Religion, Race, Rights is a rewriting of the history of modern western law. Challenging the assumption that law is an objective, rational and secular enterprise, it shows that the rule of law is historically intertwined with Christian morality, the forces of capitalism responsible for exploiting minorities, and conceptions of individualism bound up in the 16th century Reformation and rapidly developed in the Enlightenment in the 17th and 18th centuries. Drawing upon landmark legal decisions and historical events, the book emphasises that justice is not blind, because our concept of justice changes over time and is linked to economic power, social values, and moral sensibilities that are neither universal nor apolitical. The author's focus on the historical interconnections between religion, race and rights shines a bright light on contemporary legal issues and foregrounds the cultural specificity of western legal concepts. Moreover Darian-Smith shows how, in a global political economy, Anglo-American law is not always transportable, transferable, or translatable across political landscapes and religious communities.

'Darian-Smith's new book is an example of what is most exciting about new scholarship in the humanities... [she] explodes the myth of secularism in modern society, and the illusion of post-racialism, in her unblinking analysis of present dilemmas. Once you read this book you will never again think that the western concept of individual rights is sufficient to resolve the contradictions of modern existence. This is a genuinely important step forward in western scholarship.'
Stanley Katz, President Emeritus of the American Council of Learned Societies and Professor, Woodrow Wilson School, Princeton University

'Eve Darian-Smith takes us on an amazing journey spanning four centuries, brilliantly illuminating the continuously evolving interplay of law, religion, and race in the Anglo-American experience. This wonderfully readable book is imaginatively organized around a series of eight 'law moments' that ingeniously show how legal rights are subtly shaped by culturally prevailing ideas about religion and race.'
Richard Falk, Albert G Milbank Professor of International Law Emeritus, Princeton University

'Eve Darian-Smith offers a passionate, wide- ranging analysis of the complex, historically-vexed relations among religion, race, and rights over the past four centuries, beginning in 1517 with Martin Luther, and ending at the dawn of the new century with the discriminatory labor practices of Walmart, the recent crusades of George Bush and his theocons, and the resurgence of religious faith. ...This is an ambitious work of scholarship, which, by virtue of brush strokes at once deft and broad, challenges us to understand the legal underpinnings of our world in new ways.'
John Comaroff, Harold H Swift Distinguished Professor, University of Chicago

'Little torques public policy in modern America quite like race, rights, and religion. The mix is explosive fodder for shock-jocks of all political stripes. Few, however, appreciate the historical forces that gave shape to contemporary culture wars. Fewer still perceive that vehemently opposed positions share common roots in the religious history of Europe and its cultural offspring. Brilliantly and concisely canvassing five hundred years of the history of the west, Darian-Smith accounts for the lineage of complex ideas that inform contemporary America. She does so with clarity, insight, and sensitivity. This outstanding work is essential reading for those who would understand our shared present.'
W Wesley Pue, Professor of Law and Nathan Nemetz Professor of Legal History, University of British Columbia

Eve Darian-Smith is Professor of Global & International Studies at the University of California Santa Barbara, USA, and the author of *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe* (Winner of the Law and Society Association Herbert Jacob Book Prize).

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RELIGION, RACE, RIGHTS

Darian-Smith

HART PUBLISHING

RELIGION, RACE, RIGHT

LANDMARKS IN THE HISTORY OF MODERN ANGLO-AMERICAN LAW

Eve Darian-Smith

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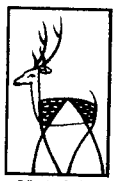

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RELIGION, RACE, RIGHTS

The book highlights the interconnections between three framing concepts in the development of modern western law: religion, race, and rights. The author challenges the assumption that law is an objective, rational and secular enterprise by showing that the rule of law is historically grounded and linked to the particularities of Christian morality, the forces of capitalism dependent upon exploitation of minorities, and specific conceptions of individualism that surfaced with the Reformation in the sixteenth century and rapidly developed during the Enlightenment in the seventeenth and eighteenth centuries. Drawing upon landmark legal decisions and historical events, the book emphasises that justice is not blind, because our concept of justice changes over time and is linked to economic power, social values and moral sensibilities that are neither universal nor apolitical. Highlighting the historical interconnections between religion, race and rights aids our understanding of contemporary socio-legal issues. In the twenty-first century, the economic might of the USA and the west often leads to a myopic vision of law and a belief in its universal application. This ignores the cultural specificity of western legal concepts, and prevents us from appreciating that, analogous to previous colonial periods, in a global political economy Anglo-American law is not always transportable, transferable or translatable across political landscapes and religious communities.

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Preface

This book was written to highlight the importance of history in contemporary socio-legal scholarship. My hope is that by interesting the reader in past events, and illustrating how these events remain significant to our understanding of law in the present, I might convince the reader that history matters to our future. History may not help us predict the future, but it can show us that the challenges we face are not necessarily new, and that proposed solutions may not necessarily be the best solutions. History, as the historian Margaret MacMillan notes in her book *Dangerous Games: The Uses and Abuses of History*, is important for teaching us the limits of our understanding, and for nurturing humility, skepticism and an awareness of ourselves.

More specifically, I hope to show that the historical narratives that have developed over 400 years with respect to the development of modern western law—that law is objective, rational, universal and unbiased—are fundamentally flawed. By highlighting selected historical moments which I call 'legal landmarks', and focusing on the ways in which the concepts of religion, race and rights influenced the unfolding events, I suggest that Anglo-American law is deeply imbued with the ideologies, values and concepts that these discourses promoted. This point is of grave importance given the increasing cultural, religious and legal pluralism apparent in many countries in the early years of the twenty-first century.

I explore the development of Anglo-American law against the backdrop of great social, cultural, religious and economic revolutions. At times law facilitated these upheavals; at other times law was forced to respond, accommodate and adapt to new circumstances and conditions created by them. In short, Anglo-American law is both an architect and an artifact of social change. Most importantly, it is never value-free, floating abstractly above the melee of power and politics that informs everyday interactions.

The underlying question that frames the book, and the issue I leave the reader to ponder, is: Why is the narrative of law's neutrality still 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?

Introduction: Connecting Religion, Race and Rights

ON 18 MARCH 2008, the US presidential candidate, Senator Barack Obama, gave an unprecedented speech on race and religion and their connection to inequality. The speech was a response to the fiery words of Obama's pastor, who—on media beamed around the world—had damned white Americans for their oppression of blacks. The public outrage over the pastor's address in turn forced Obama to face head-on the sticky topic of religion, race and rights. In a deeply moving speech reminiscent of a sermon, which reduced some to tears, Obama did what most politicians have failed to do—acknowledge and confront the complex intersections of religion, race and inequality in American society. By highlighting the histories of slavery, oppression and lack of opportunity that inform the bitter divide between black and white communities, Obama declared, 'I have never been so naive as to believe that we can get beyond our racial divisions in a single election cycle, or with a single candidacy—particularly a candidacy as imperfect as my own ... This union may never be perfect, but generation after generation has shown that it can always be perfected.'[1]

The long-standing silence of politicians and commentators on the connections between religion, race and rights begs the question: Why? This book is about the relationship between religious faith, racist practices and the growth of legal rights in the history and development of modern European-Anglo-American law, or what I refer to as Anglo-American law or western law more generally. I argue that we cannot understand the enduring political, economic and social inequalities that plague our so-called democratic systems if we do not confront the question of how legal rights relate to religious and racist discourses at any one moment in time. While there have been wonderful books written about law and racism in the United States, including Patricia Williams' *Alchemy of Race and Rights* and Ian Lopez's *White By Law*, few scholars have engaged the historical relationship of law and religion. Among legal historians, most accounts of Anglo-American law

[1] Obama's speech was reminiscent of other famous speeches on race—most delivered by blacks. See Abraham Lincoln's speech at the Cooper Union in New York, 27 February 1860; Booker T Washington, 18 October 1895; President Lyndon B Johnson, 4 June 1965; and Jesse Jackson, 18 July 1984 (Wills 2008).

fail to speak about either race or religion at all. There are notable exceptions (Berman 1993, 2003; Witte 2002, 2006; Witte and Alexander 2008), but on the whole legal historians have tended to focus on changes in specific laws as a way to speak to wider societal transformations. Such accounts tend to prioritize the economic impulses of capitalism in the development of contract law, torts law, property law, family law, and so on. In short, issues of religion, race and rights are not always seen as connected in accounting for change in western legal cultures.

This book critically engages with the basic assumption that modern western law is an objective, unbiased and rational enterprise, and by implication the product of secular societies. Drawing upon what I call legal landmarks that involve conflict over religion, race and rights, I underscore the sacred, irrational and ideological elements embodied within modern law. I show that today's western understanding of the rule of law is historically grounded and linked to the particularities of Christian morality, the institutionalized exploitation of minorities, and specific conceptions of state and individual rights. These rights first surfaced during the Reformation in the sixteenth century, rapidly developed through the Enlightenment in the seventeenth and eighteenth centuries, and now form the basis of contemporary law, which pivots on the concept of an individual's legal entitlement to ownership of one's own life and property.

It is important to acknowledge the irrational and ideological elements in the development of western law in order to see that justice is not blind, because our concept of justice changes over time and is linked to economic power, social values and moral sensibilities that are not universal, apolitical or static. This point is of great significance in the early years of the twenty-first century, as the economic might of the United States and other industrialized nations often leads people to take a myopic vision of law, and adopt a readily asserted belief in its universal application. This perspective ignores the cultural specificity and ideological content of western legal concepts, and prevents us from appreciating that, analogous to past colonial periods, in today's global political economy Anglo-American law is not always transportable, transferable or translatable across political landscapes, cultural customs or religious communities. In other words, this perspective fails to recognize the tension inherent in western law between its claims to universalism on the one hand, and its particular historical development in unique social and cultural contexts on the other.

This book is organized around events, trials and people that were significant in the development of Anglo-American law. These landmarks occurred from the sixteenth century through to the present day, and have been selected because they are emblematic of greater social, cultural, economic and political forces that together have shaped (and are shaping) the profile of the modernist era. 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. However, I believe that the topics selected are significant as symptomatic of the jostling among communities and political groups representing various religious, economic, nationalist, ethnic and humanist interests in any one

historical era. 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 agree. That being said, though, I hope that the breadth of the historical narrative conveys an expansive outlook, one that prompts the reader to see links and connections across time.

The legal landmarks selected, and the tensions between the various group interests that they underscore, raise core questions that I explore throughout the book. How and in what ways did these groups access the legal system? Did the legal system support one faction over another, and if so, why? In what ways did conflict and opposition (and at other times unity and cooperation) between interest groups create opportunities for the growth of new legal concepts, legal reform and/or legal repression? How were discourses about religion, racism and rights constructed, mobilized or manipulated to serve the particular demands and needs of any one community or association? How did changes in legal practice affect wider social values, assumptions and common-sense understandings of national and/or cultural identity and related practices of racial differentiation? Did changes in public attitudes to religion and spiritual affiliation help to shape justifiable legal discrimination against minorities and racialized others? And as dominant attitudes shifted with respect to the relative importance of religion and race, how were these shifts connected to colonialism and capitalism? In other words, in what ways did colonialism, capitalism and their combined drive for cheap labor affect (both positively and negatively) the emerging concept of a rights-bearing citizen?

These sorts of questions indicate that this book does not present a conventional legal history. Rather, I am attempting a cultural study of law that explores the 'conceptual conditions that make possible that practice we understand as the rule of law' (Kahn 1999: 36–37). I use specific legal events as a lens through which large-scale paradigmatic shifts in legal thinking may be viewed. These in turn reflect people's commonplace assumptions and imaginings about law in their everyday activities. A cultural interpretation of specific legal events opens up for discussion the wider and often contested societal contexts involving religion and race that influence legal change. In this respect I take seriously Paul Kahn's argument that 'the rule of law is a social practice: it is a way of being in the world. To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation' (Kahn 1999: 36). My focus is on the shifting contours of those sets of beliefs over the centuries—particularly as they relate to ideas of religion and race—such that law appears at any one moment in time 'as the legitimate and even "natural" arrangement of our collective lives' (Kahn 1999: 36).

In thinking about the connections between discourses of religion, race and rights I refer to the concept of 'intersectionality'—a term associated with feminist theorists Kimberlé Crenshaw and Patricia Hill Collins—to emphasize that discourses of religion, race and rights are interrelated, dynamic and co-constitutive of each other (see Crenshaw 1989, 1991; Collins 1998; Grabham et al 2008). In

short, I argue that these three categories are analytically distinct, but dialectically interconnected in practice and meaning. Wars of religion are always about something other than religion, and discriminatory practices are always about something other than simply marking racial difference. Similarly, the conceptual emergence of a citizen's legal rights cannot be discussed without also referring to who qualifies as 'human', as well as to issues of nationalism, internationalism and forces of capitalism that have informed the relationship between a nation and its citizenry.

In exploring the intersections of religion, race and rights I do not wish to suggest that these are the only forces at work in shaping legal concepts and norms. Class, gender and sexuality are obvious variables that also play a critical role. I do not exclude these elements, nor foreground them as the central pillars of my argument. Moreover, in exploring the connections between religion, race and rights I do not mean to suggest that at any given moment each prompted equal public attention or held equal political weight. Sometimes public debates over race were heard over those relating to religion. At other moments, concern with political and civil rights took center stage. For instance, in the early modern period leading up to the mid-eighteenth century, religious belief played a more explicit role in governing people's everyday thoughts, practices and political loyalties. Religion was central to explaining why the world was as harsh and brutal as it was. Albrecht Durer's famous woodcut, *The Four Horsemen of the Apocalypse* (1497), dramatically illustrates the sense of imminent death, famine, war and plague facing medieval societies as prophesized in the Book of Revelation 6: 1–8 (Figure 1). However, the centrality of religion in people's lives gradually declined with increasing industrialization and technology, and the growth of cosmopolitan city centers throughout the nineteenth century (McLeod 2000). Racist practices, too, fluctuated in their influence and political prominence over the centuries, coming to the fore in debates such as those over slavery, but deliberately glossed over during McCarthyism and the Cold War era. And while conceptualizing human rights is often associated with eighteenth-century Enlightenment philosophers, it was not until the post-World War II period that human rights assumed political prominence and became a force in international and intra-state negotiations. My general point is that, whether in public conversations or behind closed doors, debates about questions of religion, race and rights have always been in constant play in defining the western legal norms that inform today's national, international and transnational legal landscapes.

Finally, in exploring the intersections of religion, race and rights I do not want to suggest a causal or determinative relationship. Hence I am not arguing for a linear account, implying that shifts in religious faith caused shifts in constructing categories of race, which in turn created new social attitudes that are reflected in laws about property rights, citizenship qualifications, or the ability to vote. Rather, my contention is that the ebb and flow of religious practices, fluctuating racial tolerances, and the emerging idea of a rights-bearing individual are overlapping constitutive forces that together shape and have been shaped by legal

Figure 1. *The Four Horsemen of the Apocalypse*, 1497, Albrecht Durer. Staatliche Kunsthalle Karlsruhe.

The horseman holding a bow represents disease, the rider with a raised sword represents war, the rider with empty scales represents famine, and the rider holding a trident represents death.

processes. In my argument, law functions as the central axis around which discourses of religion, race and rights circulate, crystallize as ideological concepts, and become institutionalized through the administrative, bureaucratic and military agencies of the state. Law operates as a central site of organizing power, imbuing these debates with rationality, neutrality and legitimacy backed up by the ever-present threat of state-sanctioned violence.

DEFINING THE TERMS

Religion, race and rights are complex and difficult terms to define, and their meaning and application have been the focus of much scholarly and philosophical debate across historical epochs. I use the terms loosely to designate sets of

belief that at particular historical moments have been mobilized to inform political ideologies, which in turn have shaped the development of Anglo-American law. For each landmark discussed in the book, I show that as proponents of particular beliefs with respect to religion, race and/or rights sought legal legitimacy for their perspectives, the rule of law and the status of the sovereign state shifted to accommodate, resist or empower believers according to wider historical contexts and social and economic forces.

Very briefly, *religion* is a belief in the existence of a supernatural force and the set of practices that substantiate that belief. Philosophers and scholars have sought to define the concept of religion for hundreds of years. Early descriptions of religion from sociological and anthropological perspectives were analyzed by Karl Marx, Max Weber, Emile Durkheim, Herbert Spencer, Edward Tylor and James Frazer in the latter half of the nineteenth and early twentieth centuries (see Fenn 2003; Clarke 2009). Some of these scholars, such as Durkheim, focused on the divide between the profane and the sacred as the defining feature of a religion and pointed to the collective dimensions of religious practice to create community solidarity. More recently, scholars such as Clifford Geertz and Thomas Luckmann have emphasized the deeper symbolism behind religious practices 'by which everyday life is brought into relation with a transcendent reality' (Hamilton 1995: 184). Arguably no single definition has adequately encapsulated the diversity and range of faith-based practices over the past 400 years. This becomes even more apparent given the range of religious practices in the early years of the twenty-first century. 'New Age, flying saucer cults, radical environmentalists, eco-feminism, human potential groups, holistic therapies—all have been identified as instances of a growing religious diversity quite different in character from the organized and exclusive practices of the church, denomination and sect' (Hamilton 1995: 15). Clearly, it is no longer possible to limit the identification of religion along the lines of recognizable and formal ritualized practices of mainstream religions. However, since this book is concerned with the moments when religious discourse is mobilized for the purposes of justifying and granting ethical legitimacy to a particular ideological position, it engages primarily with mainstream, institutionalized religious practices.

The concept of *race* is a social construct that shifts over time, as do the meanings that people attach to the concept. The idea that there are distinct human races existed in the Ancient and Greco-Roman worlds. However, with the emerging Enlightenment in the seventeenth century race began to be thought of in scientific terms. Gradually, early scientific theories hardened into social evolutionary racial hierarchies whereby white-skinned people were deemed 'naturally' superior to darker-skinned people. In other words, old ideas about racial difference were given a new meaning. As Ivan Hannaford notes in his illuminating book *Race: The History of an Idea in the West*, 'it was not until after the French and American Revolutions and the social upheavals that followed that the idea of race was fully conceptualized and became deeply embedded in our understandings and explanations of the world. In other words, the dispositions

and presuppositions of race and ethnicity were introduced—some would say "invented" or "fabricated"—in modern times' (Hannaford 1996: 6; Gossett 1997: 3–16). Pseudo-scientific theories of race provided the logic to invent markers of racial difference, such as intelligence levels, physical ability, or personal dispositions such as laziness or dirtiness. These racial markers played enormously significant political and social roles in the eighteenth, nineteenth and twentieth centuries, and informed, amongst other things, laws determining who could claim civil and political rights and citizenship.

All humans belong to the species *homo sapiens* and there is no discernable genetic difference between people from different parts of the world, despite common physical traits between geographical regions, such as hair color or skin color. However, acknowledging that the concept of race has no scientific basis, and is in fact socially constructed, does not prevent the idea of distinct human 'races' operating within and across societies and shaping most people's everyday assumptions about cultural difference. False understandings of race continue to shape contemporary mainstream attitudes and social behaviors. 'It is in this context that race is both a falsehood and a fact, being false in its biological, scientific sense and factual in its very real effects on lived experience' (Sturm 2002: 15). An extremely disturbing aspect of all societies is how often popular misunderstandings about race pop up in political ideologies and surface in legislation and government policies such as those relating to immigration, access to social services, criminalization of particular ethnic groups, dismantling of affirmative action policies, and school voucher programs. In short, ideas of race, no matter how incorrect or misleading, cannot be disentangled from society's willingness to acknowledge an individual's right to equal opportunities and legal representation.

The concept of *rights* is also complicated and can be broken down into various categories, such as civil, political, economic, social and cultural rights. These different kinds of rights include, to varying degrees, the belief that all people are created equal in nature. Some of these rights, such as the right to vote and the right to be politically represented, are based on a person's status as a citizen of a state. In contrast, human rights, at least in theory, are not necessarily linked to a person's status with respect to state institutions but are supposedly determined on the basis of their intrinsic human dignity.

Modern ideas about rights developed relatively recently and are usually associated with the massive political and cultural shifts that occurred in European societies as a result of the Protestant Reformation of the sixteenth century. In this period, as historian John Witte Jr notes:

> Protestant doctrines of the person and society were recast into democratic social forms. Since all persons stand equal before God, they must stand equal before God's political agents in the state. Since God has vested all persons with natural liberties of life and belief, the state must ensure them of similar civil liberties. (Witte 2006: 40)

The Reformation's reliance on biblical texts to justify individuals' state-sanctioned right to freedom was gradually replaced in the seventeenth and eighteenth centuries by 'a new foundation of rights and political order' grounded in 'human nature and the social contract' (Witte 2006: 41; Ishay 2008). Philosophers and political commentators such as Thomas Hobbes, John Locke, Jean Jacques Rousseau, Thomas Paine and Thomas Jefferson argued that every person has the capacity to choose for him or herself the best way to achieve personal goals in what is known as the 'state of nature'. Unfortunately, in the state of nature people could be violent and selfish in their pursuit of self-interest. This required the intervention of the nation-state to bring order and control. And so, the argument went, a social contract was formed whereby people gave up some of their rights to the state, and in return the state was obliged to protect and defend them.

In Europe and the United States, against the turbulent background of the American War of Independence (1776) and the French Revolution (1789), the notion of human rights emerged based on a person's inalienable rights to life, freedom and liberty (Hunt 2008). Encapsulated in the French Declaration of the Rights of Man and of the Citizen (1789) and the American Bill of Rights (1791) was the idea that all individuals have, by virtue of their humanity, certain inalienable rights that the state is obligated to defend. In practical terms, this meant that a person's human rights were limited to the extent that the state would defend them. A person's status as citizen was seen as key in determining the degree to which a liberal democratic state would involve itself, or not, in defending any notion of rights and freedoms.

Unfortunately, the history of human rights is also a history of violence, oppression and exploitation. Colonialism, and the conquest and occupation of European nations over large areas of Africa, the Americas and Asia-Pacific regions from the sixteenth to the twentieth centuries, helped to establish schema whereby people were determined to be Christian or non-Christian, civilized or savage, citizens or non-citizens. These schema or hierarchies of mankind were based on social-evolutionary anthropological understandings of race which presumed that different human characteristics, such as intelligence, correlated to a person's ethnic identity and racial classification. In the nineteenth and early twentieth centuries, these pseudo-scientific arguments developed into popular theories associated with eugenics, which sought to classify mankind on the basis of genes and improve mankind through selective breeding, sterilization, and other horrifying social policies. As a result, 'While the colonizing West brought the constitutive aspects of the human rights tradition—sovereignty, constitutionalism, and ideas of freedom and equality—their beliefs about anthropology effectively excluded non-European peoples from human rights benefits' (Stacey 2009: 12).

With decolonization in the mid- to late twentieth century came a change in policies excluding non-European peoples from human rights benefits. The decolonization era saw the withdrawal of many European powers from their

former colonies. International attention focused on the implementation of human rights in new self-governing systems. With the establishment of the United Nations in 1945 in the wake of World War II, and the issuing of the Universal Declaration of Human Rights in 1948, the subject of human rights was radically transformed. A number of formerly colonized countries joined the international forum of the United Nations and helped to draft the Universal Declaration. The Declaration's primary purpose was to protect individuals' human rights from violation by state governments, as had occurred under the Nazi regime which resulted in the mass extermination of millions of people. In an attempt to prevent such atrocities of war (and colonialism) from ever reoccurring, the Universal Declaration did not link human rights to citizenship but argued that people, as bearers of human rights, were self-determining, sovereign actors, whether or not a given state recognized them as such. In other words, the Universal Declaration attempted to move human rights discourse away from its former dependence on nation-states as the grantor and enforcer of a person's rights. While recent progress has been made in this regard, such as the establishment of the International Criminal Court in 2002, the conceptual innovations based on principles of self-determination introduced by the Universal Declaration of Human Rights have not yet been fully realized in national and international law (Stacey 2009).

Complicating the effectiveness of national and international human rights law is the premise that it is universal in its application. This premise is questioned by third world and postcolonial scholars, among others, who are skeptical that modern western law can operate as a rational and objective enterprise, devoid of cultural assumptions, values and biases (Preis 1996; Baxi 2006; Chimni 2006; Anghie et al 2003). This skepticism has an historical basis. In the past, the Enlightenment's triumphant narratives of reason and objectivity were employed by European leaders to argue that western law was universal and therefore applicable to colonized communities. Over the last 300 years, law has been a most effective weapon in institutionalizing colonial oppression and the imperial exploitation of non-European peoples. Against postcolonial scholars' critique of western law's universal claim, Anglo-American scholars have pointed to the secularization thesis, arguing that with the decline of religion in western societies through the nineteenth and twentieth centuries there has been a correlative rise in scientific logic and rationality. From a western perspective, law is interpreted as being a product of secularization, devoid of cultural particularities, and capable of being transferred and applied around the world. Modern Anglo-American law is a hallmark of modernity, and modernity, so the argument goes, is synonymous with secularization.

THE SECULARIZATION THESIS

Philosophers of the English and French Enlightenment such as Francis Bacon (1561–1626) and Voltaire (1694–1778) prophesied that with the rise of scientific experimentation and rational logic there would be a correlative decline in the importance of religion. These men argued that people would no longer depend so heavily on their spiritual beliefs to explain the world and their place in it. The natural and material worlds could be explained in empirical terms according to the laws of science. This prophecy turned out to be true, at least in part. During the eighteenth and nineteenth centuries European societies witnessed a steady decline in institutional religious practices, and public demonstrations of faith became less overt. This decline in public religiosity did not occur at the same rate or in the same manner in all countries and communities. However, it was sufficiently widespread across Europe and North America for Max Weber to argue in *The Protestant Ethic and the Spirit of Capitalism* that the rise of rationalization, particularly in the United States, had stripped the 'pursuit of wealth' of its religious and ethical meaning (Weber 1904: 182). Weber, along with other social commentators such as Karl Marx, subscribed to the secularization thesis, which assumes the inevitable decline of religion as a political and economic force in society and in the minds of individuals. Secularization, and the understanding that men and women are personally responsible for their actions and not subject to the whim of God, imbues ideas of 'progress' and 'improvement', which are emblematic of modern capitalist societies.

In recent years the secularization thesis has been hotly debated by sociologists of religion and church historians, divided on the issue of whether western society has become more, rather than less, religious since the Middle Ages. The issue in question is the degree to which the lessening power of religious institutions at the macro level correlates to a lessening of subjective religious belief at the individual level (Martin 2005; Gorski 2000; Demerath 2001; Norris and Inglehart 2004: 3–32). Peter Berger, a leading sociologist, summarizes the central problem:

> To be sure, modernization has had some secularizing effects, more in some places than in others. But it has also provoked powerful movements of counter-secularization. Also secularization on the societal level is not necessarily linked to secularization on the level of individual consciousness. Certain religious institutions have lost power and influence in many societies, but both old and new religious beliefs and practices have nevertheless continued in the lives of individuals, sometimes taking new institutional forms and sometimes leading to great explosions of religious fervor. Conversely, religiously identified institutions can play social or political roles even when very few people believe or practice the religion that the institutions represent. To say the least, the relation between religion and modernity is rather complicated. (Berger 1999: 2–3; Sheehan 2003)

Berger, along with other scholars, argues that it is increasingly clear that the secularization thesis is too simplistic and modernity is not synonymous with secularization. Yet if we accept this, can we reconcile the enduring presence of

religion in western societies with the dominant assumption that law is a logical, rational and objective enterprise, free of any connection to subjective spiritual belief? As the legal historian AG Roeber has remarked, 'The reemergence of competing and possibly irreconcilable religious and legal systems in a postmodern twenty-first century unsettles much of the accumulated wisdom on the modernizing dimensions of early modern states and communities' (Roeber 2006: 201; see also Bhandar 2009). This questioning of the long-accepted secularization thesis has, in turn, prompted a reassessment of the development of modern nation-states and the role of secularization in their formation. There is an emerging appreciation that secular and religious practices are not unconnected or mutually exclusive. Hence, writes Nomi Stolzenberg:

> Contrary to the expectations of the likes of Marx and Proudhon, modern life has not been characterized by the 'withering away' of religion. Instead, we have witnessed the increasing polarization of religious and secular points of view. This polarization feeds on itself. It is all too easy to dismiss religious critiques of the law and the secular state as the products of fanaticism, religious fundamentalism, and political extremism, with which there is no possibility of constructive engagement. Conversely, it is all too easy for defenders of religious tradition to demonize the secular world. Both sides demonize the other; both sides talk past each other, without realizing that they share a common root. In fact, religious fundamentalism and modern secularism derive from—and yet are cut off from—a common political and religious heritage, an intellectual tradition borne of the struggle to reconcile the idea of divinity with the practical needs and limitations of the mortal world. (Stolzenberg 2007: 31–32)

Recognizing the limitations of the secularization thesis in explaining the development of modern liberal democracies has inspired a new body of thinking on the relationship between law and religion (see Cane 2008). There is a need to question the assumed separation of religion and state in modern liberal democracies, as well as a need to recognize that religious associations and apocalyptic visions continue to play a role in shaping political policies and public attitudes, particularly in the United States (Taylor 2007; Hall 2009; Micklethwait and Wooldridge 2009). As Mark Lilla, a scholar of modern theology and politics, has noted:

> The twilight of the idols [Bacon] has been postponed ... Today we have progressed to the point where we are again fighting the battles of the sixteenth century—over revelation and reason, dogmatic purity and toleration, inspiration and consent, divine duty and common decency. We are disturbed and confused. We find it incomprehensible that theological ideas still inflame the minds of men, stirring up messianic passions that leave societies in ruins. We assumed that this was no longer possible, that human beings had learned to separate religious questions from political ones, that fanaticism was dead. We were wrong. (Lilla 2007: 3)

Religion and religious fervor appear to be alive and well, even among the most advanced industrialized societies typically characterized as secular. The presence of religious belief in political institutions is quickly revealed on an examination

of the relationship between church and state. In Britain, the Bill of Rights (1688), Act of Settlement (1701) and Act of Union (1707) continue to exclude Roman Catholics from the throne. People who have fallen foul of this prohibition include Prince Michael of Kent and the Earl of St Andrews, who married Catholics in 1978 and 1988 respectively. Many British people believe that these laws are archaic, and legal challenges have been mounted on the basis that they conflict with the country's Human Rights Act (1998). According to a leading constitutional lawyer, Geoffrey Robertson QC, 'The Act of Settlement determined that the crown shall descend only on Protestant heads and that anyone "who holds communion with the church of Rome or marries a papist"—not to mention a Muslim, Hindu, Jew or Rastafarian—is excluded by force of law. This arcane and archaic legislation enshrined religious intolerance in the bedrock of the British constitution' (*Guardian Weekly*, 3 October 2008: 16).

In the United States, the distance between church and state is in many ways even less clear-cut than in Britain. According to Diana B Henriques, a *New York Times* reporter who has written extensively on the Bush administration's favoring certain religious organizations with tax exemptions, the church-state separation is a 'portable wall' (*New York Times*, 13 May 2007). Some legal scholars have shown not only that the concept of separation is open to interpretation, but that the concept has not always existed in US history, as is widely assumed. Philip Hamburger's *Separation of Church and State* (2002) is perhaps the most eloquent in debunking the myth that the founding fathers wanted to employ the doctrine of separation to guarantee religious freedom. On the contrary, he argues, the doctrine of separation was initially met with derision and criticism. However, in the late eighteenth century and into the nineteenth, the concept of separation was reinvigorated due to the rise of anti-Catholic organizations and others anxious to quell religious minorities. As a result, the concept of separation was installed as a central tenet in democratic governance. Hence the doctrine, now symbolic of democracy's tolerance of religious freedom, is arguably an historical product of religious discrimination and prejudice. Arguing against this view are distinguished scholars such as Isaac Kramnick and R Lawrence Moore, who in *The Godless Constitution: A Moral Defense of the Secular State* (2005) write about the foundational separation of church and state in American government.

Whatever side one takes in the complex debate about the separation of church and state in US constitutional history, it now seems clear that the widespread popular assumption that the rule of law epitomizes the secularism of modern society does not stand up. Despite a long-accepted narrative in liberal western societies, 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 rationale, 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. 'Law, thought to be one of the exemplary domains of secularism, instead emerges as a signal location in which the sacred

has resided and continues to reside alongside and as a fundamental part of the secular' (Umphrey et al 2007: 20; Schlag 1997; Novak 2000).

In this book 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.

LAW AND RELIGION

The rise of science in the seventeenth and eighteenth centuries dovetailed with Enlightenment liberal ideology and together engendered skepticism that a Christian God is the inspirational source of all knowledge. Such skepticism had profound political consequences. In England it led to a public denunciation by parliament of the king's claim to 'divine authority', as dramatically displayed in the beheading of Charles I in 1649. Over the politically turbulent decades that followed, which included reinstating Charles II as king, a belief in God as the highest authority in the land was gradually replaced by a progressive system of constitutional democracy where men (not women) assumed responsibility for making legal rules through the application of what they thought of as logic, balance and reason. In the United States, the distancing between God and government played out in the signing of the Constitution (1787) and the Bill of Rights (1791). Together these documents created colonies free to govern themselves according to principles of equality and liberty, where one's personal religious affiliation was supposedly irrelevant (so long as one did not claim to be godless!). In the same period, the French Revolution of 1789 witnessed the rise of the Third Estate (primarily middle-class merchants) against the clergy and nobility. This revolt against traditional elites ultimately led to the decline of the *ancien régime* and the guillotining of King Louis XVI and his queen, Marie Antoinette. Importantly, in each of these three major revolutions in Britain, America and France, the separation of religion and state (and private and public spheres) was seen as exemplifying a transition from feudal society to modern self-governing societies free from supernatural intervention.

In contrast to the well-received revolutionary narratives of increasing secularization in Europe and America, this book presents three main arguments with respect to law and religion. First, I argue, in the spirit of legal theorist Austin Sarat, that 'modern law's relation to the sacred remains deeply ambivalent' (Sarat 2007: 188). While a hallmark of western law is that it is made by and for the people it serves, its ultimate validity seems to rest on some reference to a higher order of natural law and divine authority. Thus at the times when new regimes of western law were constructed, lawmakers typically invoked some concept of the sacred as a source of legitimacy for their actions (Asad 2003; Sarat et al 2007;

Fitzpatrick 1992: 51–63; Fitzpatrick 2004). As Martha Umphrey notes with respect to the American founders who evoked 'divine warrant' in the writing of the Declaration of Independence and the Constitution:

> God functions as an absolute that undergirds the legitimacy of the new order by virtue of its greater harmony with divinely ordained natural law. ... Moreover, this turn to God comes at an extremely inharmonious moment: one of rupture and one that anticipates the impending revolutionary violence that inaugurates a new law, which will in turn legitimate the preceding violence. (Umphrey et al 2007: 11)

Secondly, I take seriously the idea that western legal concepts such as 'state', 'representative government', 'sovereignty', 'rights' and 'the individual' have their roots in Christianity (Mensch 2001; Roeber 2006: 200; Witte and Alexander 2008). Perhaps one of the more controversial proponents of this view is Carl Schmitt, who in his *Political Theology*, written amidst the turmoil of the German Weimer Republic in 1922, argued that 'all significant concepts of the modern theory of the state are secularized theological concepts' (Schmitt 1934: 36). In other words, according to Schmitt, a Catholic worldview permeates our understanding of the state apparatus. Notwithstanding whether one finds Schmitt's arguments compelling or repugnant given his subsequent association with the Nazi dictatorship, the point I would stress is that there is an intrinsic cultural affiliation between legal and Christian practices. This does not mean that the development of modern western law and the liberal nation-state can or should be understood solely from the perspective of Christian faith. However, as Elizabeth Mensch argues, 'much liberalism appropriated the forms and values of Christianity' (Mensch 2001: 61). She goes on to say:

> The medieval church employed the methodology of law to construct itself as a vast, legally constituted political entity. Moreover, by epistemologically combining the mystical and the legal, it invented a number of concepts still central to liberal legalism. For example, with the church as the first case in point, medieval canonists described a corporate body sufficiently of the present age to own property and enter contracts, yet sufficiently like the body of Christ to survive the death of any particular church official. From thence emerged the modern corporation, which has an existence apart from the mortality of any individual CEO or group of shareholders. Similarly, canonists produced something like a theory of representation: the pope was head of the church, with authority over members because he 'embodied' the whole church, which was in him. ... The concept of embodiment was a first step toward a theory of representation: because the many were mysteriously present in the one, the one could legitimately make decisions on behalf of many. (Mensch 2001: 61)

Moreover, Mensch continues, the modern state is premised on its 'inquisitorial' character, which means that the state—like the Catholic Church in earlier centuries—assumes the ultimate power to authorize investigations into nonconformist behavior and implement sanctioned violence (Mensch 2001: 71–2; Derrida 1990; Kirsch 2009). The state's ability to use violence legitimately was most famously discussed by Max Weber in *Politics as a Vocation* (1919), where he

defined the state as an entity having a monopoly on the legitimate use of physical force within a given territory. Hence law, as a mechanism of the state, embodies the potential to implement authorized violence, a point graphically made by Michel Foucault in his analysis of the transition from public executions to panopticon prison systems in *Discipline and Punish* (1995). Today the state's legitimate exercise of violence can be seen in everyday forms of policing as well as in its marshalling of military force in times of perceived crisis and potential conflict.

Thirdly, I argue that, analogous to the ways in which western law developed over time through negotiation of categories of race, class and gender which determined who qualified as 'citizen' at any given moment in time, law also developed over time as a result of negotiations about categories of religious affiliation. This point is important but rarely discussed. Often glossed over in explorations of the development of Anglo-American law are its histories of conflict and legal discrimination between Christians and non-Christians (ie colonists against native peoples), as well as between members of different Christian faiths (ie Protestants against Catholics). These conflicts determined a person's standing and status before the law. Just as the color of a person's skin was and is used as a way of demarcating 'us' and 'them', a person's spiritual affiliation also historically functioned and continues to function as a marker of cultural identity and differentiation that can justify both explicit and implicit legalized intolerance. Significantly, racial and religious intolerance are not mutually exclusive practices; in many cases prejudices dovetail and overlap. In countries such as Australia, Britain and the United States this was most recently demonstrated by legislative endorsement of racial profiling against dark-skinned people of Islamic faith in the wake of the 9/11 terrorist attacks. Today it may be possible to say that, similar to previous historical eras, religion has again emerged as being more significant than race as a primary indicator of ethnicity and difference.

LAW AND RACE

A fact often forgotten or ignored in the public domain is that Anglo-American law is an effective mechanism for institutionalizing racial discrimination. Despite the existence of an extensive body of scholarship on law and its role in implementing or resisting racial discrimination, little recognition is given to the ways in which law underpins racial discrimination in the public consciousness. One reason for this amnesia is that, following the civil rights era in the 1960s, it is now illegal in most liberal democracies to differentiate between people on the basis of skin color, cultural affiliation and/or gender. In the twenty-first century all citizens governed through democratic legal systems ostensibly have equal rights to vote, go to court, buy a house, seek employment, and so on. In a superficial sense, the battle for racial equality has been won. However, racism is still pervasive and Du Bois' 'color line' has not been eradicated but rather made more

difficult to articulate and define (Du Bois 1903: 10). By this I mean that contemporary discriminatory practices are more insidious and tricky to attack precisely because they can and do operate outside formal legal rules, and because racial formations are dynamic and constantly changing (Calavita 2007: 19; Omni and Winant 1986;Winant 2004).

In any discussion of law and racism, it is important to foreground capitalism and its drive for material resources, cheap labor, and the constant need to open up new consumer markets. Of course capitalism did not produce racism, and racist practices existed long before the modern capitalist system was first institutionalized in England under a Protestant regime in the sixteenth and seventeenth centuries. That being said, full-scale capitalist enterprise has been very much a central concern in the creation of labor hierarchies. And labor hierarchies have pivoted primarily on racial differences that determine an individual's capacity to garner higher or lower wages.

We can see these forces today in the growing gap between rich and poor. As has been remarked upon by many scholars and economists, the exploitation of the many by the few is today's economic reality (Carbado 2002). What we are currently experiencing is a post-Fordist process whereby economic and political power settles in a core group of entrepreneurs who outsource work to a floating periphery of temporary workers both locally and overseas. Often glossed over in mainstream media, racial and gender minorities are disproportionately represented in western countries' most disadvantaged classes (see eg Winant 2004). Moreover, outsourcing is most profitable when the overseas labor pools are poor and desperate workers willing to accept terrible working conditions, job insecurity and minimal wages. As a result, the gap between the wealthy north and impoverished south has not been closed—nor has it come even close to it—since the decolonization movements in the middle of the last century. Significantly, there remains a racialized differentiation between developed and developing geopolitical regions that has its roots in and perpetuates the racial distinctions of former colonial eras (Winant 2004). What we are witnessing today, then, is a global political economy that still depends on maintaining racial hierarchies and marginalized communities both within and between western and non-western states. Anglo-American law and international legal agencies, albeit perhaps unintentionally, play a significant role in denying adequate legal access to marginalized communities and in turn sustaining and enforcing racial biases in favor of the capitalist enterprise.

LAW AND RIGHTS

In discussing individual rights, one is forced to engage with issues of power. Throughout the modern era, liberal democratic states have been the grantor and enforcer of people's rights, be these with respect to voting, access to social services, or claims to educational opportunities. Against societal demands to protect the

rights and freedoms of individuals, as well as to extend these rights progressively to marginalized groups such as women and ethnic minorities, national governments have to contend with the self-serving economic and political interests of those in power. It should come as no surprise that historically, Anglo-American law has typically worked to the benefit of the rich and powerful.[2]

In the twenty-first century, the phenomenon of law servicing the interests of powerful elites is evident on a global scale. Susan Silbey's work on globalization, or what she calls 'postmodern colonialism', highlights the role that legal institutions play in facilitating new forms of economic domination across borders and transnational spaces. 'Significantly', she argues, 'this is not something happening outside the law or without the active collaboration of law and legal scholars' (Silbey 1997: 220). For the past 300 years modern western law has 'provided the "infrastructure" for capitalist investment and development' (Silbey 1997: 221; Tigar 2000). Today law continues to facilitate, on a global scale, a largely deregulated free market system loosened from centralized state accountability and control. The acknowledgement and enforcement of ordinary people's legal rights has been sacrificed in this process.

Of course Anglo-American law (and its western and non-western practitioners) does not represent a system of total power and domination.[3] There are moments of resistance against the forces of capitalism, as seen in the periods of colonialism in the eighteenth, nineteenth and twentieth centuries as well as in the current postcolonial era (Merry 2004). There are also numerous instances of law being mobilized to empower marginalized people through a recognition of their political, economic and civil rights, and provide leverage for the demands made by actors within social movements (eg Rodriguez-Garavito and Arenas 2005). But, as Silbey concedes, the worry is that despite these moments of local resistance and victory, the dominant narratives of globalization, which draw on Enlightenment ideologies of reason and progress, mask the realities of how power actually operates

[2] This is not a new insight. Socio-legal scholars associated with the Critical Legal Studies (CLS) movement, which began in the 1970s in the United States and Britain, argued that all legal decision-making is in fact political despite claims that it is neutral and objective. CLS scholars drew on the insights of the earlier legal realist movement, whose proponents argued that all law is political, and that 'Every decision [judges] made was a moral and political choice' (Mensch 1990: 22; Unger 1986; Kelman 1990; Altman 1993; Douzinas et al 1994).

[3] '[I]n a world of transnational movement and cross-border transactions it is still an open question whether international law will simply be the law of the powerful or whether, indeed, local practices working around the edges of the formal law will be of far greater import. Many business agreements now incorporate by reference the law of England or an American state as governing in the event of a dispute. But that may only mean that trade agreements, based on nonlegal ties, will become all the more important, or that allowing a Western nation's law to apply in the business realm will actually give greater scope to the use of local laws for matters of criminal law or family law jurisdiction. Whatever the results, studies of history and culture suggest two factors that are likely to remain extremely important in the face of seeming globalization: the local always has a way of reasserting itself as people keep responding to the cultural imperative of category experimentation, and the changes will be reciprocal despite the seemingly incommensurate array of powers' (Rosen 2006: 167–68).

(Silbey 1997). And by masking how power operates, economic exploitation and political manipulation are presented as somehow 'natural', inevitable, and no one's fault (see Foucault 1995). Thus the notion of any form of social responsibility, held by either a government or a specific leader on behalf of society, is erased from the public consciousness. As a consequence the structures of inequality are made invisible as popular dissent is silenced. As Silbey notes, 'the dominant narratives of globalization deny the existence of a recognizable and powerful other from whom one can demand justice' (Silbey 1997: 228).

The great ideological promise of the Enlightenment, with its belief in modern law as the source of equal protection and enforceable rights for all, has clearly not been fulfilled. Certainly democratic states have vastly improved living and labor conditions for many people, particularly with the increasing international recognition of human rights in the wake of World War II. Nonetheless, violence and atrocities still occur, and civil wars and genocides taint the history of the twentieth and twenty-first centuries. With vast movements of people across borders and regions, many are increasingly caught literally in-between states without full or partial citizenship status and so without the capacity to appeal to state enforcement agencies. Refugees, undocumented immigrants, and those displaced by natural disasters such as the victims of Hurricane Katrina occupy extremely ambiguous legal spaces where rights and liberties are severely compromised, if recognized at all. An increasing recognition of human rights and the proliferation of international legal instruments seeking to protect those rights are clearly insufficient to counter the massive institutional structures that sustain global inequities and violence. Despite industrialized nations' overwhelming wealth and range of advantages over the global south, western law's narratives of freedom, reason, progress and justice fall short of what many ordinary people experience in their everyday lives, whether they live in Britain, the United States, Japan, India or Russia.

The book is divided into three parts that follow an approximate historical chronology. The first part explores the ways in which the development of Anglo-American law is the product of the Reformation and the Enlightenment. The second part shows how the law has been shaped by its role in slavery, labor and colonialism. The third part focuses on events since World War II that reveal the ways in which law has been changed by international and world affairs and the forces of a global political economy. The general thrust of this historical narrative is to demonstrate how law is made and shaped through its encounters with political, economic and cultural forces, and how ideologies of religion, racism and rights played out in these encounters.

I

Moving toward Separation of Church and State