvii).

My third main argument in *Religion, Race, Rights* relates to the issue of time and space, and what I see as a constant need to reread and reconnect past histories to the geo-political contexts of their making.[14] Methodologically, I selected events for discussion in the book that I call legal landmarks. And as I note in my Introduction, other landmarks could have been chosen. What links the landmarks that I did select is that each starkly illustrates law's development through historical genealogies of race and religion, and each underscores law's ultimate inability to embrace a universal concept of the "human". As Denise poetically remarks, "In each of them there is this ghostly promise of a modality of governance, ruled by law and guaranteed by the state, which never quite lands" (Denise this issue).

Charting the historical genealogies linking these "ghostly promises", the book represents my quest to try and understand why, despite the obvious failures of law to achieve equity and equality, people living in western democratic societies continue to hold dear the promise of law and to have faith in what is seen as its intrinsic virtue. As I lay out in the book's Preface, the underlying question I hope to leave the reader, and one which I myself continue to grapple with, is:

> Why is the narrative of law's neutrality so compelling, perhaps even necessary, for contemporary western nations? Or, to put it another way, why do societies that employ Anglo-American law need to *believe*, perhaps now more than ever before, in the impartiality of the rule of law, despite many people's daily experiences to the contrary? (Darian-Smith 2010, xiii).

Denise notes in her comments that despite my revealing the limits of Anglo-American law to create social equality and democracy, I do not see failure in law itself but in the context of its application (Denise this issue). My response is that to the contrary, *Religion, Race, Rights* is my attempt to articulate the foundational failings embedded within western law (i.e. Christianity and its racist underpinnings) that have in turn constrained the conditions of its application. That being said, I am a product of my time and place,[15] and my need to believe in the promise of law,

[14] Personally, one of the reasons I wanted to write this book was to revisit some of the periods of history that I had encountered at university (ie Reformation history, Early English History), and reexamine assumptions taught to me in law school about the rationality and universality of western law. I was acutely aware that issues of racism had not featured at all in my education, while issues of religion had only featured when studying the pre-modern period. I felt that as both a student of history and a student of law I had somehow missed out on a much bigger story and I was keen to explore what it could be.

[15] Didi raises the interesting issue of whether my being Australian with some cultural distance from both Britain and the United States allowed me in some way to think critically about Anglo-American law (Didi this issue). There may be something in this comment though I have lived in both places for years that together account for more than half my lifetime, and so I am not sure what role my nationality played beyond a general willingness to point out the shortcomings of colonialism and imperialism.

despite its historical disappointments, speaks to my inability to imagine viable alternatives beyond law as practiced in democratic systems. This is why I ultimately read the Nuremberg trials as path-breaking (albeit I explicitly concede its enormous limitations in my book). For me, Nuremberg represents the qualifying of state sovereignty in the name of a greater international/transnational social good. It represents the embracing of the principles of legal pluralism, even if somewhat reluctantly, and the focusing on commonly sought long-term outcomes and goals rather than falling back on internal legal logics within national jurisdictions. That the Nuremberg trials involved only western nations and overlooked the gross hypocrisies of "victor's justice", does not, in my opinion, diminish its symbolic importance in establishing "the precedent of collective judicial collaboration" and in turn laying the groundwork for the United Nations, the Universal Declaration of Human Rights, the International Court of Justice, and more recently the International Criminal Court (Darian-Smith 2010, 212; see also Ignatieff 2001, 106–107).

The embracing of legal pluralism is the kernel of hope to which I cling. I take seriously Clifford Geertz's argument that the law is a way of "imagining the real" (Geertz 1983, 184), and so I promote legal pluralism for its potential capacity to imagine diverse realities and new possibilities.[16] Legal pluralism—at least theoretically—does not create a hierarchy of legal meaning but places different "legal sensibilities" side-by-side. These "legal sensibilities differ not only in the degree to which they are determinate; in the power they exercise, vis-à-vis other modes of thought and feeling, over the processes of social life…They differ, and markedly, in the means they use—the symbols they deploy, the stories they tell, the distinctions they draw, the visions they project—to present events in judiciable form" (Geertz 1983, 175; see also Merry 2008; Tamanaha 2001; Wilson 2000; von Benda-Beckman 1997). A commitment to plural legal sensibilities means that there is value seen in all conceptualizations of law, unlike state policies of multiculturalism which posit one dominant culture under which different subcultures must ultimately submit. Such a commitment seeks to promote legal commonalities by virtue of collective human goals such as health, security, and freedom of conscience. In addition, since legal pluralism exists in spaces and realms not necessarily bounded by state institutions, it is necessary to fold into the mix understandings of what constitutes "the legal" from various scales and formations of community at global, national, regional, subnational, village or neighborly levels (Santos 2004; see also Darian-Smith 1998).

All my work grapples with issues of legal pluralism because I see it as an avenue toward pushing law toward commonly sought goals, rather than conveniently resorting to formal logics and precedents within any given legal system that tend to maintain structural inequalities and the status quo (Darian-Smith 2004, 2000, 1999). As demonstrated under the Bush administration, formal legal logics can be twisted and manipulated to justify all sorts of gross injustices including torture. And over

[16] This quest to re-imagine is echoed in Jon's reference to "mourning and hope" and his quoting of Nietzche who wrote of the need "to replace what has been lost, to recreate broken moulds" (Jon this issue).

time, these internal formal logics can function to legitimize patterns of abuse, forming what I call "precedents of injustice" (Darian-Smith 2008). My hope in legal pluralism is that by acknowledging and embracing multiple legal epistemologies we can begin to imagine a new inclusive legal system more suitable to the complex cultural arrangements of the twenty-first century (see Santos 2007). In other words, by shifting a focus to shared values and commonly sought just outcomes across a range of cultures and religions and ethnic groupings, be these within nation-states or in international/transnational arenas, we may be able to move beyond the deeply embedded prejudices and hypocrisies built into Anglo-American law. The future of culturally pluralistic societies must not be reduced to an "assimilate or die" kind of mentality, justified by a racialized crusading logic. The long history of legal injustices over the past 500 years suggests that there is a limited future in that kind of worldview, rhetoric, and practice.

Moreover, and here I go beyond the book's discussion, it seems to me that a commitment to legal pluralism introduces new criteria by which the appropriateness of law should be judged, such that any law that cannot in practice be applied equitably should be deemed untenable. In the United States, this would mean that affirmative action laws that sought to address structural inequalities and level the playing field would be reinstated, and laws of capital punishment which result in a disproportionate execution of black youths would be discredited and dismantled. It would also mean that the United States could not so readily dismiss different conceptions of collective identity, community, property, and social relations such as advocated in the 2007 UN Declaration on the Rights of Indigenous Peoples. In short, legal pluralism offers some promise of tilting the balance of law's failings toward commonly desired just outcomes and for me that hope, albeit culturally constrained, is worth believing in.

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