Righting the Relationship Between Race and Religion in Law
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Righting the Relationship Between Race and Religion in Law[†]

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On May 18, 1987, the United States Supreme Court handed down a pair of decisions addressing the characteristics that groups need to display in order to qualify as a 'race' and receive the protection of laws against racial discrimination. In one case, *Saint Francis College v. Al-Khazraji*, an Iraqi-born American citizen, Majid Al-Khazraji, had alleged that he was denied tenure on account of his race (Arab), religion (Muslim), and national origin (Iraqi). The defendants countered that Arabs were not a protected minority 'because Arabs are taxonomically Caucasians [and are] therefore "white citizens"' for purposes of applying the laws prohibiting race discrimination.[1] In *Shaare Tefila Congregation v. Cobb*, a synagogue that had been spray-painted with anti-Semitic slogans brought a lawsuit alleging a violation of section 1982 of the Civil Rights Act, which forbids racially discriminatory interference with property rights.[2] The lower courts in *Shaare Tefila* had dismissed the claims on the ground that discrimination against Jews is not racial discrimination because Jews are not a race.[3] By contrast, the lower courts in

[†] A review of Eve Darian-Smith, *Religion, Race, Rights*: *Landmarks in the History of Modern Anglo-American Law* (Oxford, Hart Publishing 2010). Hereafter *RRR*.

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[1] 523 F.Supp. 386 (W.D. Pa. 1981), 481 U.S. 604 (1987).

[2] 481 U.S. 615 (1987). The Civil Rights Act of 1866, enacted after the Civil War, includes both Section 1981, which provides that "All persons born within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens" and Section 1982, which provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Section 1981 is the section of the Civil Rights Act relied upon in the *Al-Khazraji* case. Section 1982 is the section of the statute relied upon in *Shaare Tefila*. 42. U.S.C. Sections 1981 and 1982.

[3] 785 F.2d 523 (4th Cir., 1986).

Al-Khazraji professed their 'unwilling[ness] to assert that Arabs cannot be the victim of racial prejudice,' even though today's opinion might not classify Arabs as a race. Leaving the definitional question regarding race open, the district and appellate courts both held that Al-Khazraji should be given 'the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981,' the section of the Civil Rights Act relied on in that case.[4]

Affirming those holdings, and, in a separate decision, overturning the judgment of the lower courts in *Shaare Tefila*, the Supreme Court held that in both cases the requirements for satisfying the civil rights statutes' definition of race were met. Rejecting the defendants' contentions that the analysis should be controlled by the current understanding that neither Jews nor Arabs are properly viewed as separate races, Justice Byron White reasoned that the discrimination involved in the two cases 'is race discrimination that Congress intended section 1981 [and 1982] to forbid whether or not it would be classified as racial in terms of modern scientific theory.'[5] Justice White concluded that the Civil Rights Act was 'intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics' and further concluded that both Arabs and Jews are groups protected from racial discrimination under this reasoning.[6]

The *Al-Khazraji* and *Shaare Tefila* decisions represented one of the rare occasions on which American courts have broached the general question of what race is, and the more particular question of whether groups such as Arab Muslims and Jews, more

[4] 784 F.2d 505, 517-18 (3d Cir. 1986), reversing 523 F.Supp 386 as to the Section 1981 claim.
[5] *Al-Khazraji*, 481 U.S. 604, 613 (1987).
[6] *Al-Khazraji* (n 5), 613; *Shaare Tefila* (n 2), 618.

commonly classified as religious, ought also, or instead, to be classified in terms of race.[7] One might have expected that such an occasion would have led to a consideration of how the categories of race and religion intersect. But American[8] courts have largely avoided confronting how racial and religious categories of identity and discrimination relate to one another. For a number of eminently practical reasons, cases involving overlapping claims of racial and religious discrimination or otherwise addressing the relationship between race and religion have been few and far between.[9]

The practical considerations that explain why so few cases have addressed the interrelationship between race and religion are well illustrated by *Al-Khazraji* and *Shaare Tefila*. In most cases where antidiscrimination suits are brought by members of groups that could be defined in either racial or religious terms, as in Dr. Al-Khazraji's lawsuit, the laws under which plaintiffs sue prohibit discrimination on the basis of race, religion *or* national origin. Because the civil rights statutes recognize all of these categories as creating 'suspect' or protected classes, there is no need to sort out *which* protected group a particular plaintiff falls into, or what kind of discrimination he or she endured. For the same reason, courts in these cases have had no cause to confront the question of whether

[7] To clarify, there have been numerous decisions adjudicating 'racially ambiguous' parties' racial identities. Ariela Gross's *What Blood Won't Tell* (Harvard, Cambridge 2008) is the definitive treatment. But '[w]hile state courts frequently litigated individuals' racial identity, the U.S. Supreme Court rarely did,' Gross, 211, and few if any of these decisions addressed the role of religion in racial identity, or developed a general theory about the relationship between religion and race.

[8] As a scholar of American law, I do not have the knowledge to comment on English or European law, so my remarks are confined to the law in the U.S., although Darian-Smith's book undertakes to provide a synthetic account of "Anglo-American law," comprising developments in England and Europe as well as America.

[9] LEXIS and Westlaw searches reveal a paucity of opinions considering whether religious discrimination violates the Equal Protection Clause or statutory laws against discrimination, and fewer cases still in which religion is compared or linked to race. Likewise very few cases litigated under the laws protecting religious freedom involve race in any explicit way. One notable exception is *Bob Jones University v. U.S.*, 461 U.S. 574 (1983) in which the Supreme Court upheld the constitutionality of the IRS's decision to withhold the tax-exempt status usually granted to religious institutions to a Christian university that imposed rules forbidding interracial dating. Even here, though, there was no analysis of how race and religion interrelate.

certain people or groups fall into more than one identity category at the same time, as the proponents of theories of 'intersectional discrimination' and 'hybrid' identity would have it.[10] The questions that fascinate discrimination theorists, such as whether and how identity categories like race and religion intersect, and with what implications, simply do not arise in cases where multiple bases for discrimination are available, as courts see little point in trying to figure out which box, or set of boxes, the plaintiffs fall into, so long as it is clear that they fall into at least one.[11]

Similarly, courts have not had to confront the relationship between race and religion in cases like *Shaare Tefila*, not because more than one category is available, but rather, because the laws that govern these cases only recognize one type of discrimination, thus obviating the need (or opportunity) for choice. The only way for the plaintiff to go forward in *Shaare Tefila* is to satisfy the legal definition of race discrimination, because that is the only type of discrimination made illegal by the governing statute.[12] For this reason, the synagogue did not even advance a claim of religious discrimination, although outside the sphere of legal discourse, synagogue desecration is widely seen as an example of religious discrimination, *par excellence*.

This frankly instrumental, pragmatic approach to dealing with race and religion in law is perhaps no better illustrated than in the case of *Wilder v. Bernstein*, a class action suit brought against the Jewish and Catholic Family Services agencies of New York City

[10] The work that launched the theory of intersectionality in discrimination scholarship was Kimberly W. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 Stan. L. Rev. 1241. The literature spawned by this work generally pays relatively little attention to religion as a category of identity compared to race, gender and sexual orientation, but it nonetheless paves the way for thinking about how religion and other categories of identity interact.

[11] My thanks to my colleague, Stephen Rich, for helping me to clarify this point.

[12] Section 1982 of the Civil Rights Act of 1866, the law that the synagogue relied on, merely says that all citizens have the same property rights 'as white citizens,' which makes race, and race alone, salient. See 42 U.S.C. Section 1982 (n 2).

in the 1980s, in which, far from dropping out of the analysis, as it does in cases like *Shaare Tefila*, religion was yoked together with race to define the identity of the plaintiffs, albeit in a singularly peculiar fashion. The plaintiffs in this lawsuit were identified as 'Black Protestant children,' an 'intersectional' label whose jerry-rigged nature was made plain in a footnote dropped in the trial judge's opinion, where he candidly explained that, '[f]or purposes of this opinion, the term 'Protestant' is meant to refer to those children who are neither of the Catholic nor the Jewish faiths.'[13] In other words, 'Protestant' in this context was just a term of art, a catchall used to refer to all the children in New York City's foster care system who were denied equal access to the Jewish and Catholic foster care agencies by virtue of admissions policies which gave preference to Jewish and Catholic children, respectively.

The concern in *Wilder* was not that non-Jewish children were excluded from the Jewish foster care agency, but rather, that they faced longer waiting lists to get in. Likewise, non-Catholic children seeking access to the Catholic agencies faced a longer waiting list than children from Catholic families. Children who did not gain placement in either the Jewish or Catholic agencies were thrown back on the city-run, secular child welfare agency – widely perceived to be inferior to the Jewish and Catholic agencies in the quality of the services it offered, which was why the advocates for non-Jewish and non-Catholic children sought not to eliminate the city's reliance on religiously affiliated agencies, but rather, to gain access to them. This goal explains the obviously strategic nature of the definition of religion adopted in this case and its relationship to the category of race. The majority of the children turned away as a result of the Catholic and Jewish Family Services agencies' religious matching policies were African American. Many,

[13] 499 F.Supp. 980 (1980), fn. 1.

though by no means all of them, were Protestant as that term is usually defined. But the way the term was defined in the litigation, a 'Black Protestant' child could just as easily have been a Black Muslim, or a Jew, or indeed any religious persuasion other than Catholic or Jewish – or of no religious persuasion at all. No doubt a substantial number of the children represented by the certified class *were* Muslim or religiously unaffiliated. Such was the peculiarity of this openly artificial and strategic definition of group identity, on the basis of which simultaneous claims of racial discrimination, religious discrimination, and interference with the free exercise of religion were mounted.

Wilder v. Bernstein, *Al-Khazraji*, and *Shaare Tefila* together demonstrate the instrumental nature of legal definitions of racial and religious identity and the pragmatic considerations that have rendered answering theoretical questions about these classifications largely unnecessary in the context of litigation. Courts have had little to say about the relationship between race and religion for the simple reason that the way most legal claims are framed creates little perceived need for the question to be addressed. The consequence is that in the world of case law and legal doctrine, race and religion exist largely in a state of acoustical separation, a barrier that not even cases like *Al-Khazrai* have been able to shatter.

But the practical imperatives and instrumental nature of legal reasoning which explain the lack of judicial attention to race's relationship to religion cannot explain the same inattention to the issue that we see in the realm of scholarship. The segregation of race and religion, observable both in legal studies and in other fields of scholarship where race and religion are explored, is perhaps understandable as an artifact of specialization and other academic norms. But the result is nonetheless lamentable, for the fact of the

matter is that the discourse of race and the discourse of religion have never been estranged from each other in real life.

That race and religion must be examined together, in relation to law, is the central insight of Eve Darian-Smith's recently published, *Race, Religion, Rights: Landmarks in the History of Modern Anglo-American Law*.[14] Its primary objective, which I wholeheartedly applaud, is to rectify the longstanding situation in which scholars of law and religion pay little heed to race and scholars of law and race fail to plumb the depths of religion. While scholarly norms like specialization may explain and even justify the segregation of the study of religion and the study of race into separate fields of academic inquiry, failing to pay heed to the various ways that race and religion interact impedes our understanding of race, our understanding of religion, and our understanding of law itself, as many of the most fundamental concepts of modern law – concepts such as 'rights,' 'freedom' from 'discrimination,' and the very concepts of a 'minority' and 'religion' itself – have been forged out of the complex of interplay of beliefs about (and of) racial and religious groups.

Darian-Smith's new book undertakes to document this complex interplay by presenting and analyzing a series of landmark events that highlight the role of religion in some of the most seminal developments in Anglo-American political and legal history. The Reformation (launched by Martin Luther's attack on the Catholic Church)[15], the demise of political absolutism and the rise of liberal democracy (seen through the lens of the trial of Charles I and the publication of Thomas Paine's *Rights of Man*)[16], colonialism

[14] Hart Publishing, Oxford 2010. Hereafter *RRR*.
[15] *RRR* 21-51.
[16] *RRR* 52-114.

and slavery (explored through the 'Eyre controversy'[17] and the passage of the Dawes Act[18]), class conflict and labour strife (the Haymarket Riots,[19] genocide and the emergence of human rights (the Nuremberg trials[20]) are each given a chapter or two in this effort to provide an overview of the interrelationship between race and religion in the formation of modern law. Building on decades of scholarship about race and colonialism,[21] and a much more recent literature on religion and secularity[22] – and inspired by a Critical Legal Studies critique of liberal rights[23] – Darian-Smith aims to overcome the estrangement that exists between the study of race and the study of religion by showing the important influence that religion has had on understandings of race and race relations, and the combined influence of race and religion on conceptions of rights and law.

Indeed, as the book shows (but does not completely parse out), religion has played many different roles in the development of law and the construction of race and rights, as 'religion' is a term used to refer to many different things. Sometimes when we refer to religion, we – and Darian-Smith – are speaking of *religious beliefs*, either the highly formalized articulations of beliefs expressed in religious doctrine and systems of theology, or the more diffuse, less sharply articulated beliefs that people 'hold' as part of a 'belief-system' or 'culture.' Alternatively, we might be speaking of *religious sociology*, which includes such matters as the kinds of religious affiliations and the degree of religious diversity found in a society, and the social practices that develop in

[17] *RRR* 117-47.
[18] *RRR* 180-208.
[19] *RRR*
[20] *RRR* 211-47
[21] The literature on race and law is too vast to enumerate. On colonialism, see, e.g., Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press, 2002).
[22] See n 42.
[23] *RRR* 17, n 2.

response to demographic diversity, as well as all the social practices and institutions that shape and give expression to the belief-systems of particular religious groups. Yet again, we may be speaking of *religious history* and the way in which the historical experiences of religious life, religious conflict, and the opposing forces of secularization and religiosity have shaped our legal and political culture. All of these are roles that religion, loosely speaking, plays. And all of these are roles that religion *has* played in shaping our conceptions of how peoples are differentiated from one another, how different peoples should relate to one another, and what role law should play in governing their relations.

This means that there are quite different sorts of questions to be addressed under the heading of 'linkages' between religion and race. One set of questions concerns the kinds of issues that surround cases like *Al-Khazraji*, *Shaare Tefila*, and *Wilder v. Bernstein* – issues about the construction of identity and how people are categorized and how our different classifications (race, religion, ethnicity, nationality, etc.) interact. These are essentially sociological questions, concerning how society differentiates groups. While religious beliefs and history certainly affect the way a given society divides people into groups, the divisions drawn between groups are invariably shaped by other, sociological, factors as well, such as politics, economics, geography, ideology and culture. Indeed, a sociological perspective will often point up the extent to which religious beliefs are *products* of such factors rather than (or in addition to) the other way around.

Is Religion Like Race?

But questions about how racial and religious identity categories intersect are hardly the only sorts of questions that come up regarding the linkages between racial and

religious classifications in law. Race and religion can be 'related' to one another in other ways as well – for example, by analogy. Is religion is 'like' race? Is race like religion? Here the question is not whether racial and religious classifications overlap or fuse in the construction of a person or group's identity, but rather, whether racial and religious classifications are *analogous* in legally significant ways. Is discrimination on the basis of religion like discrimination on the basis of race? Civil rights statutes that prohibit racial discrimination and religious discrimination alike (such as the statute invoked in *Al-Khazraji*) are predicated on their analogy. By contrast, many civil rights laws explicitly exempt 'religious associations' from their coverage. And even when statutory law does not create exemptions, a long line of case law and judicial reasoning holds that constitutional principles such as the guarantee of the free exercise of religion may *require* granting such exemptions.[24] This view reflects the intuition that discrimination on the basis of race and religion differ in normatively significant ways.

It was just such an intuition that led to the carving out of an exception for 'pervasively religious' groups in the settlement agreement eventually reached in *Wilder*. While the settlement replaced the traditional religious matching policies of the Catholic and Jewish agencies with a policy of first come/first served, it made an exception for children coming from families 'whose religious beliefs pervade and determine the entire mode of their lives,' allowing them to be placed in 'specially designated programs designed to accommodate their religious observances.[25] The immediate beneficiary of this exception was New York's community of Orthodox Jews. Indeed, it was in response

[24] The debate over whether a right to accommodation is constitutionally compelled has spawned an extensive literature. For a small sample, see Michael W. McConnell, 'Accommodation of Religion: An Update and a Response to the Critics' (1992) 60 Geo. Wash. L. Rev. 685; Mark Tushnet, 'The Emerging Principle of Accommodation' (1987-88) 76 Georgetown L. Rev. 1691.
[25] Wilder 1344.

to their intense lobbying that the exception to the newly installed policy of colorblind and religion-blind access was drawn. But the conceptual contours of this exception followed a template previously laid down in *Wisconsin v. Yoder*, the landmark case in which the Supreme Court had recognized the right of the Amish to segregate themselves from the rest of society in order to preserve their distinctive and pervasively religious cultural 'way of life.'[26] *Wilder*'s adoption of this notion of a 'pervasively religious way of life' a decade and a half later demonstrated the emergence of a category of groups endowed with the right of self-segregation that could theoretically be applied to any 'pervasively' religious community whose 'strict observance of religious law' constitutes an 'entire mode of life' (and perhaps to some nonreligious communities as well). Both *Yoder* and *Wilder* endorsed the idea that religious freedom might consist not just in an individual right to freedom of belief, but also, in a group's right to preserve its way of life. And with that came the corollary idea that religion itself might be thought of not just as the beliefs an individual holds but as a *way of life* possessed by a cultural group.[27]

This notion, that religions are cultures, endowed as such with rights to cultural self-preservation, throws into relief the implicit assumptions on which the supposed disanalogy between race and religion often rests. Religions, it is commonly thought, have this cultural dimension; races do not. Or alternatively, even if racial identities are granted a cultural dimension and viewed as 'a way of life' (as an empirical matter), the normative corollary (that being a culture gives rise to rights of cultural self-preservation that justify acts of segregation) is denied.

[26] 406 U.S. 205 (1972).
[27] See Ronald Garet, 'Communality and Existence: The Rights of Groups' (1982-83) 56 S.Cal. L. Rev. 1001.

But why? Why should only religious groups, and not racial groups, be viewed as possessing a cultural 'way of life,' or what cultural anthropologists call an 'ethnos'? Alternatively, why should the empirical condition of being possessed of an ethnos give rise to rights of cultural self-preservation and freedom from the prohibition on discrimination in one case (religion) but not the other (race)? Why is *any* ethnic group endowed with the right to discriminate that the rights to freedom of association and cultural self-preservation inevitably entail? Are all religious groups equally 'ethnic' and 'cultural' and entitled to discriminate in furtherance of their cultural ends, or only some (for example, only 'pervasively religious' groups)? What of ethnic groups defined not by religion but, rather, by race or nationality, such as Italian-Americans, Irish-Americans, Latinos, Arabs, Asians, and 'secular' Jews?[28] If, as is commonly asserted, these groups also are (or have) ethnic cultures, why do they not have the same entitlement to cultural rights? Or do they?

A Question of History

It is at this point in the (often tacit) line of reasoning that underlies the presumed disanalogy between race and religion that people frequently turn to history to try to differentiate the 'deserving' minority from undeserving groups. The ultimate question is not just whether, but why, to grant a religious (or ethnic) group a right to freedom of association (and exclusion) denied to racial groups. And answering *that* question requires taking a position about what religion and race are like – not just whether they are *alike*, but the logically prior question of what each one (viewed separately) is *like* in the first place.

[28] On the treatment of these groups as races, see eg, Leon Paliakov, *The Aryan Myth: A History of Racist and Nationalist Ideas in Europe* (1974), Ivan Hannaford, *Race: The History of an Idea in the West* (Johns Hopkins, Baltimore 1996), George Frederickson, *Racism: A Short History* (Princeton, 2002).

Faced with these sorts of questions, many people have thought that an appropriate place to look for sorting criteria is to history. The sociology of religion may instruct us in what the requirements of religious life (and hence religious freedom) are; but it cannot, by itself, tell us when, as a moral or constitutional matter, these requirements ought to be met. So, too, with the requirements of cultural life; sociology can only go so far. Moral philosophy is one way of filling in the void. But even moral philosophers have felt the need, or at least found it edifying, to turn to the actual history of relations between groups in order to flesh out the abstractions of moral philosophy and figure out when it is appropriate to satisfy the demand for a right to cultural self-preservation (and insulation), and when not.[29] While history cannot by itself serve as arbiter of the claims to a right to freedom of association put forth by different groups, it can serve to inform the normative debates about the merits of those claims, not only by providing a seemingly inexhaustible stock of cautionary tales, but also by supplying the raw social material out of which the very ideas of 'minorities,' minority 'cultures,' 'races,' 'religions' and 'minority rights' were forged.

Indeed, history abounds with examples of nefarious groups, such as white segregationists, claiming the rights of cultural self-preservation and freedom of association that entail the right to discriminate on behalf of the dominant group. On the other hand, history is also replete with examples of beleaguered minorities on the brink of cultural extinction whose claims to those same rights inspire sympathy. Groups like the Amish, the Crow Indians and other indigenous peoples and religious groups that have been subjected to the combined forces of persecution and assimilation tend to inspire nostalgic feelings not only for *their* lost or vanishing ways of life, but also for our own.

[29] See John Rawls, *Political Liberalism* (Princeton, 2002).

And this makes us more willing to entertain their claims to cultural rights even as we remain wary of extending them to less vulnerable groups.

It is tempting, in this context, to draw a simple dichotomy between minorities and majorities, on the assumption that it is always majorities who dominate and victimize minorities, and not the other way around. But history reminds us that such a simple distinction will not hold, as there are plenty of cases in which it is a minority that stands in the position of oppressing the majority. (South Africa's apartheid state is the obvious example.) Conversely, there are groups, such as the KKK, who champion the same doctrines of white supremacy and segregation, whose claims to the rights of cultural self-determination and discrimination we would clearly want to reject notwithstanding the fact that, numerically, the members of the KKK are in the minority. Faced with the spectre of the KKK and other morally odious groups playing the culture card, and the difficulty of differentiating their claims from those of 'deserving minorities,' history has seemed to carry the promise of helping us to figure out not just what a 'minority' is but, more to the point, what is important about being a 'minority.' If only we could reconstruct the historical context in which this fundamental normative concept emerged, the thought goes, we might be better able to illuminate its content and determine what the normatively relevant criteria are.

The Religious Origins of Minority Rights

Darian-Smith's book is very much in keeping with this historicizing impulse. Although by training a cultural anthropologist, her approach here is wedded to the idea that we can illuminate the normative content of concepts such as 'race,' 'rights', and 'religious minority' (and show how these terms are related to one another) by tracing

their origins and subsequent evolution. She is careful to explain that 'this book does not present a conventional legal history,' but, '[r]ather … a cultural study of law that explores the "conceptual conditions that make possible that practice we understand as the rule of law."'[30] That said, methodologically, it takes a historical approach, structured chronologically around a series of key stages, or turning points, in the development of modern legal conceptions of race, religion, and rights. Inevitably, as a result of its chronological reach (from the 16th century to the present) and its ambitious aim (to synthesize all the most crucial developments), depth is sacrificed for breadth, and specialists in the diverse eras and areas covered by its broad swath will no doubt find much to quarrel with. But there is no disputing Darian-Smith's basic historical contention, which is that both our rights discourse and our race discourse have been influenced, if not completely shaped, by ideas about 'minorities' and 'rights' that migrated out of the religious context in which these ideas were originally formed.

Darian-Smith's book is at its best in recounting the religious origins of the concepts of 'minority' and 'minority rights' that have come to play such a large role in our legal and political life on both the national and international stage. It documents the centrality of the notion of minority rights to rights discourse generally, and further demonstrates the central role of religion in producing our notions of what minorities are and what rights they deserve. As Darian-Smith notes, theological reasons and arguments were put forward in favor of recognizing and protecting religious minorities as far back as the 16th century. These early theological arguments for religious liberty and minority protection can be seen as precursors of the doctrines of human liberty and equality that gave rise to the political philosophy of modern liberalism. To be sure, not all of the

[30] *RRR* at 3.

premodern theological formulations regarding the freedom of religious minorities took the form of 'rights.' Some religiously grounded policies of religious tolerance were enunciated in terms of government charters and corporate privileges granting religious minorities forms of protection that bear little relation to modern liberal notions of rights. Nonetheless, Darian-Smith is right to maintain that there were theological traditions that adumbrated modern ideas about granting religious groups or individuals 'rights' and, in so doing, supplied the intellectual origins of liberal principles of liberty and equality. Principles of tolerance and freedom of dissent and belief that originated in the context of thinking about relations between competing religious groups eventually were extended to nonreligious beliefs and groups as well.

From Theology to Politics (or Vice Verse)

But it was not only in the realm of theological argument that religion brought about an appreciation for the rights of minorities. Religion played a role in producing the values of tolerance and individual and minority rights in more material ways as well. Indeed, according to the standard history of religious tolerance, the material forces of religious history were primary, ideas, secondary. The standard story, recounted by Darian-Smith, is that religious tolerance emerged in the aftermath, and as a consequence, of Europe and England's violent and protracted religious wars. It was the historical experience of religious persecution, more than any theological doctrine, that brought about first a grudging acceptance, and then a more robust form of respect for the rights of religious dissenters, as sheer exhaustion after centuries of religious conflict led to a growing revulsion against bloodshed. Eventually, this recoil from religious conflict led to the piecemeal implementation of policies of religious tolerance, policies that were

initially based on purely pragmatic considerations and only gradually evolved into more principled (philosophically and theologically grounded) positions about religious minorities' *rights*.

What Darian-Smith seeks to add to this familiar story is a sense of how emergent notions of religious tolerance and minority rights were enmeshed with evolving notions about the existence of different (and unequal) races and nations. She does so by turning back the clock to focus on religious conflicts that predated the Protestant Reformation and the ensuing conflicts between Catholics and Protestants (and between religious dissenters and the established church). As Darian-Smith reminds us, the formative contexts in which Western ideas about religious minorities first took shape were not the conflicts among competing sects of Christians that led to Europe's 'religious wars,' but rather, Europe's confrontation with the 'infidel Turk' and Christianity's still more ancient conflict with Judaism. Whereas the 'marauding Turks' were the foreign enemy, posing a constant threat of invasion, the 'Christ-killing' Jews constituted the enemy within. What made these internal and external enemies alike was not just that they were they both, definitively, non-Christian (and hence the target of ceaseless anti-Jewish and anti-Muslim religious polemics) but also that they both they occupied categories of an alien 'other' in which the religious, racial and national dimensions of identity were blurred. To the Christian crusaders who sought to reclaim the territories lost first to the Arab conquest and later to the 'marauding Turks,' the external enemy was defined as much by his Muslim as by his 'Oriental' identity. Indeed, the two dimensions were thoroughly in the self-definitions of the parties to the conflict as much as in the negative definitions each thrust upon the other. Thus, 'European Christendom,' on behalf of which the Christian

warriors and polemicists crusaded, conjoined the categories of the Christian and the European. Likewise, the more particular European identities that emerged, such as British or French, seamed together a sense of national distinctiveness with the sense of Christian identity that grew out of the broader European confrontation with non-Christian and (ostensibly) non-European others.[31]

Similarly, the Jew figured in the European Christian 'Orientalist' imagination as an object of enmity that was inextricably religious and racial. Jews themselves traditionally defined themselves as a 'people' – a term that simultaneously connoted ancestral bonds of kinship and biblical notions of political nationhood as well as divine election to the status of followers of Mosaic law. 'Religion,' in this traditional conception, was not separated out as a faith or creed that individuals 'confess.' Rather, it was embedded in the broader notion of peoplehood, and referred specifically to the status of being subject, or bound, to Mosaic law. More broadly, it involved studying, transmitting and being governed by Jewish law. Thus, while the Jews' self-understanding differed radically from the conception of them held by European Christians, it shared the conflation of racial, religious, cultural and national aspects found in Christian depictions of Jews. Like the 'infidel Turk,' the Jew figured in the European Christian imagination as the dark embodiment of the Orientalist 'other,' fueling fantasies and fears and anti-Semitic ideologies that, despite their ever-mutating form and content, were remarkably consistent in their conflation of racial, national, and religious aspects of identity.

European Racial Thought

[31] The assertion that Turkey is not part of Europe is of course itself a deeply contested ideological position that reflects the larger contestation over national, racial and religious identity boundaries that Darian-Smith seeks to relate.

One mark of this consistency is the durability that anti-Semitism and anti-Muslim sentiments displayed throughout the different epochs of European history.[32] As *Religion, Race, Rights* convincingly demonstrates, anti-Turkish sentiment continued to play a large role in European thought even after the religious conflicts between warring factions of Christians displaced the wars with the Turks as the central war theater. Shedding light on the roots of contemporary European Islamophobia, what Darian-Smith reminds us, in the most fascinating pages of her book, is that the conflict between European Christendom and Muslim Turkey did not end with the Reformation. Rather, Luther himself was a continuator of the traditional discourse against 'the so-called Turkish infidel,' using the 'West European fear and hatred of Arabs and Turks [that] had existed for many centuries,' and the more specific 'dread of an invading Ottoman empire'[33] to tarnish the Pope and the Catholic Church. Luther accomplished this '[b]y drawing on established iconographic cues and commonplace assumptions about Muslim peoples as barbaric and evil, and linking these images with his criticism of the papacy.'[34] In Darian-Smith's analysis, this is evidence of early practices of 'racializing religious difference,'[35] which she views as continuous with later, modern ways of thinking about racial and national differences.

The issue of continuity is complicated, however, particularly when it comes to modern notions of race. Certainly, one can find evidence of terminology and concepts resembling modern notions of 'religion,' 'race,' and 'nation' as far back as antiquity. And certainly there is some degree of continuity of between premodern and modern

[32] On the former, see Gavin I. Langmuir, *Toward a Definition of Anti-Semitism* (University of California Press, Berkeley 1990).
[33] *RRR* 36.
[34] *RRR* 40.
[35] *RRR* 39.

usages. But, as Darian-Smith recognizes, none of the premodern usages bore the precise meanings that these terms would come to bear once the modern ideologies of racial pseudo-science and political nationalism came to prevail. And this is in part because one of the things that both modern nationalism and the modern science of race aimed to do was to bring a 'scientific' precision to concepts that was formerly lacking. Racial scientific theory purported to accomplish this by identifying the biological differences that distinguished the races, thereby making cultural differences and political boundaries secondary to ancestry and physiology. It thus separated out components of identity (biological race, political nationhood, religious and cultural practices and beliefs) that formerly were fused, elevating biology over these other bases for classification as the defining criterion of identity and social rank. Nationalism did its part by attempting to separate out ostensibly different ethnic groups into their own political entities. Thus, both physically, through various forms of political and social segregation, and conceptually, by positing and analyzing scientific concepts of race and ethnos, these two quintessentially modern 19th century endeavours, political nationalism and scientific racism, crystallized racial and ethnic identities into distinct biological and cultural/political entities, and strove to maintain their analytic and social distinctiveness by any means possible.

From Europe to America

Of course, these efforts at physical and conceptual separation were doomed to fail. 'Scientific' racism was ultimately no more successful in purging cultural definitions of identity from the 'biological' categories of 'Caucasian,' 'Mongolian,' 'Semites,' and 'Negroid' than nationalism was in achieving religiously and ethnically homogeneous

political units. Inevitably, every effort to 'cleanse' the putatively distinctive groups of racial impurities was defeated. Not, however, before much deadly work in the service of maintaining racial and national boundaries was done.

Darian-Smith's book touches on these complexities but does not fully do justice to them. And indeed, perhaps no single book could. Where she does perform a valuable service is in reminding us of the salience of the Jew and the Muslim/Turk in the racial imagination of the West. Whether real or imaginary, this cultural entity, 'the West,' was firmly ensconced in Europe at least until the 16th century, and even after European colonialist ventures exported Western culture to Asia, Africa and the Americas, it retained its Eurocentric perspective. It was in America that transplanted Western culture would undergo its most profound transformations. But while the U.S. was destined to attain a position of cultural dominance that would reshape Western conceptions of race and religion (and just about everything else), it was, historically speaking, a latecomer to the Western experience and outlook. Ideas about race and religion that had originated in early European encounters with non-Christian 'others' would continue to exert a powerful hold on Western thought, even if that hold was more palpable in Europe than in America. Darian-Smith's book serves as an important reminder of this point.

What the book does not discuss is how the difference in perspectives between Europe and America, and between Europeanists and Americanists, might account for much of the dichotomization between race and religion that Darian-Smith observes. Indeed, a good deal of the 'blindness' that she ascribes to scholars is attributable to the differences – and, more importantly, the growing separation – between Europe and America that developed as the colonies gained increasing independence. To

Europeanists, it will come as no surprise that the lawsuits that confounded the American categories of race, nation, and religion were brought respectively by a Muslim Arab (Dr. Al-Khazraji) and a Jewish synagogue (Shaare Tefila Congregation.) While other groups also confound the categories,[36] it is surely no coincidence that the two groups which gained the courts' attention in making a bid for status as a legally protected 'racial group' were the very same ones that historically loomed largest in the European imagination as racial and religious 'others.'

Indeed, the Jew and the Muslim/Arab are, for Europeans, the quintessential racial others. They are also quintessentially liminal groups, transgressing the political borders and crossing the conceptual boundaries between racial, religious, European and non-European identities. From the point of view of European history, it makes perfect sense that the test cases in America feature Muslim Arabs and Jews. It likewise makes perfect sense to conclude, as the Court did, that both should count as 'races' protected by the laws against discrimination. If the lesson of European history – a history that includes the Holocaust and the Nazi racial laws, which took the racialist strand of European anti-Semitism to its utmost limit, in addition to the long and tangled history of colonialism and decolonization that has led to the surge of Muslim immigrants and consequent wave of Islamophobia sweeping across Europe today – is that race will ultimately be defined negatively, by the beliefs that racists impose on those they victimize, rather than positively, in terms of the self-conception of the group, then it makes sense to conclude that Jews and Muslims are races protected under civil rights laws.

For Americans, by contrast, far from being paradigmatic, Jews, Arabs and Muslims are 'hard cases' precisely because they are liminal and straddle the ostensibly

[36] See Gross (n 7).

separate categories of race, nation, and religion. The paradigmatic victim of racism in America is not the Jew or the Muslim, but rather, the African American. As in Europe, race takes its meaning in America from the country's history of racism and the particular institutions under which its history of racial subordination unfolded. That history of course begins with the history of slavery, and it continues with the legacy of slavery, from Jim Crow segregation and lynchings to the various forms of bigotry and institutional and structural racism that persist to this day. This is a history that makes the descendants of slaves the paradigmatic racial minority, and thereby makes race, in the sense of biological ancestry, the supposedly sole criterion of racial identity. Whereas the paradigmatic victims in Europe fuse elements of religion, nationality and ethnicity with race, the paradigmatic racial other in the United States is defined by race largely to the exclusion of other dimensions of identity, such as religion, nationality and culture.

This is not to deny that in practice the ascription of racial identity in America rests on all sorts of criteria other than 'blood.'[37] Nor does it mean that cultural differences are not imputed to Blacks and Whites (and other recognized races.) There is indeed a long and sorry history of attributing cultural differences, in particular, a 'culture of poverty,' to Blacks, while ascribing superior cultural characteristics to Whites. Occasionally, the tables are turned and minorities are attributed with positive cultural characteristics that the dominant racial group is said to lack.[38] Religion also is deemed to play an essential part in racial identity by promoting a sense of cohesion and a positive sense of group identity. None of this, however, makes religion or culture integral to the

[37] See Gross (n 7).

[38] The current debate over stereotypes attributed to Asians spawned by the controversy over "the Tiger Mother" is an interesting example. See Amy Chua, *Battle Hymn of the Tiger Mother* (Penguin, New York 2011); Wesley Yang, 'Paper Tigers,' New York Magazine, May 8, 2011.

definition of the African American in the way it is to the definition of the Jew or the Muslim. As the consciously artificial conflation of 'Black' and 'Protestant' identities in the *Wilder* litigation revealed, notwithstanding the substantial demographic overlap between racial and religious groups, Blacks are understood to affiliate with a variety religious denominations. Race is thus fully detachable from religion and culture as a conceptual matter. Indeed, the diversity of cultural and ideological outlooks among members of a single racial group is a point that is insisted upon in the American conceptualization of race.

Correcting the Record

These differences between Europe and the United States go a long way toward explaining the acoustical separation between the study of the history of race and racism and the study of religion. To a significant extent, the gap between the study of race and religion reflects the gap between Americanists and Europeanists. When Darian-Smith faults scholars of race for not having 'engaged the historical relationship of law and religion'[39], it is clear that the scholars she has in mind are chiefly Americanists. The insight she seeks to bring into the role of the Jew and the 'infidel Turk' in the European construction of race is surely not news to the scholars of European Jewry, Orientalism, and racial thought on whose work she relies.[40] But it may be an insight whose implications have not been sufficiently appreciated or drawn out by scholars of American racial thought.

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[39] *RRR* 1.

[40] In addition to the works cited by Darian-Smith, see Jonathan Schorsch, 'Blacks, Jews and the Racial Imagination in the Writings of Sephardim in the Long Seventeenth Century' (2005), 19 Jewish History 109; John Efron, *Defenders of the Race: Jewish Doctors and Race Science in Fin-de-Siecle Europe* (Johns Hopkins, Baltimore 1994). The classic work on European Orientalism is, of course, Edward W. Said, *Orientalism* (Vintage 1979).

To say that religion is entirely ignored by American scholarship on race, slavery and colonialism is somewhat of an overstatement, however. Scholars of race have long been aware of the work on European constructions of race. They likewise have hardly been indifferent to the role of religious beliefs in generating ideas about rights and equality. The role of theology and religious beliefs in motivating abolitionism and the civil rights movement is well documented, as is the parallel role played by religion in justifying the institutions of slavery and racial subordination. Scholars have long recognized that religion in the sense of belief has been an important factor in shaping American beliefs in equality and civil rights – and in fueling resistance to those values.

Furthermore, historians of race and slavery have recently taken great strides in overcoming the longstanding division between Americanists and Europeanists, particularly with the burgeoning of scholarship on the Atlantic slave trade, which examines the links between America and other European colonialist ventures.[41] The attention paid to the differences between slavery as practised in the colonies established by the Spaniards, the English, and the French has brought the question of religion and its connection to race and rights more into focus. This, along with the scholarship on the social construction of race, which situates American notions of racial identity in the longer history of European beliefs about the distinct racial identities of Jews, Irish, Italians and other groups once viewed as 'dark races,' has lessened the division between Europeanist and Americanist perspectives. And that in turn has at least begun to bring the scholarship on race into conversation with the scholarship on the history of religion.

Challenging the Secularization Thesis

[41] See, e.g., Herbert S. Klein, The Atlantic Slave Trade (Cambridge University Press, 1999); David Eltis, The Rise of African Slavery in the Americas (Press Syndicate of University of Cambridge, 2000).

What has not yet penetrated the scholarship on race, slavery and colonialism, as far as I know, is the relatively new body of work challenging the 'secularization thesis,' which for more than a century dominated thinking about the role of religion in modern society. It is here that Darian-Smith's book performs its most valuable service. Beginning with Jose Casanova's *Public Religions in the Modern World* and Talal Asad's *Formations of the Secular* and continuing with Charles Taylor's magisterial *A Secular Age*, and Mark Lilla's *The Stillborn God*, a number of scholars have called into question the long-standing view that the steady march of progress and history in the West has been in the direction of secularization.[42] As Darian-Smith discerns, this is a critique that has important implications for liberalism and modern conceptions of rights and law, although what those implications are is still open to interpretation. The interpretation that Darian-Smith seems to favour is one that puts a new religious spin on an old Critical Legal Studies argument (or, more accurately, an old religious spin on the relatively new CLS critique). As she puts it, the fact that the liberal ideals embodied in modern secular law are 'historically grounded' in Christian theological thought challenges the commonplace 'assumption that modern western law is an objective, unbiased, and rational enterprise, and by implication a product of secular societies.'[43] Following Taylor, Darian-Smith is against the 'subtraction stories' told by the conventional secularization thesis, according to which the liberal ideals that derived from Christian theology ended up supplanting the religious beliefs on which they were originally founded. Instead, she argues, that liberal legal culture retains 'the sacred elements' that were embedded in 'the particularities of

[42] Casanova (Chicago, 1994), Asad (Stanford, 2003), Taylor (Harvard, Cambridge 2007), Lilla (Knopf, New York 2007). See also Peter Berger, ed., *The Desecularization of the World: Resurgent Religion and World Politics* (Wm. Eerdmans, 1999); Ronald Ingelhart & Pippa Norris, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge University Press, 2004).
[43] *RRR* 2.

Christian morality,' making Western law a far less universalistic and secular system than it purports to be.[44]

Here again, though, matters are more complicated than Darian-Smith makes out. Critics of the secularization thesis themselves disagree about what the implications of liberalism's religious origins are. Some, like Darian-Smith, see 'hidden continuities' between modern liberalism and Christian theology, but others, like Asad, object to the search for hidden continuities and seek 'to get away from the idea that the secular is a mask for religion, that secular political practices often simulate religious ones.'[45] Still others, like Casanova, tell neither 'subtraction' nor 'hidden continuity' stories, but rather, what we might call 'reaction stories,' that is, stories that grant that religions have been subjected to forces of secularization which have had the effect of 'privatizing' religion, but focus on the forces of reaction which have led religious groups to mobilize to reclaim the public domain. My own view, which may be regarded as a variation on the hidden continuity story, blended with a reaction story, is that as far back as the medieval period, there were theological arguments in favor of secular government and law, found within both Christian and rabbinic thought, which in important respects adumbrated liberal secular political ideals, but over time, this synthesis of theological and secular values that I call 'theological secularism' split apart, producing the contemporary estrangement of secularism from religion, and of religious fundamentalism from the liberal ideals that were fundamental to the religious traditions which they purport to uphold.[46] Darian-Smith herself seems split on the issue. Half the time she seems to subscribe to a version

[44] *RRR* 2.
[45] Asad, 26 (n 42).
[46] See Nomi M. Stolzenberg, 'The Profanity of Law,' in *The Law and the Sacred* (Stanford, 2007, Sarat, Douglas & Umphrey, eds.) and Nomi M. Stolzenberg, 'Theses on Secularism,' 2010, 47 San Diego L. Rev. 1041.

of the hidden continuities story, according to which secular liberal legal systems are unknowingly 'sacred' in character – although precisely what this means is not entirely clear. But the other half the time, as when she discusses Paine, she seems to revert to the old secularization thesis, according to which secularism is associated with the forces of liberal progress, while religion is presented as a force of reaction which had to be shed before the rights of man could be vindicated.

Another problem with Darian-Smith's presentation of the critique of the secularization thesis is that it is not fully clear how these views about the relationship between secularism and religion connect with race and how they connect to law. The omission of race from the study of religion is no less glaring than the omission of religion from many analyses of race. The idea that the recent spate of critiques of the secularization thesis might shed light on the interrelationships between race and religion is tantalizing. In our post-9/11 world, the questions of how religion interacts with race and how discrimination on the basis of religion interacts with discrimination on the basis of race and nationality in cases like Dr. Al-Khazraji's would seem to be more urgent than ever. But while Darian-Smith makes the religious pedigree of liberal ideas of civil rights and human rights clear, and shows how that religious pedigree sometimes undermines those ideals, causing them to legitimate regimes of oppression rather than to liberate people from them, she never brings all of the threads of her vast topic – religion, race, rights – together.

Nor could any one book be expected to. As Taylor wrote, '[t]he story of what happened in the secularization of Western Christendom is so broad, and so multi-faceted, that one could write several books of this length' (his own was 776 pages excluding

notes) 'and still not do justice to it.'[47] But as Taylor also wrote, confirming Darian-Smith's historicizing impulse, 'the [historical] narrative is not an optional extra.' Although attempting to add a historical analysis to the analysis of secularism 'enlarges the task, potentially without limit,' not undertaking a historical reconstruction of the evolution of secularism means that the true nature of our legal system and its connections to religion will remain hidden from sight.

Darian-Smith has performed an immensely valuable service in bringing the scholarship on secularization to bear on the study of law and race. If she has not succeeded in making the connections between that scholarship and race fully clear, she may yet succeed in prompting other scholars to consider the topic, and that would be a great boon. What she has succeeded in doing is making clear modern liberalism's religious origins. The religious pedigree of secular liberalism too often goes unacknowledged both by secular liberals, who fail to recognize the religious origins of their cherished liberal ideals, and by religious conservatives, who fail to recognize the liberal values inherent in their religious traditions. The current mutual incomprehension between secular liberals and people of faith, and the political confrontations between liberal democracies and the forces of religious fundamentalism taking place around the world, are in no small part owing to this failure to recognize the religious roots of liberalism and the liberal aspect of traditional religious ideals. The ways in which these 'culture wars' and religious politics intersect with nationalism and racial politics have yet to be fully examined. With work like that of Darian-Smith's new book, and the further work on the relationship between race and religion that this book will hopefully

[47] Taylor, 29 (n 42).

stimulate, the mutual incomprehension of ‘the secular’ and ‘the religious’ and the acoustical separation between race and religion may yet be overcome.