1. INTRODUCTION

Law played a central role in shaping struggles over inequality in colonial situations, at least in the colonies established by European powers since the sixteenth century. Law was the central discourse used within colonizing countries to assert and contest both political authority and control over economic resources. Inevitably, colonizers drew on legal discourses when asserting sovereignty over the peoples and lands they coveted. As a result, by claiming to institute the rule of law in their colonies, colonizers established—perhaps unwittingly—law as the authoritative discourse for claiming and resisting power over others. Colonists carried domestic conflicts over law to their overseas colonies, shaping hierarchies among colonizers, even as the discourse of law provided colonized peoples with a powerful language to invoke against those who would rule them.

In this essay, I will focus on the effects, both intended and unintended, of a particular discourse of law—social contract theory—based on the idea that equal "men" should make the laws that govern them. To highlight the historical specificity of social contract theory, I will contrast its effects on colonial struggles over inequality with the effects of another discourse of law, that based on the idea of a God-ordained hierarchy, as it was brought to the Americas by sixteenth-century Spanish colonizers. My narrow focus on social contract theory is intended to complement Sally Merry's broader essay reviewing the wealth of studies published on colonialism in the last decade (1991). While she, too, focuses on the role of law in shaping struggles over inequality, she concentrates on law's role in promoting the cultural transformation of colonized peoples. I focus instead on contradictions within social contract theory as these played themselves out during colonizing ventures.

2. BASIC PREMISES

Discourses of law are always and inevitably fields of argument. Not only do assertions of power predictably provoke resistance (Dahrendorf 1968; Foucault 1980), but the language of justice necessarily conjures up its opposite, injustice or oppression. The two concepts of justice and injustice are mutually constructed; the absence of each establishes the existence of the other. As a result, claims to rule based on dispensing justice through law necessarily spawn competing notions of which laws are just and which are unfair or oppressive, as well as arguments about whether or not existing laws are being properly interpreted and enforced. These arguments, in turn, serve to validate the concepts of law and justice that make argument possible. As Bourdieu has observed, competing opinions establish a field of shared doxa, consisting of assumptions that tend to go without saying and so to become part of people's commonsense knowledge about the everyday world (1977: 168).

Because commonsense assumptions are rarely articulated, the contradictions they contain tend to pass unrecognized. In this essay, I want to offer some preliminary observations on how contradictions at this level of seldom contested assumptions shaped hierarchies within European colonies by shaping struggles over laws and their applications. In particular, I want to explore how a central contradiction inherent in social contract theory—the use of "equality before the law" to justify and enforce unequal distributions of power, privilege, and prestige—was played out in the colonizing efforts of northern European countries, particularly Britain, in the nineteenth century. I focus on Britain because most of the writings in English deal with British colonies in India and Africa (see also Merry 1991). But, as noted earlier, I will briefly compare the nineteenth-century colonization efforts of northern European countries to the earlier sixteenth-century colonizing ventures of imperial Spain in the New World in order to separate the effects of differences between their conceptions of law from the effects of their shared use of law as the legitimizing discourse for rule.

Since emerging from the Dark Ages, Western Europeans developed a set of interrelated concepts about sovereignty that were not shared by many of the non-European peoples they conquered and colonized. Europeans had a notion of peoples, linked to territories, who could (should) be ruled. And they conceived of rule as maintaining order through the enforcement of laws. In sixteenth-century Spain, for example, "the state was fundamentally a dispenser of justice, and its officials were invariably known as 'judges' or the like" (Stern 1982: 293). But sixteenth-century Spain and the later republics and
constitutional monarchies of northern Europe differed in their assumptions about the primary source of law and about the nature of human society. In Spain, the king derived his authority from God and proved his legitimacy by enforcing God's laws on earth. Rulers of post-Enlightenment republics and constitutional monarchies, in contrast, derived their authority from "the people," whose laws they were expected to implement. And sixteenth-century Spain was a hierarchical society, whereas eighteenth- and nineteenth-century northern European polities declared all "men" equal.

In sixteenth-century Spain, people were unequal on Earth, even if equal in heaven, because God, in his infinite wisdom, ensured an orderly society by allocating different privileges and obligations to different status groups. "Justice," in this ideology, was defined as apportioning to each person and group the particular privileges and obligations that God had ordained for it. Predictably, this ideology spawned endless conflicts over whether particular people were assigned to the correct groups and over whether officials were correctly interpreting God's commandments. On a deeper level, the generally unquestioned assumption that laws were authored by God spawned conflicts over what God had intended and, most disruptively, over who had the authority to report God's will. Kings, as God's appointed representatives on earth, vied with priests, and both were occasionally challenged by outsiders who claimed direct access to God's mind. Such challenges became endemic with the Protestant Reformation. In fact, the dilemma posed by Protestantism, which made it impossible to resolve conflicts over which sect spoke for/to God, led Thomas Hobbes to propose a social contract among humans (Latour 1993: 9).

Substituting man for God as the author of law may have seemed a brilliant solution to the problem of Britain's religious civil wars, but it could not end conflict because central societal discourses are always fields of argument. Social contract theory merely enabled a new set of contending opinions, giving rise to a new set of commonsense assumptions whose implications and contradictions we are still exploring (and contesting). The idea that men author law has spawned endless arguments over what nature intends (i.e., "nature/nurture" debates) as well as controversies over who speaks for nature.

In this paper, I explore how contradictions inherent in the intertwined concepts of "man" and "nature" affected struggles over hierarchical relations in the colonies established by European powers. I begin with a discussion of how these contradictions shaped relations between colonizers and the colonized, followed by a section exploring their role in constructing inequalities among colonizers, and ending with a section focusing on hierarchies within colonized groups. In each section, I will pay attention to historical processes, for the outcomes of previous struggles inevitably shaped the conflicts that succeeded them. In concluding, I will suggest how the contradictions inherent in the basic concepts of "man" and "nature" continue to shape struggles over inequality within our postcolonial world of globalized interactions.

Although I plan to explore the contradictions inherent in social contract theory by contrasting it with sixteenth-century Spanish notions of God's law, I should note that, in the early days of social contract theory, its social consequences were not very different from those of Spanish law. The first colonists from Protestant northern Europe, for example, did not establish egalitarian societies, but rather small commonwealths. The heads of such commonwealths might have claimed equality with one another, but they expected hierarchy to prevail within their domains, where dependent kin, servants, and slaves had unequal obligations and privileges. Before the nineteenth century, when social contract theory became the central discourse used to assert and contest sovereignty in northern Europe, the most obvious difference between the social inequalities established in Spanish colonies and those established by Protestants from northern Europe lay in the fact that Spaniards imagined one, all-encompassing hierarchy in which everyone had a place defined by God, whereas Protestants tended to imagine a series of smaller hierarchies, each presided over by a head who participated in the social contract. But if social contract theory had little impact on social hierarchies when first proposed, its long-term effects were far-reaching.
3. THE ROLE OF LAW IN CONSTRUCTING HIERARCHIES BETWEEN THE COLONIZERS AND THE COLONIZED

Sixteenth-century Spaniards who assumed sovereignty derived from God had little difficulty justifying the conquest and rule of ethnically distinct peoples. Spaniards, for example, easily interpreted their “discovery” of America and their subjugation of its peoples as a sign that God intended the New World to be governed by a Christian king. Post-Enlightenment social contract states, in contrast, found it difficult to justify ruling ethnically distinct others. If “men” were supposed to author the laws that governed them, then colonizing powers lacked a cultural justification for imposing their own laws on peoples who had had no part in making them. For a long time, northern European states avoided this problem by refusing to become rulers of native peoples—at least in theory. British colonists in North America, for example, took over “unoccupied” lands, “bought” property from native peoples, or made “treaties” with native “chiefs.”7 In other areas of the world, particularly those with dense, settled populations, such as India and Southeast Asia, northern European trading companies made “contracts” with native rulers. For most of the eighteenth century, this arrangement worked fairly well. Property-owning colonists and traders from northern Europe were governed by home country laws (which meant that their propertyless “dependents” were as deprived of rights as their counterparts in Europe), while native rulers supposedly retained sovereignty over their own peoples.8

This convenient fiction of nonrule, however, became increasingly difficult for European powers to maintain as native leaders became unwilling and unable to guarantee the security of persons and property required by capitalist traders and colonizers. By the end of the eighteenth century, for example, the British East India Company had ceased to be a trading company, and had become instead a military and administrative operation, directly responsible for ruling large tracts of land in the Indian subcontinent. But administrative and military operations were expensive, cutting into company profits. The company was able to make a profit for its investors only through its monopoly on opium, which it used to finance the China tea trade. Faced with a situation where it needed money to govern its Indian possessions, and where “more than half the revenue of the State was derived from taxation of land” (Stokes 1959: 38), company employees became de facto rulers, even as their efforts to collect land revenues undermined the economic basis of social relations in the Indian countryside. As famine and disorder spread, the East India Company turned to the British Parliament for help in restoring law, order, and prosperity (see Cohn 1989).

Once the British state accepted the task of ruling Indian peoples, three schools of thought emerged offering contending strategies (Stokes 1959). These schools resembled those that had emerged three centuries earlier when sixteenth-century Spaniards faced governing conquered New World civilizations (Borah 1982). One school favored retaining indigenous traditions. Britons influenced by Romanticism, for example, tended to argue for preserving (or rather, restoring) the institutions of traditional Indian rule (Cohn 1989: 134–35; Stokes 1959). Similarly, one school of sixteenth-century Spanish thought held “that the Indians, having developed their own society, were entitled to their own institutions and law” (Borah 1982: 266). A second school, supported primarily by missionaries, also favored maintaining a separation between the institutions of the colonizers and colonized, but for the purposes of radically transforming rather than maintaining indigenous traditions. Both British Protestants and earlier Spanish Catholic missionaries hoped to create utopias on Earth by settling the natives in communities where missionaries could supervise their education apart from the corrupting influence of other Europeans. A third school, reflecting the desires of government administrators, argued for transferring European institutions to the colonies. British Whigs, for example, advocated installing a British type of government in the colonies (Stokes 1959). And in sixteenth-century Spain, “crown jurists and most of the colonists, advanced the idea of one republic: the Indians should be assimilated as rapidly as possible into the European system and be moved thus to Castilian institutions and law” (Borah 1982: 267).9

The idea of imposing European institutions tended to prevail in the colonies of both Britain and Spain, but in both cases colonial officials adopted strategies advocated by the other schools of thought as natives’ resistance and colonists’ greed undermined efforts to establish “law and order.” In British India, the “utilitarian” policy articulated by James Mill combined aspects of the Whig, Romantic, and missionary visions (Stokes 1959). And Borah observes that Spanish “official royal policy steered an ambiguous course among the three schools of thought (1982: 297). In both colonial situations, those advocating respect for indigenous traditions tended to prevail to the extent that indigenous people successfully resisted attempts by colonial officials to transform their societies. And the missionary vision of radical transformation prevailed to the degree that the social, economic, and political changes introduced by colonial rule required indigenous peoples to refit their commonsense assumptions about everyday reality (see Comaroff and Comaroff 1991).

Despite similarities in schools of thought and pragmatic politics, however, eighteenth-century Britain and sixteenth-century Spain differed in their ideas about the source and nature of law, leading to profound differences in the effects their policies produced. British policies tended to create a binary contrast between colonizers and colonized, whereas Spanish policies tended to assimilate the colonizer/colonized opposition into the set of distinctions that divided legally defined estates from one another. As already noted, sixteenth-century Spaniards assumed that God had ordained a hierarchical society, in which status groups held different privileges and obligations corresponding to their rank and social function. As a result, Spaniards—once they had decided that New World Indians had human souls—experienced little difficulty, at least
conceptually, incorporating Indians into their hierarchical society as one more status group with its own particular privileges and obligations. This policy had the effect of playing down the conceptual opposition between Indians and non-Indians, making it just one contrast in the set of distinctions among status groups. This policy also had the effect of playing down differences among the colonized, encouraging Indians of various ranks and groups to unite as one legally defined status group in competition with other status groups.

Colonizing social contract states, in contrast, faced problems not only in justifying their rule over colonized peoples but also in deciding how to treat them once forced to abandon the fiction of nonrule. The ideal of equality before the law, in the double sense of equal treatment by the law and equal access to making law, would not only have been difficult to implement in colonial situations but was never intended to be implemented, even in home countries, where the ideal of equality served to justify and enforce unequal distributions of power, privilege, and prestige. Transported to the colonies, the contradictory ideal of equality fomented endless struggles, whose effect was to highlight and exacerbate the binary opposition between colonizers and colonized as well as to encourage ethnic group distinctions among the colonized.

In eighteenth-century Britain, equal treatment by the law meant equal protection for persons and (especially) property. Because “equality” was imagined primarily in contrast to the divisively ordained hierarchies of feudalism, it tended to be defined in negative terms, as government refusal to dictate the separate rights and privileges of different status groups. As a result, the ideal of equality established the concept of a “free market,” governed by its own economic laws (in contrast to Spanish notions of God’s hierarchy which provided no grounds for imagining an economy separate from politics or religion). Many social theorists have observed that “free” (i.e., capitalist) markets produce inequalities. But this effect is actually a result of a basic contradiction within social contract theory, which, by treating unequally placed people as if they were equals, perpetuates and exacerbates existing inequalities. When the law requires equal protection of property, for example, it not only protects those fortunate enough to own property from direct actions by the propertyless but also discourages propertyless people from using political means to demand a more equal distribution of resources.

This ideal of equal treatment is well expressed by Cornwallis, a British Whig who took over as governor-general of India from 1786 to 1793. He planned to introduce

a new order of things, which should have for its foundation, the security of individual property, and the administration of justice, criminal and civil, by rules which were to disregard all conditions of persons, and in their operation, be free of influence or control from the government itself. (Fifth Report from the Select Committee on the Affairs of the East India Company, 1812, quoted in Stokes 1959: 4)

Cornwallis’s intention to guarantee the “security of individual property” actually led to endless struggles over property rights. If the contradiction inherent in using equality before the law to preserve unequal privileges fomented conflict in the home countries, it caused even greater problems in the colonies, where relations between people in respect to land tended to be based on principles other than those which the Europeans inherited from Roman law. In India, for example, people held overlapping rights in land leading to struggles among the colonizers (as well as among the colonized) over whose rights were to be considered “ownership.” Cornwallis, as a Whig, treated Indian elites as owners of large estates; Romantics argued for communal tenure vested in villages; and missionaries envisioned peasants as owners of the small plots they farmed (Stokes 1959). Needless to say, the colonized took advantage of legal ambiguities and conflicts among the colonizers to argue for interpretations of the law that benefited their own families and groups.

The concept of a self-regulating free market, inherent in the ideal of a state limited to protecting persons and property, also caused problems for colonizers who claimed areas without class differences, such as parts of Sub-Saharan Africa, where the immediate families of producers tended to consume all of the goods and services produced. When such colonized peoples refused to produce a surplus for the colonizers, “irrationally” preferring to consume their produce and enjoy leisure time rather than produce goods for sale or work for wages, colonizers from social contract states found themselves having to violate their principle of equal treatment by the law. They had to impose special taxes or labor requirements on colonized peoples in order to force them into the market, creating exactly the kinds of legally differentiated status groups that social contract theory was designed to abolish.

More disruptive than the ideal of equal treatment by the law was the ideal of equal participation in making laws. As noted earlier, when Hobbes—and then Rousseau—invoked “natural equality” as the fact that required men to make their own laws rather than submit to laws made by a king, they established “natural inequality” as the principle justification available to rulers of social contract states for denying other humans the right to participate in governing themselves. If “all men are created equal,” then those who are denied the franchise must be classified as not “men,” that is, as somehow less than human. Modern racism and sexism are produced by social contract theory; they are not unfortunate deviations from it (Fitzpatrick 1992). Sixteenth-century Spaniards were not free from racism and sexism but, because they believed that God had ordained a hierarchy of status groups, they tended to recognize gradations of skin color and gender instead of constructing and enforcing stark white/nonwhite and men/women dichotomies.11

Peter Fitzpatrick, drawing on Michel Foucault’s analyses of shifts in Western thought, has written a provocative book (1992) analyzing the conceptual oppositions that rulers of social contract states developed in the process of replacing the rule of God with the rule of man. He argues that during
the eighteenth century, when Western thinkers used classificatory grids to understand and manage the world, they invented the “man of reason” by conjuring up his opposite: the person who was incapable of rational, objective thought. European thinkers constructed “savages” as lawless, propertyless, promiscuous, and enslaved (to despots or custom) in the process of endowing “rational man” with the qualities of law, property, morality, and autonomy. This European image of the “savage”—constructed in the process of inventing the free (male) “citizen” of liberal democracies—proved useful to European colonizers as the fiction of nonrule broke down and they found themselves needing to justify governing people whom they wanted to exclude from participating in making laws.

In the nineteenth century, when European thinkers began using origin stories rather than classificatory grids to interpret the world, they invented evolutionary myths of progress, based on social Darwinism, to explain both the “savage” residue within rational man and why “less evolved” peoples could not govern themselves. Fitzpatrick (1992) observes that the “status-to-contract” stories told by nineteenth-century jurists and social scientists (most of whom had experience in the colonies) constructed colonized peoples as lacking the personal autonomy and private property rights supposedly enjoyed by evolved Europeans. Unlike civilized “men” who created nations through social contracts and who regulated themselves, colonized peoples were portrayed as unfit for self-government because they remained embedded in kin relations, held property communally, and were constrained from acting autonomously by fear of social sanctions. Fitzpatrick observes, ironically, that Europeans used images of dominated natives to construct themselves as self-regulating individuals at the very time when European governments were extending their control over citizens through the disciplinary mechanisms analyzed by Foucault: schools, prisons, hospitals, factories, and asylums.

The shift from classificatory grids to evolutionary origin stories coincides, roughly, with the triumph of abolitionist thinking in Europe linked to the creation of “free” laborers. Cooper and Stoler, in their discussion of the dynamics of colonialism, note a break point in “the early 19th century—when the debate over slavery brought the new universalist discourses on economy and state into the colonies” (1989: 617), forcing colonizers to find new ways to distinguish the naturally free from those to whom nature had denied the ability to govern themselves. As Europeans began condemning the enslavement of non-European peoples “in the name of a universal definition of free labor that transcended the moral vision of any one religion or any one state” (1989: 617), European colonizers turned to social Darwinism to justify uplifting and civilizing the natives whose lands and labor they coveted. Evolutionary thinking, as Fitzpatrick (1992) notes, allowed European colonizers to portray themselves as helping the colonized toward self-rule, while endlessly postponing the postcolonial moment.

Because social contract thinkers tended to construct stark oppositions between those eligible to participate in making laws and those who were not, colonizers from social contract states had a more difficult time deciding how to classify children of mixed parentage in their colonies than did sixteenth-century Spaniards, who simply proliferated categories of racial mixtures. The problem became acute for colonizers during the nineteenth century, when increasing numbers of colonists led to increases in mixed-race offspring and the abolition of slavery had destroyed the convenient fiction whereby children born to slave women were slaves unless freed by their master. Ann Stoler suggests that European colonizers—faced with increasing numbers of free persons of mixed ancestry, often with education, who were challenging the dominance of European whites—responded by importing white women from Europe to “make empire respectable” and to provide the means for drawing a clear line between white people and others (1989: 634). Most earlier accounts of colonialism had accused white women of bringing racism and rigid moral codes to colonies that had previously enjoyed relaxed sexual relations between colonizers and colonized. Ann Stoler contests this view, arguing that the correlation between white women’s arrival in the colonies and the imposition of racial hierarchies is due less to women’s bringing racist and moralistic ideas with them, than to the fact that white men imported white women for the express purpose of creating a racial barrier between whites and persons of mixed ancestry.

4. The Role of Law in Constructing Hierarchies Among the Colonizers

Recent work, particularly in anthropology, has emphasized divisions among the colonizers. Sally Merry observes that Darby (1987), in his “historical study of British imperialism in Asia and Africa from 1870 to 1970, notes that European colonial expansion incorporated three motivations: power politics, moral responsibility, and economic interest” (Merry 1991: 896). The British missionaries to South Africa, whose writings John Comaroff (1989) analyzed, also recognized these divergent, and inevitably conflicting, motivations among colonizers. And these three motivations can be distinguished among Spanish colonizers of the sixteenth century. These three motivations, however, do not correspond to the three schools of thought about governing colonized peoples discussed in the previous section. Rather, they reflect differences in the interests of colonists—roughly the differences between colonial officials concerned with ruling, missionaries concerned with saving souls, and colonists hoping to make money as settlers, mine owners, or traders.12

Although colonists from Europe may have exhibited the same three conflicting motivations across five centuries of colonial expansion, sixteenth-century Spanish colonists drew on a different set of legal discourses when struggling among themselves for power and privilege than did later colonists from social contract states in northern Europe. As noted earlier, sixteenth-century Spaniards did not imagine a separation between the state,
the economy, and religion. Because the Spanish crown had "responsibility for reconciling life on earth with the principles of a higher, divinely ordained law" (Stern 1982: 293), colonists expected the state to establish and enforce the economic privileges and obligations of unequal status groups as well as to oversee the conversion of Indians to Christianity. As a result, the major line of struggle and cleavage among Spanish colonizers occurred within the ranks of would-be rulers—between colonial officials born in the Americas and officials sent over from Spain. This struggle between colonists and the crown over who should determine the allocation of privileges in the New World continued until the early nineteenth century, when successful revolutions ended Spain's colonial rule.

Eighteenth- and nineteenth-century colonists from northern Europe, in contrast, expected the state to refrain from interfering in colonists' freedom of religion and contract. The state, in their view, should limit itself to guaranteeing the security of persons and property. As a result, struggles and cleavages among colonists from northern Europe tended to reflect their different motivations, with missionaries, bent on saving souls, and traders or settlers, bent on making money, coming into conflict with each other and with colonial officials over what constituted proper protection of their liberties and what marked improper state interference.

Comaroff (1989), for example, identifies "three models of colonialism" that reflect the different interests and demands dividing colonists. These three models, as expressed in letters and essays written by British missionaries in South Africa during the nineteenth century, were a "state model," a missionary model of "civilizing colonialism," and a model of "settler colonialism." "The state model, according to which the colonial government was seen to oversee the territory, had, as its first priority, Pax Britannica: the pacification of 'tribes,' under British law" (1989: 673). After pacification, the missionaries expected the state to "protect the aborigines"—from internecine war, unscrupulous whites and enslavement” by Boer settlers (1989: 672). The state, according to the missionaries, should not concern itself with civilizing the natives. Comaroff observes, however, that over time the state did interfere in native life—and in the missionaries' domain—through "the imposition of taxes, the limitation of chiefly authority and many other (typically legalistic, punitive) forms of regulation" (1989: 673). Not only did colonial officials have to maintain peace in the colonies but, faced with opposition from taxpayers in their home countries, they had to find ways to make the colonies (i.e., the colonized) pay the costs of colonial administration.

The missionaries in South Africa appropriated for themselves the task of civilizing the natives, which they hoped to do without interference from other Europeans. Unlike sixteenth-century Spanish missionaries, who expected the state to help them convert the Indians, nineteenth-century missionaries in Africa expected the natives to convert of their own "free" will. Missionaries "sought to 'cultivate' the African 'desert' and its inhabitants by planting the seeds of bourgeois individualism and the nuclear family, of private property and commerce, of rational minds and healthily clad bodies, of the practical arts of refined living and devotion to God" (Comaroff 1989: 673). The missionaries wanted to use education rather than law to reform all aspects of the natives' private and public life. "The nub of the civilizing colonialism of the mission—and it was, quite explicitly a colonialism, in that it sought to subordinate Africa to the dominance of the European order—lay in replacing native economy and society with an imagined world of free, propertied, and prosperous peasant families" (1989: 674).

The model of "settler colonialism" represented all that the South African missionaries abhorred. "To them, Boers were no more than half-savages; they led degenerate, unrefined lives, lacked a true European 'spirit of improvement,' and showed their 'monstrous' character by treating blacks as prey to be hunted and enslaved" (Comaroff 1989: 673). The Boers, who sought freedom from British rule after the British abolished slavery, probably did represent the most exploitative kind of settler. But settlers, mine owners, and traders in other colonies all came into conflict with missionaries over what constituted proper protection of persons and property. Settlers wanted the state to protect "their" farms and mines from native claimants, and to uphold the "contracts" they made with native workers. They probably also wanted protection from missionary and other "agitators" who urged the natives to reclaim stolen lands and to contest exploitative work relations. Finally, settlers, like taxpayers in the home country, probably wanted to avoid, as much as possible, having to pay for the government protection they demanded.

These three nineteenth-century "models of colonialism" identified by Comaroff (1989) reflect, I believe, similar conflicting visions in the home countries linked to the contradiction within social contract theory between equality before the law and inequality of property holdings. Like owners of large properties in the home countries, capitalist settlers, mine owners, and traders emphasized the protection of private property at the expense of equality. They wanted the state to protect the rights of property owners even if that meant consigning some, or most, people to remaining propertyless (and powerless). The missionaries, like propertyless people or owners of minuscule estates at home, emphasized equality over the protection of property, at least in the sense that they wanted all their (male) converts to own enough land to support themselves and their dependent wives and children. Colonial officials were caught in the middle, trying to balance the inherent contradiction between protecting private property and ensuring political equality, while reproducing the contradiction by equating equal political rights with security of property as well as persons.

These three models of colonialism may also have paralleled different positions in debates over morality occurring at the time in England and France. After 1848, as triumphant capitalism and uncontrolled industrialization disrupted European social relations and destroyed rural landscapes, Europeans worried about the loss of morality in their society. By that time, liberal social contract theory had clearly replaced God's great chain of being as the
symbolic fountain of law and order, setting off a debate over how to ground moral values. Social theorists, culminating in Durkheim at the turn of the century ([1893] 1933), envisioned law as the source and repository of human moral reason, arguing against religious holdouts who wanted to create God's utopia on Earth and social Darwinists who reduced natural laws to survival of the fittest. Theorists who wanted to establish law in the position formerly occupied by God argued that law represented progressive human reason in opposition to both religious "superstition" and the "natural reason" imagined by social Darwinists. Just as human reason should replace religious or traditional superstitions, so human reason required protecting persons who lacked reason (such as children, women, and savages) from the unrestrained forces of nature's competition for survival.

These nineteenth-century struggles over morality reflect the transformation in social contract theory that occurred as it evolved from an oppositional discourse during the seventeenth and eighteenth centuries into a hegemonic one by the nineteenth century. First advocated by bourgeois property owners in their struggle against the discourse of divinely ordained kingship, its assumptions became taken-for-granted reality in later struggles between nineteenth-century capitalists and those who opposed them. A similar, albeit much accelerated, transformation occurred in the colonies, as colonial officials—who first justified governing colonized peoples on the grounds of protecting the persons and properties of their own nationals from hostile "natives"—found themselves called on to protect conquered peoples from rapacious colonists and overzealous missionaries. In Europe, and then in the colonies, a discourse once invoked against "outsiders" became a discourse used by "insiders" to argue with one another, leading to profound changes in the role of officials charged with upholding and applying the law.

A role transformation from protecting colonists to protecting the colonized may have been inevitable in colonial situations. Sixteenth-century representatives of the Spanish crown, for example, who sided with colonizers in conquering native peoples, later found themselves trying to protect Indians from colonists in order to stem the drastic decline in New World populations. In both colonial situations, as well, officials were hampered in their attempts to protect indigenous peoples by at least two factors: colonists often had influential friends and supporters at home who could engineer the recall of overly zealous colonial officials, and—given the small number of colonists relative to the masses of the colonized—officials were often reluctant to expose conflicts among the colonizers that the colonized might use to their own advantage.

Although colonial officials inevitably incurred the wrath of colonists, different discourses of law affected the ability of angry colonists to form opposition groups. In Spain's New World colonies, for example, where the proliferation of legally defined status groups muted distinctions between colonizers and colonized, liberals who argued for establishing social contract states could claim to speak for all "men" in the colonies. In the nineteenth-century colonies of northern European nations, in contrast, colonists were hampered by the deep racial cleavage between whites and nonwhites from joining with indigenous peoples to establish separate states. In fact, whites in some colonies, such as the Boers in British-ruled South Africa, declared independence for the express purpose of preserving and deepening the racial cleavage between settlers from Europe and indigenous peoples.

In this section, I have focused on conflicts between colonial officials concerned with ruling, missionaries concerned with saving souls, and colonists concerned with making money, but conflicts also occurred within these groups. Colonial bureaucracies undoubtedly experienced the usual conflicts between different agencies, as well as conflicts caused by the thwarted career ambitions of individual officials. Missionaries from different sects, religions, or religious orders fought for converts as well as with members of their own groups for precedence and resources. And those out to make money inevitably came into conflict in the process of pursuing private economic interests, even as capitalist relations fostered conflict within enterprises between owner/managers and subordinated employees. Contending parties often turned to discourses of law for managing their disputes. Stokes, for example, observes that in India, "the Supreme Courts, established in the Presidency towns and presided over by judges appointed directly by the Crown, were regarded by the English inhabitants as the shield and defence of their rights and liberties against the despotic government of the Company" (1959: 61). And Stoler notes how the Dutch state cooperated with corporate authorities to prevent lower-level European employees from marrying, thus allowing companies to pay low salaries and reap high profits (1989: 638).

5. The Role of Law in Constructing Hierarchies Among the Colonized

Although scholars have probably written more about the impact of colonialism on social relations among the colonized than on any other topic related to colonialism, it is hard to generalize about the role of law in shaping hierarchies among the colonized because precolonial systems of social inequality varied considerably. Colonized peoples drew on very different resources, both conceptual and material, when invoking legal discourses to contest the power of those who would rule over them. As a result, the outcomes of struggles between colonizer and colonized, and among the colonized, varied from people to people, place to place, and across time.

In a recent book, Anna Tsing notes "a central tension that divides current scholars" who write about peoples marginalized by Western imperialism. This tension revolves "around the political implications of notions of cultural difference." One side focuses on "how the notion of cultural difference has been used [by Westerners] to debase and control Third World peoples." The other side explores the "empowering aspects of self-involvement with
developed and spread notions of racial and cultural difference in the process of colonizing peoples who invoked law to justify conquering and ruling colonized peoples simultaneously (if unintentionally) established law as a discourse that colonized peoples could use to assert and contest relations of domination. Resistance by the colonized, in turn, tended to prompt colonizers to revise the laws they propagated and enforced. In this section, I will begin by tracing commonalities in European responses to indigenous resistance, before exploring the different resources that Spanish notions of God's law and later northern European notions of Man's law offered to resisting populations.

During conquest and the initial stages of colonization, European colonizers tended to stress differences between their own rule of law and indigenous cultural difference." For scholars who celebrate empowerment, "the discourse of domination that seems most constraining is not that of encrusted difference, but that of white privilege falsely universalized to erase the struggles, accomplishments, and dilemmas of people of color" (Tsing 1993: 15). Both sets of scholars tend to fear and oppose the current rise of racist, ethnic, and religious movements designed to purify nations by using state power to expel or incarcerate those defined as different. But they adopt separate strategies for combating intolerance. Those who focus on how European ideas of difference have been used to oppress others argue that no peoples or cultures (even European ones) are pure—all are hybrids (e.g., Said 1993). Others, particularly those who deplore the rise of racist and anti-immigrant sentiments in developed nations, document the creativity of persecuted peoples who have combated oppression by invoking and reworking cultural heritages.

In this section, I adopt the first strategy. I explore how Europeans developed and spread notions of racial and cultural difference in the process of using legal discourse to assert domination over colonized peoples abroad and over minorities, women, and the poor at home. This strategy, however, does tend to have the unfortunate consequence noted by scholars who celebrate cultural difference. It focuses attention on Europeans rather than on those who resisted them. Resistances, however, are difficult to analyze for two reasons. First, it is hard to generalize about them because instances of resistance, like the outcomes they produced, varied from place to place and time to time, requiring careful attention to local histories. Second, evidence of resistance is hard to interpret from the written record. Because Europeans, from the sixteenth century to recent times, have assumed that humans live in societies governed by moral laws (in contrast to animals whose relations are determined by base instincts), European scholars, and those trained in Europe, have commonly found bounded societies governed by laws (or at least norms) wherever they looked. Given such misreadings of other realities, a deep knowledge of local histories and cultures, as well as a willingness to read against the grain, are required to uncover the subordinated discourses of sociality that colonized peoples invoked when contesting European rule.

Although I focus on European discourses, I will explore how such discourses changed through time, due to resistance from the colonized. Europeans who invoked law to justify conquering and ruling colonized peoples simultaneously (if unintentionally) established law as a discourse that colonized peoples could use to assert and contest relations of domination. Resistance by the colonized, in turn, tended to prompt colonizers to revise the laws they propagated and enforced. In this section, I will begin by tracing commonalities in European responses to indigenous resistance, before exploring the different resources that Spanish notions of God's law and later northern European notions of Man's law offered to resisting populations.

custom, which they commonly defined as a lack of law or, at least, of proper law. But as Europeans began ruling over colonized peoples, the stark conceptual opposition between law and custom began to break down. Given their own use of law as a justification for sovereignty, Europeans had to extend the rule of law to the indigenous peoples they governed, which meant, in practice, that they had to allow the colonized access to at least some of the legal procedures that symbolized the existence of law. This tactic, however, led to a transformation in the conceptual opposition between law and custom. As native peoples rapidly began taking advantage of European legal procedures to assert and contest relations of power, they confronted the colonizers with a dilemma that colonial regimes commonly solved by instituting special legal procedures, administered by special courts, for native peoples. As a result, European colonizers, however reluctantly, tended to develop—in conjunction with the colonized—a hybrid between law and custom: customary law.

Sixteenth-century Spanish colonial rulers, for example, began by recognizing a sharp distinction between Spanish law and indigenous custom. This distinction was presupposed by their arguments over whether or not to preserve indigenous institutions or replace them with Spanish ones. At first, the Spanish crown enjoined "its governors to preserve Indian organization and custom so long as they were not contrary to reason or Christian precept" (Borah 1982: 267). This injunction, however, had contradictory consequences, for in order to preserve Indian customs that were not contrary to reason or Christian precept, Spaniards had to institute legal procedures for reviewing Indian decisions. They thus extended to Indians the Spanish right of appeal "against the acts of judicial and administrative officials" (Borah 1982: 272). Indians in Spanish America discovered "very quickly, that any decision once rendered could be appealed up the long line of reviews provided by Castilian law" (Borah 1982: 272), allowing its implementation to be postponed and possibly avoided altogether. "As early as 1531, the Second Audiencia reported to the crown that Indian cases, civil and criminal, were occupying a great deal of its time" (Borah 1982: 272). Similarly, Stern observes that "by the 1550s, [Indians in South America] had flooded the viceregal court, or Audiencia, in Lima with petitions and suits—the majority of them between native communities, ayllus (kin groups), or ethnic groups." And "by the 1600's, [Indians] had developed legal forms of struggle into a major strategy for protecting individual, ayllus, and community interests" (Stern 1982: 293). Faced with overburdened courts and complaining colonists, the Spanish crown tried various means to discourage Indians from appealing every adverse decision. The Spaniards finally hit on the solution of requiring Indian "complaints, hearings, and decisions . . . to be by summary process and largely oral" (Borah 1982: 284).

Similar processes occurred in British India. Cohn reports that the British decided to establish courts in India because they "did not think that the (indigenous) procedural law and the courts, as they found them in the late eighteenth century, were adequate." But
almost from the establishment of British courts in India, it was apparent to the British that there were serious faults in these courts. It took years for disputes to be resolved, and there were too many appeals from lower courts. Use of forged documents and perjury in the courts became endemic. It was evident that courts did not settle disputes, but were used either as a form of gambling . . . or as a threat in a dispute. (Cohn 1967: 154)

Like earlier Spanish colonists in the Americas, the British in India tried to stem the flood of appeals by instituting reforms, including establishing informal, oral procedures in local communities. "But," observes Cohn, "the flood of cases continues, and, at least based on my experience in 1952-3 and on a brief visit in 1958, there is no apparent abatement in this cycle of false cases" (1967: 154).36

Colonized people's heavy use of courts had contradictory effects for the colonized as well as for colonizers. Stern, for example, observes that "mastering the art of judicial politics" allowed "ethnic groups, ayllus and even individuals" in colonial Peru to win "battles on real-life issues such as [labor obligations], tribute, and land rights" (1982: 311).

But on another level, the natives' achievement cost them a great deal. . . . To the extent that reliance on a juridical system becomes a dominant strategy of protection for an oppressed class or social group, it may undermine the possibility of organizing a more ambitious assault aimed at toppling the exploitative structure itself. . . . (Because) the Indians' struggle for Spanish justice could not . . . challenge colonialism itself. . . . it set into motion relationships that sustained colonial power, weakened the peasantry's capacity for independent resistance, and contributed to the oppression of Andean peoples. (Stern 1982: 311)

Colonized peoples, however, clearly understood that they could be co- opted through appealing to courts run by colonizers. Nader, for example, observes that many colonized peoples developed a "harmony ideology" encouraging them to settle their disputes within the native community (1990). The desire of the colonized to stay out of the colonizers' courts thus tended to coincide with the desire of colonizers to stem the flood of native appeals. Together they encouraged the development of local courts in indigenous communities that used informal procedures to promote reconciliation among disputants. Nevertheless, evidence suggests that although informal courts often succeeded at promoting reconciliation among people who wanted to reach an agreement, they usually failed to settle disputes between political opponents or between groups contesting access to vital resources (Starr and Yngvesson 1975).

Although native "overuse" of courts led both Spanish and northern European colonizers to establish informal local forums, differences between earlier Spanish and later northern European concepts of law led to differences in the visibility of customary law. The Spanish concept of a social hierarchy ordained by God, for example, tended to conceal the development of customary law because all officials recognized and appointed by the crown were expected to enforce God's laws. This reliance on officials, while prompting the crown to institute a comprehensive system of appeal, gave the crown no reason to notice deviations unless they were brought to its attention. As a result, native departures from Spanish rules and procedures tended to go unrecorded. This tactic of ignoring customary law was followed by Latin American liberals when they finally succeeded in taking over state power during the nineteenth century. Like the advocates of hierarchical status distinctions whom they replaced, liberal rulers tended to treat the elected and appointed officials of Indian communities as if they were indistinguishable from their counterparts in mestizo ones. Until recently, when indigenous groups demanding political autonomy have exposed the existence of customary law, anthropologists tended to be the only ones interested in observing that native communities in Latin America have legal norms and procedures that differ from those of positive state law.

Social contract theory, in contrast, tends to highlight differences among legal regimes, leading to the appearance of dual legal systems in colonial situations (see Merry 1991: 890). Because social contract theory rests on the assumption that "men" make the laws that govern them, it suggests that different groups of men will make different laws. The early inventors of social contract theory, particularly Rousseau, may not have envisioned this outcome, for they tended to imagine that all men of reason would reason similarly. But the spread of social contract theory, with its ideology of self-government, soon required groups hoping to avoid assimilation into imperialist social contract states, such as Napoleonic France, to develop unique definitions of self. When social contract theory became hegemonic in nineteenth-century Europe, it stimulated not only the development of class-based political movements but also Romanticism, with its celebration of folk cultures and concomitant rise of ethnic nationalism.

When carried to the colonies, social contract theory led colonial officials to expect different groups of natives to have different laws (in contrast to sixteenth-century Spaniards who posited a single divine law). Colonial officials thus set about codifying native laws, both as a way of predicting native behavior and to provide native judges in newly established courts with copies of the culturally distinct laws they were supposed to administer.17 This codification process not only tended to highlight ethnic differences among colonized peoples (in contrast to the Spanish tendency to treat all native peoples as belonging to the same status group), but also to highlight differences between the customary law of the colonized and the law of the colonizers. Customary law, by its very name, suggests that it encodes native traditions, but historians of eighteenth- and nineteenth-century European colonialism in Africa, particularly Ranger (1983), Chanock (1985), and Moore (1986), have observed that customary law is not a continuation of indigenous practices. Rather, it is a product of the colonial encounter, forged in struggles between
Sixteenth-century Spaniards, for example, championed the causes of Indian varying kinds and amounts), I prefer to explore how discourses of law affected rulers were no longer sovereign but were still entitled to respect and revenue; This argument, of course, presumes the value of equality inherent in social it became established in the colonies, tended to strengthen rather than under­
mine traditional hierarchies, increasing the power of chiefs over commoners, have challenged this view with studies that suggest the empowerment of pacification,

Historians of colonialism in Africa have argued over whether the imposition of colonial rule ameliorated or exacerbated inequalities within colonized groups. Ranger (1983) and Chanock (1985) assert that European rule, once it became established in the colonies, tended to strengthen rather than under­
mine traditional hierarchies, increasing the power of chiefs over commoners, elders over young men, and men over women. Recently, other historians have challenged this view with studies that suggest the empowerment of commoners, youths, and women relative to native elites (Roberts 1993). This argument, of course, presumes the value of equality inherent in social contract theory—the belief that law should treat all “men” equally. Instead of joining the argument, therefore, I want to shift the focus. Because I assume that European discourses of law always promoted inequalities (although of varying kinds and amounts), I prefer to explore how discourses of law affected the organization of inequality among colonized peoples by favoring some at the expense of others.

It seems reasonable to imagine that during the initial stages of conquest and pacification, all colonizing powers reduced inequalities among the colonized by supporting the enemies of elites they hoped to conquer and replace. Sixteenth-century Spaniards, for example, championed the causes of Indian groups who had been oppressed by the Aztecs and Incas. But because Spanish colonists assumed that people were inherently unequal before the law, they soon began using law to reinforce the power of native rulers. “The crown was expected to respect the rights of Indian rulers, nobility, and commoners; the rulers were no longer sovereign but were still entitled to respect and revenue; all ranks were entitled to security of possessions and good treatment” (Borah 1982: 268).

Later colonizers from northern Europe also began by championing the causes of oppressed groups. But because social contract theory required all men to be equal before the law, colonial officials found it difficult to adopt the Spanish policy of recognizing and protecting the rights of different status groups within native populations. Cornwallis, as already noted, wanted the British administration of justice in India “to disregard all conditions of persons,” such as their caste membership. Moreover, colonizers from social contract states often tried to justify their colonizing ventures by claiming to free oppressed peoples from despotic rulers (rather than by claiming to give them Christian revelation, as Spanish colonizers had). As a result, colonizers from social contract states tended to waffle in their support for disadvantaged groups within colonized populations. At times, they tried to stamp out customs they defined as oppressive. But over the long run, they, like the Spanish before them, tended to reinforce the power of native elites, particularly after pacification, when colonizers needed the support of indigenous leaders in order to govern.

When colonial officials withdrew support from disadvantaged groups, they often justified their actions by invoking the right of every group to its own traditions. Ranger, who writes about “the invention of tradition in colonial Africa” (1983), observes that “nineteenth-century Africa was not characterized by lack of internal social and economic competition, by the unchallenged authority of the elders, by an acceptance of custom which gave every person—young and old, male and female—a place in society which was defined and protected.” Rather, “competition, movement, fluidity were as much features of small-scale communities as they were of larger groupings” (1983: 248). As European powers conquered African peoples, however, they came to see competition and movement as a threat to their rule. After 1895, “pacification came to mean immobilization of populations, re-enforcement of ethnicity and greater rigidity of social definition” (Wright 1975: 803, cited in Ranger 1983: 249). Colonial administrators who had begun by proclaiming their support for exploited commoners against rapacious chiefs ended by backing “traditional” chiefly authority in the interests of social control” (Ranger 1983: 249). Colonial administrators not only installed “traditional” chiefs, but helped them to invent “traditions” that exacerbated inequalities within native populations. Chiefs and older men, for example, played a major role in recording customary law. Not surprisingly, they tended to remember (invent?) customs that favored chiefs over commoners, elders over young people, and men over women.

Colonial administrators’ waffling support for disadvantaged groups within native populations is nicely illustrated in colonial policies toward women. Social contract theory, of course, has always had problems deciding whether women are equal humans or men’s natural dependents (Pateman 1988)—just as it has always had problems deciding when nature intended some people to be unequal by granting them, for example, a low IQ or a lack of initiative. Eighteenth- and nineteenth-century colonial officials carried their ambivalence about women with them to the colonies. One the one hand, they had many reasons for supporting colonized women against those who would dominate them. In nineteenth-century Europe, social Darwinists tended to judge a group’s place on the evolutionary ladder by assessing men’s treatment of women, thus encouraging colonizers to decry colonized women’s supposed oppression as a way of justifying colonial rule. And because colonial officials from nineteenth-century Europe tended to cast their own marriages
as contracts to which women freely consented, they were particularly eager to stamp out native practices they understood as denying women the possibility of consent, such as child marriage or marriage by capture.

Chatterjee, for example, observes that British officials in colonial India condemned the treatment of women as a way of discrediting Indian civilization in general and Indian men in particular (1989). British colonial writings described women as slaves of their husbands, and British officials used law to prohibit practices they regarded as particularly abhorrent, such as "sati," the custom in which a widow committed suicide by jumping on the funeral pyre of her dead husband. Indian nationalists—who belonged to the emerging bourgeoisie and who were invoking social contract theory to assert their own right to rule India—responded to this discrediting of their culture (and manliness) by "creating the image of a new woman who was superior to Western women, traditional women, and low class women" (Chatterjee 1989: 622). Indian nationalists creatively took advantage of contradictions within social contract theory to point out the oppression of women in Victorian England.

On the other hand, European colonial officials had several reasons for condoning—and encouraging—the oppression of indigenous women. Once colonial officials recognized their need for support from local elites, their belief that nature condemned women to being dependents of men allowed them to justify supporting traditions that recognized the rights of indigenous husbands and fathers. In a fascinating article about Zambia in the 1980s, Ault (1983) explains how "the coalescence of interests of colonial officials and tribal authorities" led to the invention of "traditional" marriage customs that limited women's options by requiring men to pay high bridewealth in an area where marriage had previously involved only token exchanges. During the world depression of the 1930s, colonial officials concerned to avoid union activity among African mine workers on the copperbelt, and rural elders concerned that young women were following young men to urban areas—thus depriving elders of women's services and young men's remittances—joined forces to establish Urban African Courts designed to extend "tribal authority" to the towns. Judges appointed by rural chiefs proceeded to enforce newly invented "traditional" laws regulating marriage. Young men were required to pay high bridewealth that benefited chiefs and rural elders by ensuring a steady flow of bridewealth payments from wage-earning mine workers to rural elders. Ault is concerned to show that African chiefs, rather than being predictable, invertebrate traditionalists, "proved innovators in their own right" (1983: 198). He argues that urban African judges "departed from customary practice by insisting on the formal registration of marriage as a condition of its validity, by transforming the nature of bride-price, and even by usurping jurisdiction over marital disputes from kin elders." These judicial innovations, however, took away women's former ability to escape unwanted marriages, as judges used state power to prevent wives from leaving husbands who had paid for them.20

Just as colonizers from social contract states waffled in providing equal protection of persons, so they waffled in providing equal protection of property. In contrast to sixteenth-century Spaniards, who recognized forms of communal tenure and so had no difficulty recognizing the land rights of Indian communities in the Americas, colonizers from social contract states celebrated private ownership of property. Chanock, for example, observes that nineteenth-century British colonists in Africa viewed the "right to property as a natural human right, necessary to human nature, a just reward for labor, and the very basis of a proper political society" (Chanock 1991: 62). But efforts by colonists from social contract states to privatize land often had disastrous consequences, such as throwing subsistence farmers off their lands, causing widespread famines and massive migrations.

Historians of African colonialism have just begun to explore the role of property law in struggles over power within colonized groups, in contrast to historians of British India who have analyzed the role of property law in creating a powerful landlord class among the colonized (Guha 1963). This difference in attention is probably due to the fact that colonial officials in Africa concentrated on restructuring personal relations as a way to release labor for colonial enterprises, whereas colonial officials in British India financed their administration through land taxes. Chanock, for example, observes that "the economic transformation of Africa during the colonial period had its impact first on those laws which define the nature of control over dependents and their labor. The development of a customary law legitimizing the control of persons in new ways was followed by the emergence of a customary law of property in general, and land in particular" (1991: 62). The colonial period opened "with the dominance of ideas about the evolutionary superiority of western concepts of individual property rights. Yet communal rights to land, ideologically judged to be primitive, were eventually accorded a recognition denied to various forms of bonded labor" (Chanock 1991: 63).

6. CONCLUSION

The contradictions inherent in social contract theory continue to shape struggles over inequality in our supposedly postcolonial world. Law remains the central discourse used in national and international forums for asserting and contesting sovereignty and control over vital resources. As a result, people from former colonies, like people in colonizing countries, are likely to find that their claims, however intended, are interpreted by others within the framework of assumptions that constitute social contract theory. And to the degree that people in former colonies actively draw upon social contract theory, such as using the European idea that men should author their own laws to justify national liberation movements, they are drawn into irresolvable debates over the nature of nature and over who counts as a "man" for the purpose of participating in the social contract (Maurer 1994).
Most of the places colonized by Europe and North America have become independent nations. But dominant discourses of nature still portray their peoples as naturally inferior. Social Darwinism lives on. Not only does pseudoscience keep discovering natural differences among humans, particularly between races and sexes, but the evolutionary narrative used by nineteenth-century colonizers to justify conquering and ruling African and Asian peoples has merely undergone a facelift. The old demeaning opposition between civilized nations and savages has been replaced by an (equally demeaning) opposition between the first and third worlds. And the “civilizing mission” invoked by nineteenth-century colonists has been taken on and given new life by experts in economic development (Escobar 1991). Whereas nineteenth-century colonists promised civilization to the savages whose resources they appropriated and whose lives they invaded, twentieth-century experts from first-world nations promise development to the third-world peoples whose lands and labor they exploit for capitalist profit. Although most supposed aid to poor third-world nations is described as economic rather than political or legal, international investors, in fact, tend to demand legal protection for their persons and properties, just as colonists from Europe once did. The International Monetary Fund and the World Bank, for example, often require the governments of receiving countries to institute legal reforms, commonly establishing or enforcing private property rights, as a prerequisite to granting loans. And contemporary efforts by overdeveloped nations to spread democracy and economic prosperity around the world eerily recall Cornwallis’s vision of the new order he hoped to create on the Indian subcontinent.

People from former colonies are also being drawn, willingly or not, into debates over who counts as a “man” for the purpose of participating in the social contract. As suggested earlier, social contract theory provides two main principles for delimiting the specific group of “men” entitled to participate in making the laws of a territory: “reason” and ethnic or religious “tradition.” While the principle of reason does tend to exclude those who are culturally defined as denied reason by nature (such as children, women, the insane, savages, illiterates, the propertyless, etc.), it is usually conceived as an inclusive principle. It unites men across divides of religion and ethnicity, commonly on the basis of a shared economic interest in protecting their persons and properties. Hobbes, for example, writing in the context of Britain’s religious civil wars, stressed men’s common interest in avoiding the “warre” of each against all that rendered both life and property precarious. This intimate link between reason and economic interest has, of course, encouraged class-based resistance to the dominance of property owners. Working-class movements flourished in Europe during the late nineteenth and early twentieth centuries, after property owners had by and large succeeded in replacing divinely ordained kings with parliamentary rule.

Tradition, in contrast to reason, is usually conceived as an exclusive principle, designed to limit those eligible to participate in making laws to people who share a common ethnic or religious heritage. As noted earlier, the assumption inherent in social contract theory that men make their own laws suggests, logically, that different groups of men will make different laws. This idea was invoked and elaborated by nineteenth-century European Romantics as a defensive move to justify resisting attempts by expanding social contract states to impose their version of reason on others. And it seems to be enjoying a resurgence around the world today as leaders of militant ethnic and religious movements point out—correctly—that reason is simply another cultural tradition, imported from Europe and tainted with imperialism.

Invocations of tradition suggest, of course, a return to the past. But contemporary political leaders who invoke their ethnic or religious heritages to justify demanding self-government are operating in a modern rather than a premodern context. Whatever their intentions about preserving or restoring ancient customs, and however sincerely they believe they are following in the footsteps of their ancestors, their invocations of tradition are heard—and responded to—as challenges to power-holders who claim political dominance based on reason. Reason enjoys dominance today because during the nineteenth century, and for most of the twentieth century, it was the primary principle invoked by political leaders demanding self-government. In the twentieth century, for example, many if not most leaders of movements for national liberation invoked the principle of reason to justify throwing off the yoke of colonial or bourgeois rule, playing down ethnic and religious divisions by stressing people’s shared economic interest in exploiting their territory’s resources for their own benefit rather than for the benefit of foreign colonizers or capitalists. Discourses of sovereignty, however, inevitably provoke resistance. Reason’s spectacular success guarantees that those who oppose the policies of current governments will find ready support for their positions if they stress religious over economic values, promise to restore their nation’s glorious heritage, and/or vow to purify the nation by expelling people of the wrong religion, race, or ethnicity.

NOTES

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1. Two commonly found contrasting conceptions of “rule” are those in which a ruler’s concentration of power (mana) creates both the crowds he rules and the order among them (see Anderson 1972), and those in which “big men” construct followings and ensure meaningful relations among people by orchestrating relationships of “debt” (see Collier 1988). In both types of polities, groups do not exist (either conceptually or in reality) apart from the persons who create them, and the relevant conceptual opposition tends to be power/chaos rather than justice/injustice.
2. Sixteenth-century Spain was not a multi-ethnic empire, in contrast to the Islamic empires it displaced in the Iberian peninsula. In 1492, the Spanish crown expelled both Jews and Islamic peoples, creating a Christian polity.

3. Latour argues against those who would use the concepts of social science to understand the "social construction of science," by contending that the concepts used by social scientists to study social phenomena were developed at the same time as the concepts used by the natural scientists they want to study (1993).

4. Latour observes that when Boyle established laboratory science as the method for discovering nature’s laws, he did not try to ground “his work in logic, mathematics or rhetoric.” Rather, he drew on “a para-judicial metaphor: credible, trustworthy, well-to-do witnesses gathered at the scene of the action can attest to the existence of a fact, the matter of fact, even if they do not know its true nature” (1993: 18). Boyle’s witnesses to scientific truth were the same limited set of male property owners that Hobbes declared "equal" for the purpose of participating in the social contract.

5. In the nineteenth century, Tocqueville observed that “Democracy looses social ties, but tightens natural ones; it brings kindred more closely together, whilst it throws citizens more apart” (1984: 233).

6. In a recent book, Olwig (1993) explores the changing relation between hierarchy and equality in Britain’s Caribbean colonies, arguing that during the seventeenth century, English settlers in the Caribbean incorporated African slaves into their hierarchical households, treating them as humans, albeit lesser ones. During the eighteenth century, however, as yeoman farming gave way to plantation agriculture, British colonists began invoking a language of equality that denied the basic humanity of African slaves.

7. Colin, e.g., observes that the British colonies in North America and the Caribbean had from their inception forms of governance that were largely an extension of the basic political and legal institutions of Great Britain. The colonizing populations, even when drawn from dissident political and religious groups in Great Britain, still were thought of as English or British. The laws of these colonies were the laws of Great Britain (1989: 131).

8. Because post-Enlightenment liberal states maintained the fiction that native rulers continued to hold sovereignty, such states have, by and large, managed to avoid assuming responsibility for the massive dislocations and deaths caused by their colonization schemes. Spain, for example, which did claim sovereignty over the New World, is commonly blamed for the drastic decline of North American Indian populations, but Britain has largely escaped blame for the terrible famine that occurred in Bengal due to the mismanagement of the supposedly independent British East India Company.


10. Max Weber, for example, wrote that it is the most elemental economic fact that the way in which the disposition over material property is distributed among a plurality of people, meeting competitively in the market for the purpose of exchange, in itself creates specific life chances. According to the law of marginal utility this mode of distribution excludes the non-owners from competing for highly valued goods; it favors the owners and, in fact, gives them a monopoly to acquire such goods. Other things being equal, this mode of distribution monopolizes the opportunities for profitable deals for all those who, provided with goods, do not necessarily have to exchange them. It increases, at least generally, their power in price wars with those who, being propertyless, have nothing to offer but their service in native form or goods in a form constituted through their own labor, and who above all are compelled to get rid of these products in order barely to subsist. (1966: 22)

11. Lancaster, who argues that Spanish colonialism created racism in Central America, observes that Nicaraguans, in contrast to Anglo North Americans, recognize many shades of skin color, allowing almost every Nicaraguan to be both lighter and darker than anyone else (1991). Similarly, Lancaster’s discussion of male homosexuality in Nicaragua reveals that male and female are not cast as opposites, but rather arranged in a hierarchy according to who penetrates and who is penetrated (1988).

12. In a sense, these different colonial projects correspond to the three kinds of power identified by ETzioni (1961): the state exercised coercive power through its control of the use of force, the missionaries wielded normative power associated with morality, and the settlers, mine owners, and traders enjoyed remunerative power that came from their wealth. The missionaries were the least powerful segment, wielding only moral authority. They saw themselves as the conscience of the colonizers, a role that reflected their relative lack of power compared to state officials backed by military might and wealthy settlers able to buy favors.

13. Said, for example, observes that “because of empire, all cultures are involved in one another; none is single and pure, all are hybrid, heterogenous, extraordinarily differentiated, and monolithic” (1993: xxv). Given this hybridity, essentialist movements seeking to “purify” races or cultural traditions are inherently oppressive. While “no one can deny the persisting continuities of long traditions, sustained habits, national languages, and cultural geographies. . . there seems no reason except fear and prejudice to keep insisting on their separation and distinctiveness” (1993: 336).

14. Feminist scholars, too, have explored the double-bind of sameness/difference, noting how scholars (generally white, Western ones) who focus on sexism have tended to miss differences among women, whereas those who document and celebrate such differences (often nonwhite scholars or those who sympathize with them) tend to overlook male privilege in the groups they write about. These scholarly positions also reflect political positions. Those who stress universal sexism usually urge all women to unite. Those who stress differences among women tend to support movements for ethnic or religious liberation.

15. Tsing, e.g., observes that interethnic subversion always entails surprises, for the fact that subordinated peoples misunderstand the intentions of their superiors means that the effects of initiatives by superiors “are always complex and unpredictable” (1993: 188).

16. Cohn attributes the prevalence of “false cases” to a clash between British and indigenous values. Because Indians did not regard British procedures as legitimate, he argues, they “did not use the courts to settle disputes but only to further them” (1967: 155). Cohn may be right about why Indians appealed to courts, but it is nevertheless true that Europeans in Europe also used courts to “further” disputes. Law, after all, was the principal discourse available to Europeans for asserting and contesting claims to power. If Europeans appeared to bring fewer “false cases” than the peoples whose lands they colonized, it may have been because falseness resides in the eye of the beholder, as well as because European countries were not undergoing the rapid social changes associated with colonization.

17. Because French colonial officials in Africa came from a civil law rather than a common law tradition, they had less respect for customs and were consequently less eager than British officials to codify the laws of colonized peoples. But when resistance by educated natives
demanding self-government threatened French colonial rule, French officials, too, sought support from traditional chiefs and began to codify customary law.

18. Ranger, e.g., writes that

Elders tended to appeal to “tradition” in order to defend their dominance of the rural means of production against challenge by the young. Men tended to appeal to “tradition” in order to ensure that the increasing role which women played in production in the rural areas did not result in any diminution of male control over women as economic assets. Paramount chiefs and ruling aristocracies in politics which included numbers of ethnic and social groupings appealed to “tradition” in order to maintain or extend their control over their subjects. Indigenous populations appealed to “tradition” in order to ensure that the migrants who settled amongst them did not achieve political or economic rights. (Ranger 1983: 254)

19. The famous Restatement of African Laws project, for example, carried out in the mid-twentieth century, assembled “knowledgeable elders” (all men) to explain their community’s customs.

20. Countering such examples of how colonial rule increased the oppression of colonized women, other historians have used court records to suggest that colonial rule did, in at least some instances, increase women’s power relative to their husbands and elderly men. At a recent day-long conference, “Law, Colonialism, and Control over Bodies in Africa” held at Stanford University (Roberts 1993), many participants suggested that Ranger and Chanock may have been premature to conclude that colonial customary law subordinated women. The court records examined by conference participants revealed an unexpectedly high rate of female complainants, primarily women seeking divorces from their husbands. This finding suggests that women were not merely pawns in the marriage game,” as one paper title put it (Hubbell 1993), but rather people who appealed to law to advance their own interests. In fact, however, whether high rates of female complainants can be taken as an accurate indication of women’s power. In many, if not most, African groups, marriage was (and often still is) a process rather than an event. The degree to which women and men were married changed over time as brievishadles was paid, children born, and relations between in-laws renegotiated. Women, who tended to gain power as their children aged, often precipitated the realignment of family obligations by running away from husbands and fathers and appealing to senior kin. As a result, it would be difficult to decide without further study whether high rates of female complainants at colonial courts reflected this earlier pattern of marital negotiations, or whether it reflected a new pattern due to the fact that courts offered women an alternative, and powerful, ally against those who would constrain them.

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**THE JURY: HOW DOES LAW MATTER?**

**SHARI SEIDMAN DIAMOND**

**JASON SCHKLAR**

In the most fundamental sense, the jury is a legal matter. The legal system creates the jury and, in the absence of that legal mandate, criminal charges and civil disputes in the United States would be handled as they generally are elsewhere: without the assistance of a jury. Yet although the jury is a product and instrument of the law, it is the most nonlegal of legal creations. The legal system gives a group of ordinary citizens the extraordinary power to make consequential legal decisions—to determine guilt or innocence in criminal cases and to decide whether a defendant should be sentenced to death, as well as to determine liability and set damages in civil cases. Although most jury verdicts can be appealed or altered, the jury as a rule is not required to explain its decisions, and jury verdicts are accorded substantial deference by both trial court judges and appellate courts.

Despite or perhaps because of the formidable powers it grants to a group of laypersons, the legal system reveals considerable ambivalence toward the jury. For example, legal doctrine assumes that the jury will base its verdict solely on the facts and law presented in court, and that jurors will not be influenced by prejudice or legally irrelevant information. Yet concern about the jury’s ability to sift and to evaluate information fairly has produced a myriad of legal rules that orchestrate and restrict the presentation of facts and