Introduction

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Losing Faith in the Secular

An easy assumption in much academic writing for a century or more has been that a key feature of the modern era and social order, whether this is understood to have begun in the twelfth, sixteenth, or eighteenth century, is the progressive immanence of our concerns and our references. The separation of the state and of its various institutions, including law, from religion, and with this the religious neutrality of the state (and the political neutering of religion), has been conceived as not only central to the emergence of this new order, but also necessary for its preservation and for the achievement of the justice that it is supposed to guarantee. Given the prevalence of this assumption, it is perhaps surprising how quickly "secular," "secularism," and "secularization" have recently come to be seen as highly unstable terms in academic discourse. Whether it is their etymological and discursive origins, their present definition, or their inseparability from dubious projects of modernity and "the West," these categories have been called into question by an ever-expanding number of books, articles, and conferences.

There is a significant urgency, even a sense of panic, to much of the new discussion about the secular, as if getting control of the words might alone hold back history and provide a foundation for the reconstitution of political order. This urgency has been exacerbated by several developments, including especially the rise of religious movements, both in the United States and abroad, that have challenged long-settled assumptions and contributed to what now appears to be an existential crisis for secular liberalism.

Criticism of the assumptions underlying secularization was not entirely absent in the past; consider Karl Marx on the Jewish question[1], or Carl Schmitt's arguments in Weimar Germany that modern law has its own "political theology."[2] For the most part, however, secularism was treated as an unproblematic background condition. In the last twenty years or so, this background has become foreground. Historians, sociologists, anthropologists, and political theorists are insisting in various ways on the persistent relevance of religion or of the "sacred." Among others, sociologist José Casanova's 1994 *Public Religions in the Modern World*, anthropologist Talal Asad's 2003 *Formations of the Secular*, philosopher Charles Taylor's 2007 *A Secular Age*, and the new salience of "political theology" in both Continental and Anglo-American political thought, have reoriented the conversation, placing questions about secularism at the top of the agenda for many social and political theorists.[3]

These works and others have decentered the secular, urged a new relevance for religion, and insisted on the existence of multiple modernities and diverse ways of relating religion to the public order. Such scholarly trends highlight the changes to religion and to governance that have occurred since the accommodations of the early modern era. It is now better understood that religion, like secularism, takes plural forms, some of which fit uncomfortably with the liberal modes of thought dominant in Euro-American societies. Some of these deviations from the paradigm of liberal secularism extend the promise of multiculturalism, but some also appear to challenge key assumptions of traditional theoretical models justifying public order, and to expose vulnerabilities in the sovereignty of the secular state. It is the purpose of this volume to focus attention on one domain in which questions of the secular have received relatively little detailed attention—namely, that of law: how did law become secular, what are the phenomenology and social and individual experience of legal secularism, and what are the challenges that taking into account religious formations poses for modern law's self-understanding?

The value of the rule of law as a necessary element in global development is largely taken for granted. Great hope is placed in law, properly understood and administered, as a vehicle for the transformation of society. Most movements for modern reform also accept without question law's account of itself as autonomous, universal, and above all, secular—meaning, in the first instance, religiously neutral, but also, more strongly, paradigmatically rational. A common account of modern law is that it ensures a regime of religious toleration and pluralism, one that allows a zone of "religious freedom" in which individuals and communities are free to follow the dictates of conscience in matters of religious belief and practice.[4] In these accounts, private individual or communally

bounded modes of religion are juxtaposed to and contained within a universal "secular" law. One intention of this volume is to document, historically and ethnographically, the always mutually involved ways of law and religion.

Interestingly, law's claim to the universal resembles—indeed arguably derives its power from—the universalism that is claimed by a number of religious traditions, including, notably, Christianity. "In Christ there is," in the words of the Apostle Paul, "neither Jew nor Greek" (*Galatians* 3:28). Similar to the way in which Christianity arrogated to itself the power to succeed and contain Judaism (as Islam did in turn to both of those earlier traditions), secularism asserts its authority to displace and locate religion.[5] As with the universalisms of the monotheistic religious traditions, the contemporary promotion of secularism as a "one size fits all" approach appears similarly as an effort at proselytizing and conversion. So, while, for the most part, the very expression "law and religion" reflects an assumption that law is different and separate from religion—that they are discrete kinds of things, separate species if not members of different kingdoms altogether—in fact, regarded more closely, their overlapping functions define a range of possible relationships that law has to religion, as complement and mutual support, as competitor, or as successor.

Law may constitute, at once, a cosmology, an anthropology, a technique of textual interpretation, a regime of images or of representation, and even a soteriology—that is, a method of justification or salvation. As such, law serves a social and cultural role analogous to that served by religion. For its part, religion provides an ever-replenishing supply of lawlike norms and narratives that govern human life. As David Kennedy has pointed out, the very gesture of separation between religion and law echoes, ironically, a fundamental concern of religion to distinguish between the "sacred and the profane," suggesting the closeness between sacred and secular modes of thought precisely at the point at which they are believed to be most distinct.[6]

If we might, following anthropologist John Comaroff, call this overlap "legal theology,"[7] how does it compare to "political theology," another concern of this volume?[8] The first points to the singularity of law and implies an attitude of reverence. The latter emphasizes different points: that law, and the state and legal order more generally, are dependent upon the more fundamental category of the political, which also includes the religious; there is a necessary structural coordination between the political and the religious domains that challenges the state's pretensions to religious neutrality; and, there is a theological, in many cases a specifically Christian, residue repressed at the foundations of the modern state. These two uses of the term "theology" thus reinforce the need to reexamine what we mean by "religion" and "the secular" in law.

Apart from the implications for the legitimacy of the secular state, and the rule of law more generally, the answers to these questions have profound implications for a wide range of practical legal issues, including evolving trial processes, the law of evidence, the defining and redefining of citizenship, state security systems, family law, the law of property, new practices of sacrifice on the part of the military and the citizenry, new formations of sacral sovereignty, the transformation of geographically located religious traditions into more portable modernist ideas and practices, the consequences of transnational migration, and changes to electoral politics, among others. The authors of the essays in this volume approach these issues as anthropologists, historians, philosophers, and legal scholars. Each takes a particular area of contention concerning religion and secular law—what Hussein Agrama, in this volume, borrowing anthropologist David Scott's phrase, calls a "Problem-Space"—and begins to redescribe the dynamic interconnections between law and religion that this space makes evident, with a view to deepening our understanding of the range of possible relationships between these two domains and the many meanings of legal secularism in a globalizing modernity.

Contexts

The study of the relationship between religion and law was, until recently in the English-speaking academic world, conventionally located in two places: in the history of church-state interactions in Europe and in the history and legal management of religious diversity. This circumscription of attention, which reflected prior political decisions in favor of secularism, and was itself a symptom rather than a diagnosis of secularism, has largely displaced religion from both broader theoretical accounts of law and its place in social history. It is worth briefly recounting the most recent historical narratives that supported this displacement.

For most of the nineteenth and twentieth centuries, evolutionary accounts of the historical development of law saw a natural progression from sacred to secular law. For example, British legal historian Henry Maine (1822–88), in a discussion of the Hindu *Laws of Manu*, asserted that the earliest legal systems were religious: "There is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance."[9] His *Ancient Law* asserted and documented what he regarded as an essential transition, that "from status to contract," as a foundation for modern, positive law.[10]

The secularization of law is bound up with other themes in the development

of modern law. Some legal historians have emphasized the importance of the increasing ascendancy of written or printed codes. Such sources of "rational" legal authority are said to have replaced, variously, the capriciousness of oracles and ordeals; the rigidity of magical formalism; or the dissemination of law by oral tradition, maxim, and proverb, or more generally custom. Yet legal codification was not synonymous with secularization, if that is understood to mean the decline of religion. Aside from the fact that many of the earliest law codes were explicitly religious, the development of legal codes in the modern, English-speaking world was itself partly due to the influence of Protestant ideas of scriptural authority, and an accompanying rejection of customary traditions as "idolatry."[11] Jeremy Bentham (1748–1832), for example, in his proposal to codify the English common law vowed to end the manipulations and "priestcraft" of the judiciary.[12] Bentham asserted the independence of law from religion, morality, and ethics, and was one of the central figures in the elaboration of a theory of positive law. Although Bentham's jurisprudence was clearly rational and secularizing, it was also deeply imbued with certain strains of Protestant thought and cannot therefore accurately be termed "nonreligious."

The repudiation of ritual is an important characteristic of the modern period, as scholars from Peter Burke to Talal Asad and Catherine Bell have noted.[13] Despite the persistence of ritual throughout contemporary legal institutions, modern law can also be seen as, in part, the product of an effort of deritualization. Discussions of ancient or "primitive" law often exhibit a critique of the rigid attachment to certain prescribed modes of legal procedure.[14] Many of these critiques share a characteristic modern emphasis on the value of substantive law and of legal realism over formalism, and accordingly disparage the ritual dimensions of ancient law as a mode of irrational or "magical thinking." Part of this disdain of ritual can be traced to Protestant attacks on embodied forms of worship, which contributed to the redefinition of religion as an internal state of belief more compatible with the modern concept of freedom of conscience. Part can be traced as well to earlier Christian attacks on Jewish "ceremonial laws," which, by distinguishing these from "natural" and "civil laws," anticipated the contemporary distinction between law and religion.[15]

The German sociologist Max Weber (1864–1920), whose work is still an important point of departure for contemporary discussions of secularization and the history of law, traced secularization to developments internal to Latin Christianity during and after the Protestant Reformation.[16] Society became "disenchanted"—liberated from magic and personal charisma, as well as ritual formalism—making possible the rationalization of both law and the economy. Despite numerous challenges, Weber's account has been reinforced by several

recent works on the Christian roots of secularization.[17] Yet, the very notion of disenchantment echoes earlier theological accounts according to which the Crucifixion abolished Jewish sacrifice and silenced the pagan oracles.[18] The dependence of Weber's sociology on such theological tropes illustrates the difficulty of disentangling the secular from the religious.

Weber's younger contemporary and critic Carl Schmitt (1888–1985) recognized this difficulty. He argued, "All significant concepts of the modern theory of the state are secularized theological concepts."[19] Schmitt contended that secularism followed Protestant theology in attempting to displace transcendence, by outlawing or banishing magic, miracles, and mystery from the text of law.[20] He saw contemporary jurisprudence as lacking an awareness both of its own theological antecedents, and of the inevitable persistence of "political theology." His theory of the "state of exception," in which the sovereign suspends the law in a manner analogous to revelation or divine fiat, represented a deliberate attempt to re-enchant the law. In recent decades, a reconsideration of both Schmitt's own concept of political theology and of the influence of Jewish and Christian theological traditions, most notably the writings of Paul, on modernity has engaged scholars at the intersection of political and legal theory, philosophy, and theology.[21] Several essays in this volume take up a consideration of Schmitt's challenge to secular liberalism.[22]

Critical cultural studies of law also have contributed to a significant re-examination of modern law's claims to secularity, autonomy, or even completeness and adequacy, in the absence of a religious reference.[23] Robert Cover's iconic 1983 essay "*Nomos* and Narrative" pointed to the sacral dimensions of law.[24] Peter Fitzpatrick's 1992 *The Mythology of Modern Law* and Peter Goodrich's 1995 *Oedipus Lex* both argued for law's dependence on a mythological narrative of separation from religion, a narrative that parallels religious modes of thought. Secular law, they argue, appears to have borrowed some of its strategies from religion itself. Indeed, the bare question of "what constitutes religion" in the secular state necessarily involves the law in a process of theologizing, demonstrating the "impossibility of religious freedom" and of a complete separation between law and religion.[25]

If the boundaries between law and theology now appear less distinct, the blurriness of those edges has arguably enabled a range of new stories to be told about legal modernity, stories that reject the simplistic narrative of a separation between law and religion without necessarily collapsing these two categories or returning law to a religious foundation. Historians increasingly see a profound intertwining of religious and secular ideas, institutions, and popular practices in the early modern period.[26] Upon closer inspection, key philosophical and

social-scientific thinkers who have described the evolution of modern law and politics turn out to have been as interested in religion as in the state, and significant moments in the history of law are being reinterpreted as significant moments in the history of religion.[27]

Law is thus increasingly being recognized as varied, plural, and overlapping, dependent on religious anthropologies and cosmologies, as well as sharing symbols, ideas, and institutions with religion. The entire history of law is now being retold. Harold Berman's two volumes, *Law and Revolution I* and *II*, focus on the transformation that occurred in European law after the rediscovery of Justinian's law codes in twelfth-century Bologna, the subsequent invention of a law for the Roman Catholic Church which influenced the emerging secular states, and the Protestant reformulation of law that followed.[28] A reconsideration of the significance of customary law in Europe, including that of the common law, and the profoundly religious learning and motivation of those who invented modern positivist law is underway.[29]

These new studies, which challenge both Weber's linear account of secularization and oversimplified histories of the post-Westphalian state, while extending Weber's insight concerning the irrational or religious basis of what we call "the secular," still emphasize the unique role of Western civilization by focusing primarily on the development of law in modern Euro-American cultures and their diaspora. An urgent task for the study of legal secularism today is the displacement and "provincializing" of such a Eurocentric (and Christocentric) narrative:[30] by examining parallel and divergent examples of secularism in other cultures; by scrutinizing alternative histories of legal development; and by tracing the colonial encounter between European and non-European cultures, in which we may observe not only the emergence of "the secular" in its process of formation but also the peculiar distortions and, in some cases, Christian theological presuppositions that directed this process.[31]

Like the new histories of law, anthropologies of law have left behind colonialist constructions of culture in favor of what Comaroff calls a horizontal and polycultural legal landscape.[32] One of the most interesting aspects of globalization is the way that it restructures relations of difference—in particular, how "religion" and "culture" and "ethnicity" mark group and individual identity. On the one hand, globalization entails a universal regime of value through market exchange, the flow of capital and the sale of labor;[33] while, on the other hand, new "noneconomic" domains emerge as places where differences may be expressed.

Other anthropologists of law, such as Bruno Latour in his *The Making of Law*, an ethnography of the French Conseil d'État, attempt to specify at ground

level the peculiar life ways of modern law. Law itself, Latour observes, has no content. It is a peculiarly totalizing human form that is mixed with everything. In his words, law is "fractal"; it "has its own ontology"; "it engenders humans without being made by them"; it is "its own meta-language." Law is a particular schematizing of social facts that provides no additional information about anything. To expect otherwise, Latour insists, is to misunderstand modern law and its relation to religion, and, significantly, of both to modern science and the invention of the fact.[34]

The activities of multinational corporations and transnational religious actors are making state borders salient in new ways; and transnational political and legal institutions, both governmental and nongovernmental, have begun to enforce regional and international legal regimes that impact religion. Various sites for an investigation of these new religio-legal realities, and of their histories, include human rights, economic activity, rapid migration, environmental degradation, entrepreneurial violence, and the proliferation of electronic media. While Faisal Devji describes the contemporary terrorist as inventing the global post-human through suicide bombing,[35] President Nicolas Sarkozy talks of a *laïcité positif* that reimagines French republican religiosity.

This Volume

This volume seeks to hold together several strands of the conversation about law and religion that are often, institutionally and discursively, taken as distinct: the historical, anthropological, normative, juridical, theologico-political, and philosophical. These strands are intimately connected both genealogically and structurally today. Theorists have much to learn from the redescription being provided by historians and anthropologists about life on the ground, while historians and anthropologists have much to learn from theorists about the framing terms of the conversation and the persistence of normative claims. The study of law and religion continues to operate in a world where academic work may have immediate political currency. That currency demands careful and precise attention to history and phenomenology.

The essays are grouped into two sections, "Histories of the Legal Secular" and "Ethnographies of the Legal Secular." The essays of the first section are largely historical reassessments of the founding moments of the legal secular; the essays of the second section further specify the ambiguous phenomenology of the legal secular today. Together they address the following questions:

—What, precisely, do we mean by "legal secularism"? Is the concept of "separation of church and state" still valid as a rubric for the analysis of the many (or indeed

any) phenomena that might be grouped under the category of legal secularism? Can we say what the differentiation of law from religion means, intellectually speaking, in a context in which the stability of the categories of law and religion has been so thoroughly eroded?

—Is legal secularism primarily or even exclusively of European origin, or have there been analogous processes in other cultures and historical periods? How can we anthropologize the question of legal secularism in a way that does not simply project European, post-Christian categories as a false mode of universalism?

—When did the modern, secular legal order arise? What are its key moments, causes, and consequences? How can we construct a historical narrative of legal secularization that neither avoids specifying the differences introduced by modernity nor simply repeats earlier, discredited narratives that now appear too obviously tainted by either liberal triumphalism or the echoes of Christian eschatology?

—What is the role of Christian theology in the rise and transformation of the concept of legal secularism? Is it necessary to study Christian theology in order to appreciate the legal and political structures of modernity? If so, then what happens to the disciplinary division of labor among scholars of law, theologians, and secular scholars of religion?

Although it is scarcely possible, given the present state of our knowledge, to answer any of these questions, the essays in this volume collectively assert that such questions have been and must be posed.

Part I: Histories of the Legal Secular

The essays in this part retell key narratives in the history of the modern period with a view to putting into question the notion of a progressive and thorough modern secularization of the law. Some authors do this by tracing the lingering theological dimensions of the modern order, or by showing how an ostensibly religiously neutral modernity privileges certain types of religion. Other authors argue that what really happened in the past was not secularization, but rather various transformations in the sociopolitical order in relation to which religious motives were either epiphenomenal, superficial, or inseparable from a total social dynamic. Religion emerges as both more and less significant and distinctive than the standard narrative of secularization asserts.

Robert Yelle argues that the view that law is properly secular, or separate from, religion finds its roots in earlier theological readings of history, including the central event of Christian sacred history. Christ's redemptive sacrifice was understood to usher in a division between "grace" and "law," abrogating the Jewish ritual law and creating a divide between the theological and political domains. Paul's interpretation of Moses' veil, for example, encoded the

claim that the Gospel had superseded the darkness of Jewish ritual, banishing all such signs of ritual particularity in favor of an enlightened universalism. Such Christian themes are implicated in the "disenchantment" of the world of modern bureaucratic law as described by Max Weber. During and after the Reformation, condemnations of Jewish "ceremonial law" reinscribed the distinction between "religious" and "secular law," in part by redefining religion as antinomian and a matter of inner conscience, rather than of external performance. The historical connections and structural analogies and displacements between Christianity and secularism resulted in the formation of a secular legal economy of salvation parallel to the earlier theological one.

Jakob de Roover focuses on how secular law is drawn into defining religion. In making such determinations, secular authorities are, he says, "bound to smuggle in one particular theological conception of religion." De Roover takes up in his inquiry both the dynamic expansion of Western Christianity and the creation of a secular legal system in India. The Christian opposition of true religion to false religion or "idolatry," as well as of both kinds of religion to a third category of matters "indifferent" to religion, enabled the European accommodation between religion and the secular. De Roover further argues that the "realm of false religion has not really disappeared, but remains embedded implicitly in the practice of secular law."

Jonathan Sheehan rereads two texts from mid-seventeenth-century England with a view to understanding the political work done by the language of sacrifice. He challenges the ideas that that moment in history represented either the achievement of a political domain independent from theology, or the persistence of theological motifs in an ostensibly secular political order. He argues rather that the two allow us to see an integrated social picture in which such alternatives make no sense. John Milton responded to the publication of the *Eikon Basilike*, which had presented Charles II's martyrdom as a sacrificial judgment on the law, by insisting that Charles, like any other, was subject to the legal order. In the end, imagining Charles's martyrdom proved more powerful to a wider public than Milton's appeal to universal justice, but, Sheehan teaches us, that success was not the triumph of the religious over the secular, but rather the triumph of an emerging model of the necessity of assent to the political order. Sheehan's second example shows how Thomas Hobbes also invoked sacrifice to embody and dramatize assent to the law as a basis for a contract theory of the state.

The English Revolution of 1688—the so-called Glorious Revolution—which replaced the Catholic King James II with the Protestant monarchs William and Mary, has long been regarded as a watershed moment in the development of religious toleration. In her essay, Rachel Weil examines the security laws, in-

cluding loyalty oaths, enforced in the wake of the 1688 Revolution, and designed to preserve the new regime from disloyal elements, especially those known as "papists and reputed papists." Her study of this legislation shows that reading these strictures through the lens of an earlier "equation of Protestantism and loyalty, Catholicism and disloyalty" does not do justice to the way they were now used. This change was due in part to the newly visible phenomenon of disloyal Anglicans, and resulted in the development of new religious tests, such as the Declaration against Transubstantiation, which were aimed only at suspected Catholics. The equation of Catholicism with political disloyalty was counterfactual, but politically useful to Anglicans. A similar conflation of religious with political identity can be observed today, with the threat—magnified, again, by its subterranean nature—of "Islamic terrorism."

Tomoko Masuzawa's essay on the advent of the academic secular traces the efforts of modern states to design and promote new forms of public instruction that would unify their peoples and transcend religious differences. Following the paper trail from eighteenth-century Prussia to the founding of the University of Michigan in the mid-nineteenth century, Masuzawa sees the actions of profoundly pious and religiously motivated men as inventing not a secular university but one with a new mission, far from former curricula designed for the re-production of old elites.

Stephanie Phillips' rereading of the Unitarian controversy in nineteenth-century Massachusetts invites us to see, not a secularizing moment of liberation from older established modes of religious control, but a deliberate and violent displacement of one religious regime with another. Taking us through disputes over church property, Phillips shows how such disputes also served as vehicles for the development of new ideas of tolerance and religious orthodoxy, ideas that are, on her reading, as intolerant as their predecessors.

Banu Bargu discerns three permutations in Carl Schmitt's usage of the term "political theology": a "static structural homology" in which the political and theological are seen to share a common institutional form, vocabulary, and origin; a "dynamic affiliation, mixture, or convergence" in which the two interpenetrate; and, lastly, a relation where the two are combined. To illustrate the different ways of conceptualizing the linkages between the two, Bargu turns to the concept of sacrifice. In Bargu's rendition, political sacrifice in the modern state "becomes more and more routinized and secularized, immanent and profane." Insurgent movements, by contrast (some of Bargu's other work is about hunger striking prisoners in Turkey) "bring sacrifice to the center stage of politics . . . thereby theologizing political struggle."

Bruce Rosenstock's essay construes the recently established International

Criminal Court as the "sovereignty-less conscience of humanity." For Rosenstock, the ICC is amenable to analysis in terms of political theology, but one that draws on John Locke rather than on Hobbes's and Schmitt's notions of the absolutist state. Although a court of final judgment, the ICC does not dispense divine punitive justice with an apocalyptic coloring, and is not just another form of Schmitt's sovereign, who acts with impunity. Rather, the ICC is informed by a divine restorative justice that opposes impunity, a form of justice that Rosenstock finds in Locke's notion of the right to "appeal to Heaven." The ICC's protection of human rights, he argues, is not merely immanent and secular, but represents a theologico-political determination that potentially replaces or qualifies Schmitt's absolutism.

Some common themes emerge among these historical essays. Weil and Sheehan illustrate the birth of the modern in the renegotiation of the relationship between the individual and the political order, and of the boundary between private and public, so as to require an expression of individual assent, whether in the form of a loyalty oath or in the drama of sacrifice. Modernity was less about secularization on this reading than it was about something that might be called the creation of a new subject. Sheehan further rejects the interpretation that secularization represents the (illegitimate and unconscious) translation of theological motifs to the political domain. Yelle's description of secularization as a "myth" inherited from Christianity, and De Roover's analysis of the contribution of the category of idolatry to the formation of the secular, take the opposite approach while Phillips exposes the illiberal intolerance at the heart of the liberal legal order. Yelle's, De Roover's, and Phillips's essays all point to the manner in which an ostensibly theologically neutral modern political order actually privileges particular theologies. Bargu presents a rereading of Schmitt's work, complicating easy reductions of his critique of the secular, liberal state. Masuzawa and Rosenstock show us the deeply ambiguous nature of modern institutions, the secularity of which is usually taken for granted. All of these essays illustrate a modernity characterized not primarily by the dismissal or displacement of religion, but by the persistence, transformation, and sometimes fragmentation and dispersal of religion under what still might be termed "secularizing" dynamics.

Part II: Ethnographies of the Legal Secular

The imagined separation of religion from law today has been so thoroughly naturalized that it is difficult to see the ways in which the two continue to share spaces, texts, actors, and authorizing narratives. This part gathers together eth-

nographic readings of contemporary contexts in which the notion of separation breaks down as a useful structuring description of the relationship between law and religion. Bringing together close readings of religio-legal encounters from contexts as diverse as Denmark, Egypt, India, Sudan, Thailand, Turkey, and the United States, these essays display the shifting and overlapping domains of the sacred and the secular, confounding our assumptions about the secularity of law and the antinomian nature of religion.

Reviewing several recent cases in Egyptian personal law courts, Hussein Agrama asks whether Egypt is a secular or a religious state.[36] He argues that "some of the conflicts in Egypt that seem to be between Islamic precepts and secular ideals actually arise out of deep-rooted tensions within liberal secularism itself." Agrama concludes that it is, ironically, the very schematizing of religion by liberal legalism that enables religion to serve as a vehicle for illiberal policies. Secular law creates and polices a division and tension between the secular and the religious, and between public and private, that makes conflict inevitable when the very religion it has imagined into being is seen to violate that divide.

Noah Salomon's essay on "postconflict" Sudan describes the tensions that "emerge within the law from the competing demands for equal citizenship (translated into the principle of 'equality before the law') and multiculturalism (translated into the principle of 'exceptional jurisprudence') in which law is applied, or not applied, on the basis of the religious or cultural identity of the defendant." The conventional depoliticization of discourse on the rule of law has allowed it to be adopted by those who, by using this discourse to repress cultural minorities, call into question the very foundation of the rule of law. Barring the unlikely elimination of *shari'a* in northern Sudan, Salomon asks whether social stability must now be gauged not in terms of the presence or absence of the rule of law, as many argue, but rather through the negotiation of a system of radical legal pluralism.

Markus Dressler sees the secular and the religious in Turkey as a self-reaffirming "binary pair." He describes Turkish laicism (*laiklik*) as a process, not of separation, but of the containment and subordination of religion by the state through law and the efforts of the Directorate for Religious Affairs. The DRA does not claim authority only as a state agency: it also projects its own understanding of *shari'a* law, Greek Orthodox devotional practices, and other religious matters. That is, it is both a "secular" and a "religious" actor, one that Dressler sees as having a modernist idea of religion as excluding "superstition," while at the same time drawing on certain identifiable strands of Islamic theology to the exclusion of others.

Moving to the other end of Asia, David Engel traces the declining use of Thai courts in injury cases beginning with the suppression of customary law and religious practices through legal codification in the early twentieth century. Close linkages that had formerly existed between the *mangrai thammasat* (royal codes) in northern Thailand, and village customary practices and beliefs concerning injuries that were rooted in spirit worship and Buddhism were destroyed by the adoption of the Thai Civil and Commercial Code in 1935. In recent years village-based practices have disappeared as a viable response to injury cases, and injury victims increasingly explain causation using the principles of a modernist Theravada Buddhism, which they view as incompatible with the assertion of rights or the quest for compensation. Paradoxically, the triumph of the Thai state over the customary practices of the northern region is most obvious in the almost complete absence of state law—or indeed any sort of law—in most injury cases.

Thomas Blom Hansen, in "Secular Speech and Popular Passions: The Antinomies of Indian Secularism," discusses the deployment of secularism in India in order to contain sectarian violence following the 1947 Partition. In the shifting boundary between the "cultural" and the "political," Hansen examines how the valorization of the two domains has evolved. He describes the continued importance of emotions and passions to modern politics, "emotional intensities drawing on another time (the truth of the nation) or on another world (the sphere of the sacred)."

Three essays in this part describe the interplay of religion and law in the United States today. Greg Johnson's essay shows how the Native American Graves Protection and Repatriation Act "and laws like it shape religious claims and then conduce to misrecognition of the same." NAGPRA hearings both legally authorize and provide the occasion for the performance of Hawai'ian genealogies in hearings contesting ownership of sacred objects. Law is both complicit in the legitimizing of Hawai'ian religion and limited in its power to shape that religion in the ways it would like. Hawai'ian political and religious actors competitively and creatively work and rework both their received traditions and emerging ones in the legal spaces provided by state and federal law.

Mary Anne Case argues that "opposition to legal recognition of same-sex marriage on the part of evangelical Protestant religious conservatives who claim such recognition would undercut their own marriages" can best be understood not as disingenuous, but as the result of Protestant dependence on the state to enforce its legal traditions. Case contrasts this concern with the practices of "observant Jews and Roman Catholics, who clearly understand that civil marriage and marriage within their faith are not the same." "Protestant denominations," she suggests, "have essentially abdicated the definition, creation

and, above all, the dissolution of marriage to the state." On her reading, most American Protestants sacralize the state in a most unexpected way, incorporating it religiously by assigning it governance tasks essential to the maintenance of religious goals.

Mateo Taussig-Rubbo's essay notes that the attacks of September 11, 2001, led to the designation of property damaged in the attacks as "sacred" by officials and others. This new designation was applied both to real property (land) and to souvenirs of the attacks. Some of the objects in question were unremarkable, often nothing more than rubble, but for those who possessed them they seemed to have transcended such banal categorizations. Rather than focusing on the destruction of property and human life itself, Taussig-Rubbo's concern is with the form of value created through destruction. He asks who lays claim to that value, to what purposes it is directed, how it attaches to material objects and land, and whether it overwhelms the usual legal understandings of property and ownership or can be subordinated to them.

Finally, Tim Jensen brings us back to Europe with an essay on the legal regulation of religion in Denmark. He reviews three recent cases in the Danish courts concerning freedom of religion and concludes that, in this most secular nation, a population sometimes described as made up of "irreligious Lutherans," still-dominant Protestant normative notions of religion are imposed on minority religious opinions and traditions. Jensen's discussion is framed by a rereading of Danish secularism as a kind of Christianity, exemplified in the contemporary use in Danish passports of a photo of a tenth-century runic stone with a cross, a stone that proclaimed the conversion of Denmark to this still-dominant religion. (The Danish passport image is reproduced on the cover of this volume.)

What is an anthropology of the legal secular? The ethnographic essays in this section participate in a larger anthropology of the modern. This ethnography seeks to redescribe what Talal Asad calls "the modern secular condition we all inhabit" with a view to disrupting the separations of what Bruno Latour has labeled the "modern constitution."[37] Agrama, Dressler, and Salomon subvert in nuanced ways the all-too-common narratives about the pathological and antimodern nature of the Muslim state, showing Egypt, Turkey, and Sudan to be involved in ongoing negotiations among religious and legal accounts of everyday life and of the nature of politics. Engel, Hansen, and Case reveal similarities among Thai, Indian, and U.S. political dynamics concerning the regulation of religion. The materiality of religion and the limits of law's ability to deal with objects and their meaning are painfully evident in Johnson, Jensen, and Taussig-Rubbo's accounts of litigation conducted under the protection of laws intended to guarantee rights to religious freedom and private property.

Reappraising Secular Law

Most polities in the world today claim to guarantee religious freedom for their citizens. All also profess to respect the rule of law. How these two goals might be practicable is far from evident. The rule of law turns out to look quite different in different places, dependent as it is on local histories and cultural and religious cosmologies and anthropologies that are far from agreed upon. Ensuring the religious freedom of citizens requires a constant cutting and fitting of religion to adapt to the demands of law. Persons and communities claiming motivation from a range of religious sources test the limits of a rationally ordered and technologically driven world. Indeed, imagining citizens as secular does continued violence to humans in ways we don't fully understand.

An underlying theme of this volume is that now is not a moment for the further refinement of existing settlements but rather a moment for redescription.[38] The awkward incapacity of secular law is apparent at every turn, in efforts at the restoration of justice to indigenous communities, in the raising and education of children, in the management of sacred places, in the rehabilitation of prisoners, in end-of-life care, in the distribution of resources, in the preservation of the environment, and in the management of multicultural public life. Hence we must continue to ask: What is law? How does it work? Can it do what we expect of it? What is religion? Is it an inevitable part of human life or is it something disposable, something we might evolve out of? Has the separation between law and religion ever occurred, and does it even make sense, in either logical or normative terms?

The essays in this volume work within a range of disciplinary canons, employ an array of different models and methods, and focus on a remarkable range of fascinating human stories. Themes and cross-talk and intriguing possibilities for future research are apparent throughout. It is our hope that this volume might be understood as a bid for further work, work toward a more complete and complex understanding of the ways in which law and religion have structured and continue to structure our lives, and work that integrates historical and ethnographic methods and insights.

However, haunting this project, and ever-present in the subtle investigation and details of the lives here made visible—and the ones only hinted at—is the possibility that, "after separation" neither law nor religion will have the same power or presence—and that other ways of living will emerge. That possibility, too, beckons.

Notes

1. Karl Marx, "Zur Judenfrage" ("On the Jewish Question"), *Deutsch-Französische Jahrbücher* (February, 1844).

2. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005).

3. José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1995); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003); Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007). For an overview of contemporary discussions of political theology, see Hent de Vries, "Introduction: Before, Around, and Beyond the Theologico-Political," in *Political Theologies: Public Religions in a Post-Secular World,* ed. Hent de Vries and Lawrence Sullivan (New York: Fordham University Press, 2006), 1–88.

4. For a classic account of this hope, see Thomas Jefferson's *Virginia Statute for Religious Freedom*.

5. See Gil Anidjar, "Secularism," *Critical Inquiry* 33 (2006): 52–77; see also the essay by Yelle, this volume.

6. David Kennedy, "Images of Religion in International Legal Theory," in *Religion and International Law*, ed. Mark Janis and Carolyn Evans (The Hague: Martinus Nijhoff, 1999), 145–53 at 150.

7. John Comaroff, "Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century," *Social Analysis* 53, no. 1 (2009): 193–216, 194.

8. See the essays by Bargu and Rosenstock, this volume.

9. Henry Sumner Maine, "The Sacred Laws of the Hindus," in *Dissertations on Early Law and Custom* (London: John Murray, 1883), 1–25 at 5. There are exceptions to the rule. Notably, Arthur S. Diamond, *Primitive Law, Past and Present* (London: Methuen and Co., 1971), vii, 47–52, and esp. 104–13, argued that the conflation of law with religion in *Manu* and *Leviticus*, and so forth, belonged to a phase of later codes developed under the influence of priesthoods.

10. Henry Sumner Maine, *Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861)

11. Assaf Likhovski, "Protestantism and the Rationalization of English Law: A Variation on a Theme by Weber," *Law and Society Review* 33 (1999): 365–91; Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995), ix, 11, 44, 63, 65, 103 n.146.

12. Robert Yelle, "Bentham's Fictions: Canon and Idolatry in the Genealogy of Law," *Yale Journal of Law and the Humanities* 17 (2005): 151–79.

13. Peter Burke, "The Repudiation of Ritual in Early Modern Europe," in *The Historical Anthropology of Early Modern Italy: Essays on Perception and Communication* (Cambridge: Cambridge University Press, 1987), 223–38. Compare Jonathan Z. Smith, *To Take Place* (Chicago: University of Chicago Press, 1987), 99–103; Catherine Bell, "Ritual Reification," in *Ritual and Religious Belief: A Reader,* ed. Graham Harvey (New York: Routledge, 2005), 265–85; Talal Asad, "Toward a Genealogy of the Concept of Ritual," in *Genealogies of Religion* (Baltimore: Johns Hopkins University Press, 1993), 55–79.

14. See, for example, Sir Frederick Pollock, *The Genius of the Common Law*, reprint ed. (New York: AMS Press, 1967), 14.

15. See the essay by Yelle, this volume.

16. Max Weber, *The Protestant Ethic and the Spirit of Capitalism, with Other Writings on the Rise of the West*, trans. Stephen Kalberg, 4th ed. (Oxford: Oxford University Press, 2009); Weber, *Economy and Society*, ed. Günther Roth and Claus Wittich (Berkeley: University of California Press, 1978).

17. Taylor, *A Secular Age*; Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, trans. Oscar Burge (Princeton: Princeton University Press, 1999); Anidjar, "Secularism."

18. See the essay by Yelle, this volume, and Yelle, "The Trouble with Transcendence: Carl Schmitt's 'Exception' as a Challenge for Religious Studies," *Method and Theory in the Study of Religion* 22 (2010): 189–206.

19. Schmitt, *Political Theology*, 36.

20. Ibid., 36–37.

21. Jacob Taubes, *The Political Theology of Paul*, trans. Dana Hollander (Stanford: Stanford University Press, 2004); Giorgio Agamben, *The Time That Remains: A Commentary on the Letter to the Romans*, trans. Patricia Dailey (Stanford: Stanford University Press, 2005); Alain Badiou, *Saint Paul: The Foundations of Universalism*, trans. Ray Brasser (Stanford: Stanford University Press, 2003).

22. See the essays by Bargu and Rosenstock, this volume.

23. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds., *Law and the Sacred* (Stanford: Stanford University Press, 2007).

24. Robert Cover, "*Nomos* and Narrative," *Harvard Law Review* 97 (1983): 4–68.

25. Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).

26. See, for example, Benjamin Kaplan, *Divided by Faith* (Cambridge: Harvard University Press, 2008).

27. See Hobbes, Bentham, and others.

28. Harold Berman, *Law and Revolution*, vols. I and II (Cambridge: Harvard University Press, 1983 and 2004).

29. See, for example, Manlio Bellomo, *The Common Legal Past of Europe: 1000–1800*, trans. Lydia Cochrane (Washington: Catholic University Press, 1995).

30. Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2008).

31. See the essay by De Roover, this volume; see also Robert Yelle, "The Hindu Moses: Christian Polemics against Jewish Ritual and the Secularization of Hindu Law under Colonialism," *History of Religions* 49 (2009): 141–71.

32. Comaroff, "Reflections on the Rise of Legal Theology," 197.

33. Marshall Sahlins, "Two or Three Things That I Know about Culture," *Journal of the Royal Anthropological Institute* 5, no. 3 (1999): 399–421 at 411; David Graeber, *Toward an Anthropological Theory of Value: The False Coin of Our Dreams* (New York: Palgrave, 2001), 33.

34. Bruno Latour, *We Have Never Been Modern*, trans. Catherine Porter (Cambridge: Harvard University Press, 1993).

35. Faisal Devji, *The Terrorist in Search of Humanity: Militant Islam and Global Politics* (New York: Columbia University Press, 2008).

36. See also Malika Zeghal, *Sacred Politics: Political Islam and the State in the Middle East* (forthcoming).

37. Latour, *We Have Never Been Modern*, 13–48.

38. Jonathan Z. Smith, "The 'End' of Comparison: Redescription and Rectification," in *A Magic Still Dwells: Comparative Religion in the Postmodern Age*, ed. Kimberley C. Patton and Benjamin C. Ray (Berkeley and Los Angeles: University of California Press, 2000).