## REVIEWS

***Anti-lawyers: Religion and the critics of law and state***
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According to Saunders, we tend to take for granted the separation of Church and State effected in early modern Europe. In presuming 'the separation of spiritual discipline from secular government and conscience from law', we risk forgetting the dangers the separation was intended to address: the violent religious wars, the threat to the existence of State and society (p viii, p 153). Of course, the separation was not, could not be, complete: 'It remains our own unfinished business, a contest unresolved since early modern times' (p viii). The character of our unfinished business is seen most clearly in the religious fundamentalist attacks on law and government. The provocative and challenging argument of *Anti-lawyers* is that the continuing contest is:

> carried also by the more refined yet no less incessant claims of critical intellectuals to reshape governmental institutions and the legal apparatus in accordance with a moral principle, typically some vision of individual autonomy or communitarian self-determination. (p viii)

In this light, critical scholarship is a continuation of the longstanding debate between religion and law and critical scholars are 'missionary' and 'religious', oblivious of the 'theological genealogy' of their ideas, attempting to 'return secular law to 'sacral' conscience' (p 147). Moreover, the 'critical project, it seems, is closed to the possibility that the historical disengagement of a secular legal regulation of public life from the violence of the spiritual community was a positive or even useful achievement' (p 147).

Saunders' intention is not to debunk critical scholarship; rather, it is to 'redescribe the critical mode of thought in its historical role' (p 153). He views his role as that of historian, reminding and thereby moderating the moral and religious demands of the critical scholarship. Thus this book is an historical investigation of our 'unfinished business', intended as a timely reminder of the dangers posed by critical lawyers in their attempt to reunite religion and law. It is also an attempt 'to recover historical and ethical dignity for persons and institutions that, more usually, are the target of critical comment'(p xi).

*Anti-lawyers* starts with the thesis developed by Koselleck regarding the religious genealogy of critique, that moral critique was and is religion pursued by other means (ch 1). It then examines the various attempts at demarcating law and religion. There is an extensive discussion of the demarcation in England that focuses on 'confessionalisation', conscience and the new Puritan order (chs 2, 3), the Hobbesian critique of the common law (ch

4) and its defenders, especially Hale (chs 5, 6). The separation of powers in France is examined in the light of Bodin and Domat (ch 7). The German and Prussian divide is outlined by examining the works of German jurist Thomasius and Kant (chs 8, 9). The American experience is explored in the context of sectarianism (ch 10). The final part of the book turns its attention to contemporary American and British academic debate (chs 11, 12). Saunders is persuasive in this historical undertaking, presenting a detailed and subtle historical account of the shifting relationship between law and religion in England, France, Germany and America. His analysis is promising, though less convincing, in contending that modern critical scholars in effect attempt to unite religion and law.

More needs to be said about 'religion by other means' (ch 1): does every engagement with moral and ethical issues – with natural right and justice – represent a 'religious' question? It may be that such criticism evidences the articulation of a profound human longing to be noble in a political settlement that can no longer accommodate, and even denigrates, noble action (consider Hobbes' depiction of aristocratic pride). Perhaps the probity and fervour, moral indignation and anger, the compassion and sincerity of critical scholarship is no more than the believers' longings, finding expression where it can. If so, it would have been helpful to elaborate the reasons why. Is it perhaps because all moral and ethical questions are inevitably about the *summun bonum* and therefore implicitly raise the difficult *quid sid deus*? A more sustained investigation of these intriguing theoretical questions would have been helpful in trying to limn the character of the 'critical project'.

But is there a comprehensive and coherent 'critical project' as Saunders appears to suggest? Are modern legal jurisprudential schools of thought — Law and Economics, Feminist, Queer, Law and Literature — simply aspects of 'crit' thought evident in Unger's *The Critical Studies Movement*[1] and in Douzinas, Goodrich and Hachmanovitch's *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent*?[2] There is a tendency in this book to characterise the critical project as 'Romantic', neo-Kantian or Kantian. It is of course arguable that Kantian philosophy is secularised Christianity. But one should not forget Kant's claim that Rousseau 'set him right' — that is, it is Rousseau, with his formulation of freedom, that prepares the ground for Hegel's History and Marx's critique of the *bourgeoisie*. There is, in short, much in modern critical thought that is 'Romantic'. Yet in concentrating on Rousseau and Romanticism, with its emphasis on democratic egalitarianism, sincerity, compassion, 'Nature', it is possible to miss an equally powerful and influential stream of thought in Western political philosophy that entered legal scholarship via literary studies. Here I am speaking of Nietzsche's diagnosis of Western nihilism as the inevitable consequence of Platonism, resulting in the death of god and the Last Man. Nietzsche's powerful legacy — radical scepticism, creation of

1 R Unger (1986) *The Critical Studies Movement*, Harvard University Press.

2 C Douzinas et al (1994) *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent*, Routledge.

values, Will to Power and Will to Knowledge — is undeniable, though generally unacknowledged in legal scholarship

Modern critical scholarship has in some respects, and somewhat inconsistently, appropriated from both traditions. It has through Heidegger and French post-structuralism adopted a radical historicism that makes all 'values' contingent and 'created', necessitating an act of will as a response to nihilism. At the same time, and it would seem arbitrarily, it has favoured not the resoluteness that led Heidegger to favour National Socialism, but inclusivity, a reluctance to 'close' narrative, a need to accommodate the feminine, the 'other', the silenced. Critical scholarship has founded and built on an apparently arbitrary and terrifying nothingness a compassionate, caring and egalitarian morality — Christianity without the patriarchal eschatology.

This simplified presentation of the theoretical contours of modern legal scholarship suggests that the 'critical project' and the critics are far from the homogenous group suggested by Saunders; post-Enlightenment and post-modern thought is proud of its ability not be labelled and typologised. Moreover, to the extent that some modern legal scholarship is secular or at most un-Christian or pagan (*pace* Unger), to the extent that it regards questions of morality or ethics as matters of 'comportment', aesthetic or ironical gestures, it raises the possibility that is not simply a return to the continuing dilemma of law and religion: one needs to consider the possibility that for modern scholars god really is dead or that new and unprecedented gods are coming into being.

Finally, the radical historicism and scepticism that undergird some modern legal scholarship presents a formidable intellectual challenge to Saunders' strategy of countering critical thought by 'telling history'. Consider the claims: there is no continuing story or debate that straddles the centuries and, if there is, we have no real access to it; that all telling is making — Will to Knowledge; that we are fundamentally limited by our time and place; our historical horizon sets the absolute limits to what we can say and know, and so on. That these statements are now commonplace confirms that historicism is the new orthodoxy, underlining the lack of access we now have to arguments that suggested otherwise. It also confirms the seriousness of the challenge posed to conventional scholarship by radical historicism. Accordingly, these arguments represent a modern riposte to Saunders' strategy of getting the history right that needs to be acknowledged and addressed.

*Anti-lawyers* succeeds in reminding us of the continuing importance of the theological-political problem, of our *unfinished* business. To this extent, it challenges the uncritical confidence of critical scholars. It also leaves us with the enticing challenge 'to throw a better ethical light on practices — the professional routines of law, government and administration — that are themselves routinely criticised as falling short on the scale of moral values' (p 14). We look forward to this promising and more ambitious undertaking.

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