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An Introduction to the Study of Law and the Sacred

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Abstract

Law and the Sacred might appear as another one of the couplings that have characterised contemporary legal scholarship. Although it is too soon to say if this coupling represents a new departure, it can at least be distinguished by its passion; by its working through of the sense in which secular, western, law has failed to shake its constitution in the pre-modern. Scholarship in this field locates itself in a movement away from the domination of legal theory by a scientising social theory, or a positivisation of knowledge that rejects the mystery and the beyond in its own self-definition and auto-production. This collection attempts to follow a direction suggested by John Milbank: the relaxation of the pressure of the sacred has not filled the only available space with the steam of the "purely human" (1995: 2). A second characteristic of this scholarship is its critical edge: it could be said that it is provoked by a sense of dis-ease; an awareness that law's claims to order and empire ring hollow. In their various ways, the contributors to this volume are impatient with the claim that the triumph of scientific reason is the only means of describing the social world and the role of law. The essays collected here do not seek to give a definition of the sacred, they merely offer some orientation. Addressing the construction of particular paradigms of philosophy, legal history, theology or sociology, they share a concern with alternative ways of reading, with provocative recoveries of rival traditions. If this suggests an orientation to Critical Legal Studies, it is perhaps more to this movement's 'second wave', with its borrowings from continental philosophy and 'postmodern' theory. A reading of the sacred roots of law suggests a perspective on constructions of the contemporary secular legal order that never properly emerged in the first wave of critical legal thought; a perspective that might prove central to future developments in the field of legal theory.

Law & The Sacred: An Introduction to the Study of Law and the Sacred

Adam Gearey

> Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust --Bracton (1968: 25)

I

Law *and* the Sacred might appear as another one of the couplings that have characterised contemporary legal scholarship. Although it is too soon to say if this coupling represents a new departure, it can at least be distinguished by its passion; by its working through of the sense in which secular, western, law has failed to shake its constitution in the pre-modern. Scholarship in this field locates itself in a movement away from the domination of legal theory by a scientising social theory, or a positivisation of knowledge that rejects the mystery and the beyond in its own self-definition and auto-production. This collection attempts to follow a direction suggested by John Milbank: the relaxation of the pressure of the sacred has not filled the only available space with the steam of the "purely human" (1995: 2). A second characteristic of this scholarship is its critical edge: it could be said that it is provoked by a sense of dis-ease; an awareness that law's claims to order and empire ring hollow. In their various ways, the contributors to this volume are impatient with the claim that the triumph of scientific reason is the only means of describing the social world and the role of law. The essays collected here do not seek to give a definition of the sacred, they merely offer some orientation. Addressing the construction of particular paradigms of philosophy, legal history, theology or sociology, they share a concern with alternative ways of reading, with provocative recoveries of rival traditions. If this suggests an orientation to Critical Legal Studies, it is perhaps more to this movement's 'second wave', with its borrowings from continental philosophy and 'postmodern' theory. A reading of the sacred roots of law suggests a perspective on constructions of the contemporary secular legal order that never properly emerged in the first wave of critical legal thought; a perspective that might prove central to future developments in the field of legal theory.1

After a brief introduction to the main themes that animate this volume, the second part of this essay will elaborate one possible approach to the sacred foundations of the common law and the problematic sense of justice that emerges at this strange beginning.

II

The controversy over Serrano's *Piss Christ* is a central site for the investigation of concerns thrown up by the conjunction of art, law and theology. As Damien Casey points out, the debate raises problematic questions over the ownership of symbols and images; a concern that is a recurrent theme in law's encounters with the sacred. In a bold argument, Casey suggests that *Piss Christ* might offer a way of actually redefining Christian symbolism, re-assessing attitudes towards the body and biological processes.2 The powerful response by Casey (Michael), Fisher and Ramsay attacks both the hubris of the artist and the hollowness of his theological pretensions; perhaps Damien Casey's defence of the work is more artful than the work itself. At the very least, though, *Piss Christ* should be seen as a necessary provocation to an informed discussion of the role of the law of blasphemy in our times.

The subsequent three pieces suggest orientating points for any broad theory of law and the sacred.

Peter Fitzpatrick's essay is the latest bulletin from a project that is increasingly establishing an important agenda in wider fields of scholarship (see Fitzpatrick 1992), as well as providing a possible founding claim for future study in this field. Fitzpatrick's work is a sustained meditation on the trauma of modernity's origins. Modernity is fractured by positing its own moments of origin as a separation from the pre-modern. Fitzpatrick reads Freud's myth of the foundation of law in *Totem and Taboo* as an exemplary allegory of how modern law succeeds the sacred, but in a succession that remains 'in question'. The sacred is riven by a similar trauma. It can be imagined as divided off from the chaotic time of the 'pre-sacred', but still marked by the danger and excess of 'visionary fervour' that threatens a

return to the original chaos. This complex question of origins is the starting point for Fitzpatrick's own genealogy of the sacred. Developed between the lines of Foucault's ideas on transgression, the quest is for a link between law and the sacred that has not become occulted by the erroneous association of the sacred with savagery; an association which, in part, is an aspect of Freud's legacy. Fitzpatrick attempts to articulate the sacred as a mediation between a world view and what lies "ever beyond its limit". If the sacred can be rediscovered within, if law is "of the sacred", then the "terrible" force which allows the creation of new forms of life could be imagined within the limits imposed by modern law.

To some extent Mack is Fitzpatrick's fellow traveller. Both scholars show a keen need to return to the sources of tradition and begin an excavation of origins. For Mack, a definition of the sacred can be found in elaborating a problematic that is focused on the work of John Milbank and the late Gillian Rose. Mack's piece, a theology of social theory, is informed by close readings of a handful of contemporary theologians. The law of charity, the law of love, which Mack analyses cannot be conceived simply as an opposition of love to violence or coercion. It is necessary to elaborate a more difficult interface: "If there cannot be acts of charity without law, there cannot be law without a concern for charity". Mack's argument is that the tense relationship between charity and law is such that neither can be rejected: to be human is to live in an affirmatory tension; a problem that allows Mack to champion St. Paul against a nihilism that he finds in Walter Benjamin's messianism. The target of this kind of thinking is not just a kind of theology; it is also a particular construction of the theological in academic discourse. For instance, summarising Georg Strauss, Mack writes:

> Up to the late Middle Ages, Orthodoxy and Enlightenment do not contradict each other: scientific inquiries give proof of the liminality of human existence. Only with modern enlightenment do the realities of creation as dependent on creator lose all their rational obligations and are turned into a personal and irrational matter of faith.

To follow this argument through would be to arrive at the conclusion that science is predicated on belief rather than knowledge; a belief, moreover, "in the autonomy of the immanent that has the assumption of a perfect harmonious world as its precondition". The consequences of this argument for a form of legal reason which founds itself and sees itself as scientific are, of course, immense. Philosophical modernity represents a move away from the theological recognition of suffering, sin and the imperfection of the world. For Mack, a theology of law would recognise that law has to be applied in a context specific and dynamic way. Law cannot be defended by reference to universal and self justifying principles:

> The concept of law needs to be seen in the context of an awareness of... suffering that is inevitable in a post-lapsarian world. This recognition in the inevitability of suffering does not, however, issue in a connivance with it. Inaction would offend against the biblical admonition that we are created in His image. The fall has perverted the *imago Dei.* Yet this perversion still leaves a likeness that encourages the human to work at its imperfection. Charity and law precisely enable such work.

If this reads as a manifesto, then Mack's piece is none the worse for a certain polemicism. At stake is a kind of thought that has to be combative; it has to fight to establish its position against the various philosophies, old and new, that have sought to denigrate or sideline such an iconoclastic and innovative cross disciplinary creativity.

The implications of Crossan's careful study of Biblical materials are just as provocative as these more extended philosophical or theoretical investigations.3 Focusing on the Covenant Code in Exodus, as well as the Deuteronomic and Holiness Codes in Leviticus, Crossan produces an argument about the tendency to social justice that underlines Biblical law. As a way of reversing dispossession, the Holiness Code is perhaps the most radical as it contains the provision for a Jubilee Year, where creeping inequality was to be resisted by the return of land to owners who had lost it through debt. Underlying this practice is the command of a God who is himself the custodian of the land, and the preserver of equality amongst His people. The Jubilee Year is presented as a kind of realisable Utopian idea. Crossan argues that its importance is not that the historical record shows that it was or was not implemented: the fact is that it could have been. It is a "statement that proper distribution of land can be attained and maintained within the confines of this world" (Crossan quoting Fager) or, "the Jubilee Year may be a utopian idea but it is so formulated as to be actually possible". These utopian claims are not made in sweeping manifestos, but in a form of case law or code that has theological underpinnings. The

concluding questions open the possibility of a theology of distributive justice that would take the cancellation of debt in Biblical Law as its starting point and guiding star.

A figure whose thought has been essential to the thinking of ethics in postmodernity is Emmanuel Levinas. In his paper, Smith argues that Levinas's work is founded on an unresolved contradiction. Levinas's reworking of the sacred, his attempt to cleanse it of metaphysics, "undermines" the articulation of subjectivity that the project also puts forward. Smith's essay can be read as an attempt to rework an ontology that would allow a moral orientation to the good in the light of these perceived failures. Any attempt to summarise this complex argument would do it a disservice. It is interesting to note, however, that Levinas's thought appears again in Failinger's study of American welfare law. Such references suggest the centrality of Levinas and his legacy for any consideration of the contemporary demands of the sacred.

Throughout the collection run poems by Hakim Bey and Paul Virr. Whilst contrasting at the level of style, the discerning reader may discover correspondences at the level of sensibility. Both poets share the desire to puncture through the quotidian to some more 'profound' reality. Whether this yearning can be either satisfied or communicated is perhaps one impulse for these intense reflections. If Bey provides sweeping poetic manifestos whose surrealism is reminiscent of both Rimbaud and Bob Dylan, then Virr's pieces are more imagistic fragments; an urban poetics that echoes Eliot, Pound and William Carlos Williams. The resonances that these poems have with the other pieces in this volume are intriguing. For instance Bey's work seems to be in direct communication with those which immediately follow.

Edwards takes up the sacred in relation to justice:

> For Eckhart, Justice is God, and God is Justice. When we reflect on justice we annihilate the self-grounded subject. Anything I wish to say is an attribute, a quality, and any attribute reduces God to a mere creature. How then are we to think upon the sacred? Have we not already overreached in the very posing this question? For Nicholas of Cusa, such thinking is utterly incomprehensible, indeed, it is precisely this incomprehensibility, this impossibility of thought that draws us in and opens us up to the mystery. And yet we are asked to think upon the unthinkable. Not only must we reach out *in* thought, it is the very necessity for Justice. Our thought has been preordained as a sacred pilgrimage from the saying of Antigone. Our starting point is that Justice is the divine breath; a breath that is both in and beyond the law.

Pursuing this interest in the articulation of what resists language, Dalton's work brings together Bataille, Derrida and Nietzsche in asking how the sacred can be spoken in language. There is the paradoxical sense in which the very naming of the sacred destroys it; but it is necessary to remain within and to affirm this strange condition. Affirming the dis/appearance of the sacred in language leads to a realisation of the potential holiness of our relation to the other: language appears as a "yes to the other whom I never reach". Just as the sacred must appear as an impossibility, the other must be addressed in a form of speech that recognises the possibility of community in difference.

Carnera Ljungstr [empty set] m's essay tells of strange journeys, pilgrimages and wanderings, as he elaborates yet another orientation to the sacred:

> How can we reenchant the world again? How can we bring back a secret to our lives, that is so sadly missed in modernity? The secret is the unseen in the seen, the unthought in thought. It is to see the non-trivial side of life. To see it as something that blooms in unknown circles. Justice, God, the Good life and the beautiful life are something inaccessible. The greatest challenge is to grasp them as ungraspable and incomprehensible. To preserve them exactly in this inappropriable condition.

Virr's contribution is the poetic excavation of a Mithratic site. A god beloved by Roman soldiers, the cult of Mithras was an early contender for a faith that could have challenged Christianity as a world religion. Mithratic sites are still being discovered: ritual carvings were found recently in sandstone caves under a railway bridge in Manchester. Virr's piece describes a foundation that could have been. Its imagery fits in well with the complex of concerns that run through this collection:

> Displaced from the written surface

Where temples have been overlaid
With offices and houses.
The faithful masses,
Are now just
So much dust...

To borrow from Mack's discussion of Milbank, the broken signs, here of Mithras rather than Christ, are all that can be used to articulate the relationship between the human and the divine. These signs are a desperate attempt to achieve some kind of transcendence before we all return to dust. From the ruins of the Mithratic temple, buried under office blocks, the rise of Christianity and the sacred cathedrals and codes of law might seem the accidental triumph of a religion that has departed from the 'truths' of polytheism.

The concern with law's ethical responsibilities is taken up again in Failinger's 'Unmasking the Stranger'. This inventive and engaging study of American welfare law argues that the draconian structure of residency requirements can be traced to a "deep seated, timeless fear and dislike of the stranger, the Other". Fallinger makes use of the thought of both Emmanuel Levinas and Martin Luther to produce a theology of welfare; an argument for 'risk taking' that attempts to respect the other as other rather than impose the rigid and life denying 'mask' of the law.

Also addressing a particularly American phenomenon, Davis's work addresses the idea and practice of civil religion. Strictly separate, but in certain senses related to the "political advocacy engaged in by American communities of faith", it concerns the legitimisation of law and political processes; the sustaining "myths and "rituals" that hold together American life. Davis discovers that these present radically opposed visions of the future of American society. In a subtle conclusion he argues that this breakdown of consensus, whilst in some ways accelerating the fragmentation of the social, could also effectively reinvigorate the 'political dynamism' of a pluralist nation.

In Mestrovic's essay, the cost of secularisation is the very soul of law. If law is rooted in the sacred, and the sacred has slowly become secularised then the law is becoming disconnected from its sustaining traditions. In their place, the rise of the 'postemotional' can be observed: sound bites, empty gestures, smiles and nice teeth fill the vacuum of legitimacy. This is a 'cult' of niceness, a coping strategy that is an alternative to both modernity and postmodernity. What Mestrovic calls the postemotional 'type' has lost faith in contemporary institutions, but has not accepted the nihilism or the free play of the postmodern condition. Mestrovic plots the dynamics of the postemotional in law and concludes with a warning directed against this creeeping trivialisation of sustaining myths.

Slaughter's piece is notable not just for being one of the first engagements with the work of the French psychoanalyst Pierre Legendre (see Goodrich ed 1997) in a literary field, but also for its original approach to Toni Morrison's novel *Paradise*. Slaughter takes issue with the Legendrian insistence that the structure of the legal and social order rests on the name of the father. Her understanding of the sacred is founded in part on Legendrian terms:

> Genealogy ties the secular to the sacred and therefore establishes the legitimacy of secular authority. The political father gets his power from the ancestor who got it from God; his authority is tied to and represents the divine father. He is the direct pipeline to the sacred, to sacred truth and sacred law. Since the ancestors and fathers are representatives or images of the divine, they attract love and require submission to their line, their 'tradition', 'heritage', law.

A connection can be made between this theory and the notion of the American Constitution as a 'civil religion'. This returns to the story of the foundation of America by the Pilgrim fathers:

> There are obvious religious dimensions to the creation of the Constitution. It literally constituted a new nation/society. This leads to the barely-repressed notion that America is the promised land and its inhabitants a people chosen by God and led by his providence. The Constitution is regarded as though it were received from a sacred source, not unlike God giving Moses the law on Mt. Sinai, law which constituted the nation of Israel. The Constitution constituted a social order that was seen to be the instrument of, the child of, the divine father. To Americans, therefore, the notion that its law is divinely inspired and should command faith and love because of this is a

> familiar one. And if the law/Constitution loved by all Americans, so too are the paternal ancestors, from the Pilgrims to the founding fathers.

Toni Morrison's novel is interesting as it operates both within and against this narrative of American civil religion. Although it is structured around mainly Old Testament imagery and concerns of foundation, it is also essentially a counter myth, a vision of a possible maternal genealogy. Although Slaughter is critical of certain aspects of Morrison's vision of the alternative community, it does offer a glimpse of possibilities, of a community run on inclusive principles, and based on an effective reinscription of paternal love as a maternally orientated "redemptive" love that may overcome the alienation of the law of the father.

De Silva's essay engages with a non Western version of the sacred from a perspective informed by Heideggerian phenomenological anthropology. For De Silva, law in Sri Lanka is rooted in the cosmology of Singhalese Buddhism. He takes the intersection between nationality and the politics of language as a privileged site for the investigation of this sacred beginning. The hierarchical Buddhist cosmos allows the Singhalese to articulate their communal being:

> The role of the State is analogous to the role of the Cakkavatti (wheel rolling universal kings, an allusion to the circular nature of life and death and the acquisition of karma), the righteous Buddhist kings of the pre-colonial period who ruled in accordance with the dhamma. The ideal Buddhist king is the one who in classical Buddhist terms renouncers the world, gives up the pursuit of power (*artha*) and asserts "the principles of encompassing Buddha dharma". In turn, nation and state are 'encompassed' by the Triple Gem, the Buddha, dhamma and sangha (the collective Buddhist priesthood).

A similar mythology lies behind the political rhetoric that gives rise to a particular mythology of government that can be read in the Pali Chronicles. Buddha's arrival brings the end of chaos and the beginning of the nation under such heroes as King Dutugemunu. Fragmentation is thus replaced by unity and conquest in a mythology that borrows these controlling metaphors from the Buddhist cosmos. This same mythological imagination dominated the political struggles in Sri Lanka against the British colonial class and continues to inform contemporary struggles which focus on the dominance of the Singhalese language over both English and Tamil. De Silva intensifies his analysis with a reading of how the 'other' is subjected to an 'encompassing' in a particular version of the sacred. The drift of his thought suggests that there is a need to develop new myths of the sacred.

As much as the pursuit of the sacred opens the space for experiment, it does not call for the abdication of rigorous scholarship. Maria Drakopoulou's piece, unique in its field, could be described as a genealogy of equity; a critical elaboration of the claims made by equity to conscience and ethics from a position informed by a cross disciplinary scholarship that is equally informed by history, philosophy and literature.

Introducing this paper is an anecdote about the prosecution of Henry Sherfield, recorder of the City of Salisbury. Sherfield, a man of principle and conscience, smashed a painted window in St. Edmund's Church, as he objected to the depiction of the Biblical creation scene. Tried before the prerogative court, Sherfield was declared guilty of crimes against episcopal authority and the Crown and died a ruined man. This prosecution exemplifies the moment when the demands of conscience become subordinated to the secular laws of the state. Sherfield, like Thomas More, becomes a hero of conscience, one who opposes the law in the name of a more profound law. It is the contention of this paper that Sherfield's action gestures towards a new critical approach to law. Drakopoulou traces the roots of equity to the translation of the Greek *syneidesis* to the Latin *conscientia* and the elaboration of these terms in Christian thought and medieval jurisprudence. Conscience, for the Christians, allows man to know the law of God. In the work of Aquinas, conscience was conjoined with reason under the faculty of the "practical intellect" and with the virtue of prudence, orders human activity to the good chosen by free will. Into this integration of faith and reason Drakopoulou describes the rupture wrought by the protestant reformation, conscience became "an unquestionable obedience to a single, authoritative moral code". From this point on, conscience becomes subordinate to the law of the state. The Christian duty is simply to obey. These tensions run through a text that Drakopoulou argues is central to the contemporary foundations of equity, St German's *Doctor and Student*. St German provides the theoretical justification for subordinating equity to the common law. It is this linkage which allows conscience to be forgotten in the great modernist reformulation of equity. Despite this attempt to

erase conscience from the record it remains a presence in contemporary legal judgement. This persistence carries forward the provocation of equity as a conscience for the common law, an eternal reminder of the limitations and failures of the "positivised and monological jurisprudence" of the present.

Finally, the coupling of law and the sacred brings with it disturbing phantoms as well as the possibility of new approaches to social justice and intellectual traditions. Rolando Gaete's essay sounds a note of warning about any simplistic championing of a return to the sacred. His essay elaborates an approach to the Holocaust. The failure to understand this event is part of a wider inability to interpret history itself. Gaete makes links between the sacred and the practice of evil. Although the Holocaust can be described as evil, the term seems too melodramatic to be part of a contemporary discourse on the problems of Nazism. Perhaps Arendt's notion of the 'banality of evil' might offer a better description of the Holocaust as a grey bureaucratic initiative. Evil is produced by bureaucrats who do not think, who lack depth: only the good can have ethical substance. However, Gaete argues that the problem with Arendt's interpretation is that it deprives the Holocaust of any redemptive potential by removing it from a discourse that deploys ideas of good and evil. As a necessary strategy in the face of those neo-fascist groups who celebrate the memory of Nazism and its dangerous political and spiritual assumptions, to understand the Holocaust therefore requires that we look again at the response of modern law to the sacred.

III

The engagement with the sources of law that characterises the work discussed above could lead to a major reassessment of jurisprudential claims. It seems suitable, given this beginning, to return to source and to suggest one way in which the origins of the common law could be rethought around a notion of divinity that would open up the tradition to arguments about ethics and substantive justice.

Buried within common law jurisprudence lies a notion of fundamental law that both provokes justice and yet leaves us in an absolute void that describes a relationship between the individual and the world after a *deus absconditus*, a God who has withdrawn. This might sound like a complete failure to produce responsible thought, to revel in meaningless contradictions and paradoxes. But the thinking of justice today takes place in a time of contradictions. The key task for a responsible thinking is the questioning of a legacy - what parts of the intellectual inheritance can be maintained, and what parts must be rejected? - questions that prompts a return to the very roots of Christendom.

The text to be focused upon is Bracton's *Laws and Customs of England*. Bracton is a name that seems to hold together and ventriloquise a diverse number of voices. Pollock and Maitland confessed that it was hard to know whose hand it is in the margins of the plea rolls, whether Bracton or a later compiler, and the notebooks that accompany this work only 'seem' to be those of Bracton (Pollock and Maitland 1887: 207). The text is itself composed of fragments of both literary and legal sources. The Italian jurist Azo of Bologna leaves his trace as the shaping spirit that guides the inclusiveness of the treatise. References also abound to the Old and the New Testaments and to the Latin poet Horace. Not only is this a Frankentext, sewn together from the bodies of other books, but this work provokes readers to reinvent it and to reread it as they see fit. Bracton proposes this reading of his own text:

> I ask the reader, if he finds in this work anything superfluous or erroneous, to correct and amend it, or pass it over with eyes half closed. (Bracton 1968: 20).

Despite the reliance of this text on the aid of writing to carry it into posterity, Bracton's text celebrates writing as the very form of its undoing. Reading this way produces the text not as the well ordered legal encyclopaedia, as the archive in which everything is preserved, but as a palimpsest; a document that has been written on and written over countless times. How could the reader judge what was "superfluous"? After the prompting of Bracton's text, the following could be judged to be essential. Bracton himself reminds us that "to keep all in mind and err in nothing is divine rather than human" (1968: 20). This short phrase is quite problematic. It seems to testify to the presence of the divine in the human. To remember all is divine; remembering can testify to a fragment of the God-head existing in fallen matter: it seems to place divinity in the here and now, in the very 'keeping in mind' of divinity. How can this be worked through?

At the very beginning of the common law tradition is an equation of the juror and the priest. Bracton

writes that jurors are "rightly called priests, for we worship justice and administer sacred rights" (1968: 23).4 Justice here appears to be an origin from which both law and rights derive. What, then, is justice? For Bracton "Justice is... just treatment between man and man" (1968: 23). Justice seems to relate to the 'between', to the spaces that separate, that exist 'between' people, the liminal zones between individuals, the space of communication which allows us to face each other. Justice refers to its own priority as a space between individuals. Justice thus seems intimately would up in the human; it is the existential condition of the human, the sense of thrownness or fallenness into a world which provokes or demands a response to the others that inhabit the world.

Justice, it could be said, allows communication between the human and the divine. This has already been suggested by the short phrase discussed above; but the treatise goes further into this theme. God as creator is the source of justice as absolute provision, of absolute giving, which 'in all things rightfully order[s] and justly disposes". God himself gives to each man in accordance with his deserts. "He is neither variable nor inconstant in his deposition or his will, but is constant and unfailing. For he has no beginning and has nor will have any end" (Bracton 1968: 23). This sense of justice is sublime and unthinkable; it can only be expressed in paradox or in hyperbole. There is also, however, a justice of men. To understand justice in the created or in the 'just man' is to understand justice as the 'will to give to each his right" (Bracton 1968: 23). In this way the human echoes, but in a fallen form, the divinity of God; but there is something very disturbing here.

Man is created as an echo of God; but man gets things wrong. To be in the world is to want to act justly, but to be beset by false judges, for whom dire penalties are reserved. Bracton is quite adamant and lists them in true lawyerly fashion (see 1968: 22). Why is this? Why is it so necessary that the false judge should be punished? Could it be because the possibility of God's own inability to judge is echoed in the failure of this faculty in the human?

This double sense, this need to rely upon what cannot be relied upon is what runs through Bracton's jurisprudence, and it feeds directly into his thinking of positive law. If justice is the prior ground, how does it relate to law and sacred rights? Bracton writes that "rights reside in justice" or "what justice commands jus provides" (1968: 22). Justice seems to be some profound form of prior obligation, some form of command that law has to obey; law's provision, moreover, seems to be related to an original giving of justice; a giving that is continuous: a "constant and unfailing will to give to each his right" (Bracton 1968: 23). There is a sense of justice's priority to law here, but how are these terms developed? The sacredness of sacred rights seems to suggest a relationship between justice's priority and an intersection with positive law. Positive law can 'sometimes' accord with sacred right: there is a sense that certain decisions, obligations or judgements can sometimes be described as sacred or as just. This 'sometimes' is the mark of a sacredness that can never be defined in the present; it names a future obligation: it is what 'ought to be done', what is always up ahead. Despite its deferral the sacred appears to cohere in the here and now, in a way of living, in an attitude towards others; it is the "jus that enjoins us to live virtuously, to harm no one and to give each his right" (Bracton 1968: 24). On Bracton's own terms however, this would not be an adequate definition, because we can only ever 'sometimes' say that anything is sacred.

It seems that positive law is forever stuck in and defined by the fact that it has to mediate between the failures of God and man. The law, in Bracton, is the location of man's irresolvable existential dilemma: the need to behave justly in the absence of ground, in the dark world. As there is no one to take care of us, we must take care of ourselves. Can our thought ever understand this obligation? The pieces in this collection provide some means of pursuing this question.

IV

This volume represents a bringing together of different perspectives and agendas that are at times mutually supportive, and also, at times, in opposition; a tension that has to remain. Rather than offering a definitive perspective, the present collection offers a number of ways of defining the field. Each writer could open a trajectory with its own followers and detractors. If the claims of this scholarship can be sustained, it is precisely this diversity that will testify to the importance as a growing field of study; its disappearance will make this collection a glimpse of what could have been: a burst of Promethean energies all the more intense for their failure.

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Footnotes

1 For an elaboration of the possible links between Critical Legal Studies and liberation theology see Gearey 1992.

2 For an elaboration of this theme, see Gearey 1998.

3 The article included here is an extract from Crossan 1998.

4 Pollock and Maitland trace this phrase to the Institutes, I.I.I: "*Ius dicitur ars boni et aequi, cuius merito quis non sacerdotes appellat*". They argue that Bracton saw himself as a "priest of the law, a priest for ever in the order of Ulpian" (Pollock & Maitland 1887: 208).