PHILOSOPHERS AND LAW

NIETZSCHE AND LAW

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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important essays in English that deal with the application to law of the work of major philosophers for whom law was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of major philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both the nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have all been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engagement in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

TOM CAMPBELL
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Introduction

Ambulo, ergo sum. (Friedrich Nietzsche)[1]

According to Cato the Elder, the practice of kissing relatives had its roots in the desire to control women. The question posed and answered by the kiss was: 'Does her breath smell of wine?' Women were forbidden from drinking by Roman law because alcohol could lead them to 'unlearn altogether the art of saying No'.[2] Nietzsche uses this intriguing pneumatic example as an instance of the hidden qualities or cultural embeddedness of positive law. The norm betrays a fear and, in this instance, that fear is of the Greek, and specifically of the Dionysian. What threatens is not just the foreign and unknown, but also the satyrical tradition of the carnival, the inebriate, the joyful, the erotic and playful. The ludic or simply gay rites that drinking evoked were potentially significant as a dissipation of identity, of the immersion of the one into the many, and also of the collapse of order into ecstasy, of the unity of law into the plurality of dance.

The law, here the prohibition on women drinking, does not directly define an interior of a city-state or people, but rather betrays what the culture is not. It is a telling and touching example of the obscure, but essential, relation of law to culture and of norm to life. Consider the paradox of creating a disciplinary measure out of an erotic embrace, a juridical interrogation in the form of oral insufflation – sniffing as legal interpretation. It gives a new meaning to the hermeneutic of suspicion. Yet however one frames the instance of legal kissing for Nietzsche it has a twofold significance and can also point in the direction of the dual sources of Nietzschean jurisprudence that will be traced in the contributions to this volume. First, at a philosophical level, this rite – one that in essence juxtaposes contract and contact, law and touch – collapses legality into an interior source or before of law, tactile and internal to it. Second, in hermeneutic form, the paradox of this Judas kiss, this ulterior and opaque semiotic, is suggestive of the multi-layered quality of all juridical acts and pronouncements, of the need for interpretations and the variable moods of their illocution. Nietzsche formulates these two facets of law in terms of the opposition of the Greek to the Roman, but they can be explored just as productively by considering two encounters, those between the pre-legal and the legal, and between science and anti-science. The two traditions that Nietzsche seeks to evoke and expand are similarly the Greek – always the Greeks – and that of the Troubadours and the gay science of *rectorica*, of eloquence as law.

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[1] 'I walk, therefore I am'. Friedrich Nietzsche, *Early Greek Philosophy and Other Essays*, trans. Maximilian Müggе (1911) at p. 129. The epigram is in honour of Dean Fredrick Dolan's, 'Nietzsche's Gnosis of Law', Chapter 7 in this volume.

[2] Friedrich Nietzsche, *Joyful Wisdom ('La Gaya Scienza')*, trans. Thomas Common (1910), hereafter *Gay Science*, at p. 81. The history and art of kissing should never be broached without reference to magnificent and comprehensive work by Nicolas Perella, *The Kiss Sacred and Profane* (1969). Peter Goodrich, in *The Laws of Love: A Brief Historical and Practical Manual* (2006), ch. 7 outlines a positive casuistry of kissing.

The Tragedy of Legality

The return to the Greeks, the re-enactment of the antinomy of Apollo and Dionysus, and through that the re-encounter with cultural forms, dialogues and poetic disquisitions that institute a before of law, a beyond of contemporary institutions, is a fecund theme throughout. At the root of this return is another and more philosophical opposition, that between Heraclitus, the weeping philosopher, and Democritus, the laughing sage. So start with the disconsolate philosopher from Ephesus who conceived only of the one Justice, eternally swaying, and exclaims, 'The contest of the Many is itself pure justice. And after all: The One is the Many', going on to conclude:

> And if the world which we see knows only Becoming and Passing but no permanence, should perhaps those qualities constitute a differently fashioned metaphysical world ... not a world of unity as Anaximander sought behind the fluttering veil of plurality, but a world of eternal and essential pluralities?[3]

The return to the Greeks, to the early Greek philosophers, is not only an attempt to go before the law – and so, beyond the law – to a pagan and plural pre-Christian *nomos*, but also a way of opening up to, and reconstructing, a painful history – that of an error. The Berkeleyan triad of Nonet, Constable and Berkowitz, the latter two having trained with the former, provide a fascinating conspectus of the dimensions of this jurisprudential error as devised through, and elicited from, Nietzsche's critique of metaphysics. The significance of the One in the Many and of the Many in the One resides in the recognition of the limitation – indeed, the inadequacy, the necessary failure – of law. This tragic story is taken up on many sides by posing the simple question 'What is positive law?'. The answer: a plurality, a tragedy, an illusion, a necessary illusion. Such is the wager of the nihilist on the certainty of law. It is formulated by Philippe Nonet (Chapter 1) in a variation on a juridical maxim: '*ubi jus incertum, ibi jus nullum*' – where law is uncertain, there it is nothing (p. 8). The more usual citation is '*misera est servitus ubi ius est vagum aut incertum*' – it is miserable to follow the law where it is vague or uncertain (Coke, p. 246). Hence pessimism as the interior of nihilism and as the unflinchingly candid path to becoming, to the *incipit* of the new.

To the extent that law is embedded in the religious instinct, in the belief in a higher and other world, it requires positivity, meaning limitation to specific procedures of norm creation and application. The key is its limitation – what Nonet terms its 'rage against time' (pp. 29–30), its slow unpacking of what the supreme jurisprudential purist, Hans Kelsen (1957), borrowing from Nietzsche, terms the history of a 'gargantuan error'. For Marianne Constable, too, Nietzschean jurisprudence is, in its most exemplary form, the *longue durée* of an error that moves from the Greeks to the moderns – Heraclitus to Hart. In Chapter 2 she correctly formulates the *Twilight of the Idols*, the demise of law, as the passage from truth to myth and thence to the abolition of both – the moment of creativity, of the humanity to come. For such a trajectory to be possible requires the progressive refusal to reduce law to another virtue or discipline. It requires constraint, honesty, mere positivity, and thus the uncomfortable recognition that law is no more than what doctrine makes on specific occasions, a merely

[3] Nietzsche, *Early Greek Philosophy*, at p. 103.

human endeavour, something of a side issue in the order of disciplines and in the drama of political life.

The ending of the error – when the two laws, divine and human, are abolished; when we are done with the judgement of Jupiter, of priests and tyrants; when law is simply law – means that law too, ironically, is done. The first of the disciplines, the order of institutions, the definer of words, deprived of its sanctity, shored of its mythic unity, realizes its hybrid character, its necessary uncertainty, the power of becoming merely law, simply statement, anathema or adulation. In jurisprudential terms the interesting issue, elaborated upon lengthily by Christopher Smith in Chapter 5 and in contrary vein by Francis Mootz in Chapter 6, is that of the transition to a hybrid discipline, the opening of dialogue, the resumption of conversations that have long been abandoned. In this guise, as Nathan Widder argues in Chapter 3, difference substitutes for juridical similarity, metonymy for metaphor, and lines of flight for erroneously stable identities.

The encounter with the Greeks, the return to the roots of the philosophical tradition, is not simply an unpacking of errors, a removal of veils, but also a positive inclination towards a culture that knew, in Nietzsche's own emphasis:

> ... how *to live*: for that purpose it is necessary to keep bravely to the surface, the fold and the skin; to worship appearance, to believe in forms, tones, and words, in the whole Olympus of appearances! Those Greeks were superficial – *from profundity*![4]

There was also, of course, their commitment to conversation, 'fine talk', the avenues of dialogue that Frederick Dolan (Chapter 7) traces in the gnosis of walking, and the pursuit of ambulant and animated ideas. Putting it differently, we can say that Heraclitus has to learn to laugh, for, after all of what use is a book that does not take us beyond all books, into life, into dialogue, and in the present case, as Mootz shows, into court.

Long Live the Troubadour

The second source of Nietzschean jurisprudence, traced in the later sections of this volume moves from the Greeks to the Romans and most specifically to the Ovid of the *lex amatoria*.[5] Here the relevant transition is that of a secondary reception: the erotic norms of Roman verse, the code of contact or map of the heart, gets taken up in the laws of love, in the medieval tradition of rhetoric and, specifically, in the gay science – the poetics associated with courtly love. This less travelled road in Nietzsche's work – his return to the gay science and, specifically, to the roots of the rhetorical tradition – enjoins a second set of themes. The question posed is directly that of how to live, the aesthetic of relationship, the creation of new laws.

We find this question posed in specifically historical terms, as a question of return and of fate, as something for the laborious, in the first book of the *Gay Science*. The question is that of how to live, posed here in terms of the art of law conceived as a facet of the art of life:

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[4] Nietzsche, *Gay Science*, at p. 10.

[5] On the reception of Ovid and the *lex amatoria*, and specifically its strongly legal character, see Becker (1997) and, more broadly, Bloch, (1977). See also Goodrich (2001), and Yovel (2005). For a sampling of texts, see *The Comedy of Eros* (2nd edn, 1997), trans. Norman R. Shapiro.

> Hitherto all that has given colour to existence has lacked a history: where would one find a history of love, of avarice, of envy, of conscience, of piety, of cruelty? Even a comparative history of law, as also of punishment, has hitherto been completely lacking.[6]

If law, in this formulation, is a 'condition of existence', an institution and teaching at the root of amity and community, then it has yet to find its scholars, its poets, or – to borrow from Constable's contribution – its genuinely deviationist doctrinalists, its free thinkers.

What Constable assesses in epistemological terms gets worked out in the critical terminology of 'post-legal studies', always assuming that the 'post' coined in the neologism refers primarily to a sending on, a novelty, a new ground, rather than simply a beyond, an open space, a plurality. In that more technical sense the second thematic of this volume is precisely concerned with the viscera and embodiments of legal institutions, the inhabiting of juridical texts. The guiding theme is that of desire, Nietzsche's erudition *in eroticis* as worked through law. The issue, one which was well captured by Gillian Rose in her *Dialectic of Nihilism* (1984), is that of coming to know more and not less about the law tables. In one sense Nietzsche was at least fascinated by law, by the tablets and tables, the pronouncements and legislations, and the poetic acts of creation and determination. He was not afraid of such acts of power, such will and its positive outcomes, but rather wanted to make them his own. How that is done – in other words, legal philosophy as a way of life – becomes the conjoining theme of Parts III and IV of this book.

The initial question, posed by Peter Goodrich (Chapter 12), is that of how to live with uncertainty, how to inhabit the polysemy, the simple plurality of juridical texts. The task for the Nietzschean-inspired legal scholar is that of tirelessly addressing the enfolding of meaning in text. All of life rages here, one might say, but only the most attentive – indeed, amorous – ear can hear it. We draw this time from Nietzsche's widely cited and little understood essay on truth which reaches its now familiar crescendo in the rhetorical question:

> What therefore is truth? A mobile army of metaphors, metonymies, anthropomorphisms: in short a sum of human relations which became poetically and rhetorically intensified, metamorphosed, adorned, and after long usage seem to a nation fixed, canonic, binding; truths are illusions of which one has forgotten that they are illusion ... coins which have their obverse effaced and now are no longer of account as coins but merely as metal.[7]

The notion that meaning is coinage, interpretation an attribution or aspersion of price – etymologically *inter-pretium*, a bargaining as to value – should not surprise lawyers, but receives little expression in doctrine. The Nietzschean insight is into an economy of meaning, a market of signification that precisely responds to the relations that our canons and laws enshrine in a forgotten, and thus increasingly opaque, form. To reconstruct the history of such meaning, to understand the lives impacted in the history of texts, is the endless task of interpretation. Thus, in differing guises, the later contributors to this volume look to the transvaluation of values, the plurality of meanings and the failures of reason, as well as the

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[6] Nietzsche, *Gay Science*, at p. 43.

[7] Nietzsche, 'On Truth and Falsity in their Ultramoral Sense' (1873), in *Early Greek Philosophy* (1911) at p. 180.

spectres of significance, of inheritance and decay, of North and South, encountered endlessly in different jurisdictions and multiple precedents.

The reference to truth as metaphor can also remind us of the source of Nietzsche's views in his early lectures on rhetoric. We should not forget that the *Gay Science* was a rebirth of an earlier institutional rhetoric and that its laws of love were rules of grammar – formulae for poetic and juristic composition. The early lectures on rhetoric are motivated by two key concerns. First is the priority of speech over writing: 'the true prose of antiquity is an echo of public *speech* and is built on its laws, whereas our prose is always to be explained more from *writing*'.[8] The second and correlative point – a necessary corollary of the public quality of language use, its intrinsic sociality, its pervasively symbolic character, in sum its legality – is the acknowledgement that language is rhetoric and that meaning is a sign: 'The *tropes*, the nonliteral significations, are considered to be the most artistic means of rhetoric. But, with respect to their meanings, all words are tropes in themselves, and from the very beginning.'[9] There is no escape from rhetoric, no end to the task of tracing the erased face of the coin, the allegory of the word. As Nietzsche himself put it, 'There is just as little distinction between actual words and tropes as there is between straightforward *speech* and *rhetorical figures*. What is usually called language is actually figuration.'[10]

Rhetoric joins the market in the figure of a coin, a mercantile metaphor of repetition and erasure, of use and forgetting. The figures that survive, that become linguistic coinage, common use, are those that appeal, persuade and have value for their auditors. It is here that the earlier reference to the priority of public speech inserts politics into language, and law into rhetoric. What matters for public speech, of which law is in modernity the most serious of forms, is precisely its proper institution, its politics in the very precise legal sense of institution: namely, *aetas*, *scientia*, *mores* and *ordo*, meaning time, knowledge, custom and order.[11] An institution is a teaching, an inculcation in formal manner of a mode of life. Truth, to pursue Nietzsche's metaphor, is the outcome of agon, an expanded trial, of successful persuasion; it is only now incorporated into institutions, into the dictation of time and place and purpose. As the essays by H.W. Siemens (Chapter 14), Joseph Pugliese (Chapter 15) and Adam Thurschwell (Chapter 16) variously indicate, it is through the genealogical reconstruction of the imperialism of truth, the mapping of its geographical projection, as well as its political repetition, that critique comes to understand and challenge the cost of belief. What price do we pay for abstraction, Adam Gearey asks in Chapter 13, and what is the cost in lives, in the quality of life, the aesthetics of knowing, if we cannot recognize difference or enjoy the hedonic particularity of different cultures and difference in law?

Taken together, this collection marks the necessarily marginal trajectory of Nietzschean inquiries into law. They mark a margin not simply in the political sense of being lateral to the concerns of 'serious' – which is to say profound, heavy, sedimented – jurisprudence, but also in the more playful sense of being before what is written, beyond the script or sentence, exergue or space of glosses and thresholds. Here it is the hybrid, the plural, the swaying – to borrow again from Heraclitus – that holds sway. The issues raised and the concerns aired are

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[8] Nietzsche, 'Description of Ancient Rhetoric' (1989) at p. 21.

[9] Ibid., at p. 23.

[10] Ibid., at p. 25.

[11] This is by the 1603 Canons of the Church of England. See Gibson, *Codex juris ecclesiastici Anglicani* (1703), Vol. 2, at p. 850.

more concrete, more real and closer to speech than to writing. Recollect again Nietzsche's initial figure of law in the *Gay Science*, the regime of kissing kin that Cato viewed as a regulatory device. It overturns and undermines our accustomed interpretation of kissing as the mark of amity, of brotherhood and community. It suggests or betrays another scene of law, a complex of fears and desires whose expression is encoded in a practice of kissing whose origins have long been erased. It is a perfect example of Nietzsche's jurisprudence, that of a wisdom *in eroticis* that belongs in law, amongst in laws, a coming to know, a becoming of visceral knowledges that jurists have unhappily abandoned. This, then, could be taken as the emblem of Nietzschean jurisprudence. It is the study of juridical practices as a way of life and, here, the analysis of what the kiss betrays. More than that, it is intrinsic to philosophy which, in one etymology, is the *sophia* (wisdom) of *philein* (kissing).

But that is not all. As excoriated, deconstructed, revived and politicized Nietzsche is a gay scientist of law, an osculating jurist, an amorous rhetorician. He is an intransigent, rigorous, at times derisive and at times uncharitable hermeneut. He is great and terrible because, to paraphrase his own sentiments towards Wagner, 'love is of all the sentiments the most egotistic, and consequently, when it is wounded, the least generous'.[12] With that hermeneutic suspicion in mind, it is to Nietzsche that the last word must be given – his philosophy demands it, his philology seizes it. There is nothing we can do about Nietzsche having the last word but to attend to his word, or, to borrow again from the Latins, *nos disputatio in una, ergo sum*.[13] And so we conclude the volume with an excerpt in which Nietzsche champions the philosopher of tomorrow and the day after tomorrow, as a legislator who rises above the pablum of democratic sentiments and creates knowledge because he knows that truths cannot be discovered. His is a levelheaded cruelty, a severe spirit that is cultivated through the negativity of experience.

Opposed to the Nietzschean philosopher is the mendacious figure of the scholar. The latter is a 'specialist and nook dweller', an 'industrious worker', a 'utility man' (pp. 427–8), a parsimonious proponent of a 'theory of knowledge', one of the 'nimble smarties or clumsy solid mechanics and empiricists'(p. 433). Filling the blanks left by the great minds of yesterday, scholars toil in service to systems of thought that have outlived their usefulness and betrayed their inspiration. These are not thinkers; they are coroners.

Faced with the challenge of being a philosopher rather than a scholar, can we really talk of a Nietzschean philosophy of law? Can a Nietzschean write about law without betraying himself and descending to mere scholarship, to base legalisms, to a cellar filled with nothing more interesting than dust-besmeared files? Is it not the bad conscience of a scholar that seeks to apply philosophy to law? Nietzsche explicitly claimed not to want followers, but he did want readers – experienced, engaged, attentive, patient readers. It is our hope to have provided a space for such readers and readings here.

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[12] Nietzsche, *The Case of Wagner* (1911) at p. 5.

[13] 'We debate, therefore I exist.'

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