



Coming Home: [Commentary]

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COMMENTARY

Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law

Coming Home

Christine B. Harrington and John Brigham

Ever since the formation of an academic bar, one which left the "practical world" of apprentices and clerkships barely 100 years ago, the architects of law's intellectual life have looked outside the canons of lawyers' law to academic life and its deep thinkers for stimulation. From the German social scientists of Pound's time to Foucault in our own, the erotica of the legal academy have often been drawn from French and German philosophers and social theorists. There may be, in fact, a pattern to this inclination in America to draw insights from the "wild passion" of the French or the "dark terror" of the Germans. There is certainly an ongoing effort to avoid England in both its commonness and its construction of the "savage" or the ethnographically primitive "other" on which English law based its authority for so long.¹ American sociolegal intellectuals, as part of the legal academy, crave a hit of the "other" on the continent of Europe, having denuded the American forests of its native occupants.

To its credit, the range of insight from this style of scholarship can be sweeping. Marianne Constable's essay, "Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law,"² is an example of the escape and what it offers. We are brought into the spirit of law, carried from the West down to the East, and into the deep structures of the epistemology of legal ordering.³ Indeed, this kind of legal scholarship seems to have a soul, an inner presence barely capable of holding the anxiety and

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1. Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

2. 19 *Law & Soc. Inquiry* 551 (1994).

3. For a similar treatment of Foucault and Walzer, see Constable, "Foucault & Walzer: Sovereignty, Strategy & the State," 24 *Polity* 269 (1991).

turmoil we associate with Kafka, or Nietzsche, or Freud. Rather than the "native savage" of John Locke and similar lore purporting to demonstrate the superiority of English jurisprudence, we are presented with the modern savage within. We may all be justifiably excited about exploring the unconscious in law, but at the same time we should be cautious about being taken on a pretty self-conscious theory trip.

Nietzsche must be understood, Constable tells us, because his work underlies the work of Foucault. Here, of course, Foucault is an authorizing cite for critical legal scholarship. To understand law, we need to "get it right" and "right" is what Nietzsche laid out in *Twilight of the Idols* where he breaks out of (after constructing) the "apparent" world of philosophy. Constable takes us on a theory tour, making explicit the nuanced philosophical turns in Nietzsche's 1888 account of "How the 'True World' Finally Became a Fable."⁴ She states that "Friedrich Nietzsche enables one to begin to grasp those complications [separation between social science and law] and to consider some of the difficulties inhering in relations between law and social science in 20th-century American legal thought" (p. 554). Constable seeks to show political theorists that the history of jurisprudence can be read as Nietzsche reads the history of metaphysics. The "apparent world" of philosophy is the subtext for the "apparent world" of jurisprudence. Constable's message is that if we interpret Nietzsche with jurisprudence in mind, explicit ties will be forged between the deep thinkers and those who seek to give law an intellectual life.

Does Constable's theory tour, her effort to link these worlds and their "apparentness," transform conventional political theory treatment of jurisprudence and does it inform sociolegal scholarship of its own genealogy in theory? The reader wonders—we wonder—whether Constable has produced a genealogy of jurisprudence. A straight answer seems inappropriate. Her effort to fit developments in jurisprudence into one or another of Nietzsche's periods of history (or the other way around) is a stretch. In addition, the enterprise may itself belie the very critical intent of doing genealogies because the result is a gloss on law that further mystifies the subject. Her picture of an "unfolding . . . of nihilism" (p. 572) in modern sociolegal work belies the extent to which forms of contemporary jurisprudence, like legal realism, are forms of legal power. In failing to explore these dimensions of the theories that give law power, Constable postpones an analysis of the social relations that might show us the attraction of Nietzsche for jurisprudential scholarship.

4. See Nietzsche (1888), "Twilight of the Idols: or, How One Philosophizes with a Hammer," in W. Kaufman, *The Portable Nietzsche* 485 (New York: Viking Press, 1954). Constable cites this section of *Twilight of the Idols* in the beginning of her essay, but her translation reads a little differently from ours: "How the 'Real World' at Last Became a Myth."

The problem with her approach is the use of political theory as a heuristic device which names events in the jurisprudential history of Western law but fails to link them to such obvious social relations as those of class, nationality, or gender. We think the unsettling character of the jurisprudence she charts throughout the article is tied to the changing social relations law seeks to govern and to the delicate internal order from which law claims the authority to govern these social relations. A sociological jurisprudence should locate where and how law's order collapses and is maintained across time and economic conditions. Her "genealogy" is not critical enough or sociological enough for us because in its desire to connect jurisprudence with philosophy, it reproduces a common limitation of conventional political theory—a tendency to ignore people and their status in law.

Constable's reading of jury studies is an exception. Here she tells us that the "ultimate goal in such studies becomes a jury whose 'perception, memory, information and decision processes' best approximate the processes of social science, a science that serves to correct the mistaken assumptions of official law" (p. 577). The best thing about Constable's tour is not how Nietzsche maps onto American legal thought but what she presents as at stake in contemporary sociolegal scholarship. That is, Constable offers us the ability to comprehend the nature of law in practice, on such matters as the common law jury, without appearing dim in an age illuminated by the claims of interpretation. Nietzsche has given her some categories to work from, yet an interest in genealogy is likely to stem from wanting to know where we came from and where we are now and here Nietzsche offers relatively little. Constable charts our course on a tryptic through the territory of interpretation in contemporary law and society and shows that we shouldn't be bored by getting more precise than we have been since the wonderfully ambiguous thesis of Roberto Unger's oration to critical legal studies in 1982, in which he characterized the legal academy as standing before "cold altars" and suggested that "the mind's opportunity is the hearts's revenge."⁵ The challenge remains to advance the Realist's project without reifying its positivism.⁶

Contemporary debates in sociolegal research, however, get flattened in Constable's essay as "the 'final' stage in a Nietzschean history of jurisprudence" comes rolling over them (p. 585). For example, she notes that interpretivism is presented by some as a departure from the legal realist epistemology that informs most jury studies: "Some suggest, for instance, that humanistically inspired interpretivist work infers from the socially constructed character of law a 'shared community' of sorts, while more social-scientifically oriented work downplays or denies the extensiveness of such

5. Roberto Unger, "Critical Legal Studies," 96 *Harv. L. Rev.* 561 (1983).

6. John Brigham & Christine B. Harrington, "Realism and Its Consequences: An Inquiry into Contemporary Sociological Research," 17 *Int'l J. Soc. L.* 41 (1989).

community" (p. 585). However, as she is true to the internal order of Nietzsche's philosophy, she collapses the debates *within* interpretivism over the terrain and authority of legal realism.⁷ There is too little attention to the easy acceptance of the interpretivism of difference that invigorates a declining pluralism, and the much less ready response to work that makes the communities of interpretation places where people live, have careers, and die. These debates are precisely about the issue of how law gets "construed realistically"⁸ and where the full debate is understood, there is little danger of a "permanent transfiguring or becoming of absolute subjectivity" (p. 590). There is little danger, that is, if we don't allow the genealogies to domesticate movements in sociolegal scholarship in order to remain "true" to philosophy—Nietzsche's or anyone else's.

When Constable does get as serious about sociology of law as she is about French and German theorists, she reveals a very English capacity for describing things as they are.⁹ For instance, when she writes about parts of the world constituted in contemporary communities of sociolegal scholarship, she calls our attention to a flexibility and/or shifting of position over time.¹⁰ She sees a shift by some who claim connection to interpretivism as they have domesticated it.¹¹ She also draws attention to the resident instrumentalism in this move: "But the hopelessness Sarat and Kearns express (like the hopefulness of the critics they turn to) indeed accompanies a nihilistic sociological jurisprudence that denies the distinction between the real and the apparent worlds, the *ought* and the *is*, while affirming a law/force that threatens to become absolute" (p. 587). Here Constable finds elements of the sociological position at the heart of sociolegal research that have been wrapped in a version of interpretivism which rings nihilistic bells but leaves the chords of law's social relations intact. We think she skillfully calls our attention to the autopoietic careers of legal intellectuals who draw on the great ones and absorb the tendencies of the moment while building new empires where power and law live together.

Some projects in sociolegal scholarship operate "where the state ends" and make contemporary law capable of mystification. This is what organized institutions of higher learning have often done for the law.¹² Constable moves, with Nietzsche, to "the end of the state" and through Zarathustra to

7. These are debates that have arisen in feminist thought, gay and lesbian scholarship, and in the critique of rights on the left that led to the emergence of Critical Race Theory.

8. See Christine B. Harrington & Barbara Yngvesson, "Interpretive Sociolegal Research," 14 *Law & Soc. Inquiry* 135 (1990).

9. Alan Hunt, *Explorations in Law and Society* (New York: Routledge, 1993).

10. "Although affirming 'science as a tool of persuasion' in a discussion of 'post-empiricist' scholarship in 1990, Sarat turns a year later with Kearns to interpretive critics who reject social science." Constable, p. 235.

11. This paradigmatic move, involving some of the same actors, is described in Harrington & Yngvesson, 14 *Law & Soc. Inquiry* at 137.

12. Valerie Kerriush, *Jurisprudence as Ideology* (London: Routledge, 1992); John Brigham, *The Cult of the Court* 94 (Philadelphia: Temple University Press, 1987).

the “‘overman,’ a species or race that is not human.”¹³ But, for Nietzsche, the overman is juxtaposed, along with “peoples,” against the state in much the same fashion that the last generation dichotomized society and law. The overman transported to America need not represent much more than experience, culture, and other things possible outside the state. But, if we see ourselves through Nietzsche rather than Holmes, we are bound to get a little confused. We don’t think Nietzsche is essential, although he leads Constable to some interesting observations. She cuts through some of what goes unexamined in the power relations that constitute law in the academy. She reminds us that it is hard to leave behind the instrumentalism of ordinary discourse while still getting at law as “a social phenomenon belonging to an observable world” (p. 588). Her trip to Germany may have helped her to take our aspirations and enterprises seriously, but we would be inclined to stay closer to home.

13. From *Thus Spoke Zarathustra*, Constable, p. 239.