

## History and the Noble Art of Lying

1. *Wozu Rechtsgeschichte?* To ask is to accuse. Is there any doubt about the answer? Why is a rose a rose? Because it is (Martin Heidegger, *Der Satz vom Grund*).
2. In 1886, Friedrich Nietzsche reissued his first, youthful, brash and yet *fragwürdiges* book. *Die Geburt der Tragödie*, he informed us in the newly written critical preface, was in many ways a book infected with the passions of youth. Nevertheless, Nietzsche deemed it worthy of republication because it posed a valuable question, one of the »first rank«. Not only of abstract worth, the question was »a deep personal question«. The book asked: *Wozu – griechische Kunst?* ... In approximate English translation, »What for – Greek art? ...« (Geburt der Tragödie [GdT], Kritische Studienausgabe [KSA] I, 12).
3. Nearly 120 years later, the editors of *Rechtsgeschichte* have asked us to think about the question, *Wozu – Rechtsgeschichte?* What for – legal history? With Nietzsche reverberating in the background, the question imposes itself: is this a question of merely abstract worth? Is it a personal query? Is it an opportunity for self-justification, or does it scratch beneath the surface of a scabrous wound?

The temptations for self-justification are by now well rehearsed. »Legal history makes us better lawyers.« »Legal history deepens our understanding of problematic jurisprudential puzzles.« »Legal history, let us be honest, has no use. We practice it because it's fun.« »Legal history is an art, and the historian an artist. We produce beautiful stories that have no use – *l'art pour l'art*.«

The rationales split into two: legal history is useful for the practice of law; or its uselessness is proof of its beauty. The former subordinates historians to lawyers in a way that produces frenetic hand wringing amongst scholars. What is more, practical defenses of historical scholarship assimilate thinking into the strategic pursuit of private advantage. The latter rationale promises the scholar admittance into the fraternity of creative souls. In such company, the truth of scholarly pursuit is thought to be elevated by the noble activity of art itself.

The choice between the strategic laborer and the bemused artiste is no choice at all. For scholars weaned upon the rarefied milk of sacrifice in the name of truth and fidelity to a higher calling, the horror of wage-labor is matched only by the charm of spontaneous creativity. Nevertheless, we ought not too quickly embrace the absolute autonomy of scholarship on the model of artistic narcissism.

»Die Kunst um der Kunst willen« – das ist ein gleichgefährliches Princip: damit bringt man einen falschen Gegensatz in die Dinge, – es läuft auf eine Realitäts-Verleumdung (»Idealisierung« ins Häßliche) hinaus. Wenn man ein Ideal ablöst vom Wirklichen, so stößt man das Wirkliche hinab, man verarmt es, man verleumdet es. »Das Schöne um des Schönen willen«, »das Wahre um des Wahren willen«, »das Gute um des Guten willen« – das sind drei Formen des bösen Blicks für das Wirkliche (Nietzsche, KSA XII, 572).

Scholarship for the sake of scholarship and truth for the sake of truth are, as is art for the sake of art, equally dangerous principles. The danger lies squarely in their seductive powers.

For the passion for truth must, like the love of beauty, draw us ever upward and away from this world. The siren call of the ideal carries with it an unavoidable distaste for the actual. History for the sake of history is the mantra of someone who hates the present now.

History – not for history’s sake – but for life. But how does history serve life without being reduced to a debased means for whatever ends? What then can be the justification for history and legal history in particular? Does legal history have a what for or a why?

4. Let us be clear. If the question is a worthy question, a personal question, it has no exclusive connection to legal history. Legal history is, as the editors assure us, suffering a crisis. But the plague of purposelessness is not exclusive to legal history. Rather, the problems of this esoteric scholarly discipline reflect the tensions and neurosis of its component parts. Law and history too, suffer from the radical doubt that accompanies the death not only of God but of truth as well. Not only legal history, but all scientific research is in question. For what is the worth of the scientific pursuit of truth when one has ceased to believe in truth? The crisis in legal history, therefore, merely reflects the crisis of identity stalking the life of science.

What for – historical science (*Geschichtswissenschaft*)? What for – legal science (*Rechtswissenschaft*)? At issue is not simply a small cadre of legal historians and their newly endangered status in Germany (there has been no denigration in the United States only because legal history never attained sufficient academic status to suffer a loss of prestige). No. What is being asked, what deserves to be asked again and again, is the *Wozu* of scientific (i. e. academic) research *in toto*. Properly understood, the ques-

tion being asked is the question of science. Reframed, therefore, our question (and it is *our* question) is: *Wozu* the *science* of legal history (*rechtsgeschichtliche Wissenschaft*)?

5. To gain insight into our question we turn to Nietzsche and consider the two questions in unison. What for – the science of legal history? What for – Greek art (tragedy)? What, if anything, do these altogether dissimilar questions share, aside from the not so uncommon German grammatical construction? Surprisingly, more than one might think. Most importantly, the questioning of Greek art and the science of legal history are united by a common enemy. Both questions reflect a worry, even a fear, about the power of science.

Nietzsche’s question works in two directions. First, to ask: »What is the significance of the *tragic* myth among the Greeks of the best, the strongest, the most courageous period?« Second, and more importantly, Nietzsche »got hold of ... something frightful and dangerous, a problem with horns but not necessarily a bull, in any case a *new* problem – today I should say that it was *the problem of science*« (GdT, KSA I, 13).

6. The problem of science is the problem of truth. Truth as science; truth as the search for reasons behind the visible world of things and events. Science as the belief in reason and the rational order of the universe: *nihil est sine ratione* (Leibniz). Everything that is has a reason – the presupposition of every scientific activity. »Es giebt, streng geurtheilt, gar keine ›voraussetzungslose‹ Wissenschaft ...« (Genealogie der Moral [GM], KSA V, 400). Why does the world have a reason? Because truth itself is a metaphysical faith – »das ist der Glaube an einen metaphysischen Werth, einen Werth an sich der

Wahrheit ...« (GM, KSA V, 400). Truth as the latest – and last – in a series of metaphysical beliefs.

Faith in truth as the world beyond sets the problem of truth and the problem of science within Nietzsche's thinking on ascetic ideals. The unconditional will to truth is nothing but the unyielding »Glaube an das asketische Ideal selbst« (GM, KSA V, 400). The problem of science is the final manifestation of the ascetic ideal and with it the metaphysical rejection of this world: »Der Wahrhaftige, in jenem verwegenen und letzten Sinne, wie ihn der Glaube an die Wissenschaft voraussetzt, bejaht damit eine andre Welt als die des Lebens, der Natur und der Geschichte; und insofern er diese ›andre Welt‹ bejaht, wie? Muss er nicht eben damit ihr Gegenstück, diese Welt, unsre Welt – verneinen?« (GM, KSA V, 400).

The so-called free thinkers of science – *wir Erkennenden, wir Gottlosen*, and we anti-metaphysicians – drink from the same well that has quenched the thirsts of Platonists and Christians for centuries. The root of all metaphysics – scientific as well as theological – is the conviction that »Gott [ist] die Wahrheit, [und] dass die Wahrheit göttlich ist« (GM, KSA V, 401).

The scientist believes so fully in the rational force behind the world – in the explicability of the world – that he is unconditional on only this one point: intellectual cleanliness. In the face of the divinity of truth, the scientist submits to his rituals of objective purity. Only such belief, Nietzsche sees, can justify that industrious activity of working scientists who diligently pass hours, weeks, and years in the observation and collection of data. These last believers are convinced that they are free thinkers and free spirits even as they embrace abstinence and heroic suffering in the service of the ideal of truth:

»Das sind noch lange keine freien Geister, denn sie glauben noch an die Wahrheit« (GM, KSA V, 399).

7. The problem of science is the problem of history. History is remembering: A holding onto of what is no longer (Heidegger, *Zur Auslegung von Nietzsches II. Unzeitgemäßer Betrachtung*, 36 ff.). A scientific look past the present moment of life into the misty regions of what was. Why, however, does one look back? Why does one remember? Wouldn't it be easier, better, happier to live simply in the present?

The cow who chews his grass doesn't know of yesterday. The happy cow lives without memory and history and only thus does he not know that he has fallen short of his dreams and goals. The cow lives like a child, with no past to disown (»das noch nichts Vergangenes zu verläugnen«): happiness is always a product of forgetting – of the power of not remembering (Vom Nutzen und Nachteil der Historie für das Leben [VNN], KSA I, 249–50). Only forgetting what I have promised and learned in the past allows me the freedom to pursue my dreams in the present. At a minimum, happiness requires I forget the basic rule of memory – that my present happiness will come to an end.

Against the happiness of forgetting stands the violence of history: »es giebt einen Grad von Schlaflosigkeit, von Wiederkauen, von historischem Sinne, bei dem das Lebendige zu Schaden kommt, und zuletzt zu Grunde geht ...« (VNN, KSA I, 250). History kills insofar as it sets man and life under the burden of the past. It limits his freedom and reminds him of his bondage. History, thus, stands against life.

And yet the memory of history can, as well, be made to serve life. To remember is to exercise not simply a neutral power but rather to activate

a »plastische Kraft« that works to turn the past to man's advantage. Insofar as he has the strength, historical man appropriates (*aneignen*) the past to his present. Only by shaping history into *his* history does man create the world and culture in which he lives. Only when man »denkend, überdenkend, vergleichend, trennend, zusammenschließend jenes unhistorische Element einschränkt, erst dadurch dass innerhalb jener umschließenden Dunstwolke ein heller, blitzender Lichtschein entsteht, also erst durch die Kraft, das Vergangene zum Leben zu gebrauchen und aus dem Geschehenen wieder Geschichte zu machen, wird der Mensch zum Menschen ...« (VNN, KSA I, 253). Only through history does man come to exist and inhabit a culture. That man is an historical animal means that for man to be who he is, he must shape his past into an historical story.

8. Man is only in culture. Only as part of whole, a polity, and a unity does man come to be man. And only in history does man gain a culture. Culture is a work of art – might history be as well?

History, at least as it is practiced by historians, is a science. History has been severed from art and from life by science, »durch die Forderung, dass die Historie Wissenschaft sein soll« (VNN, KSA I, 271). In the relentless effort to dispel illusion and rend the veil of surprise and astonishment, the scientific approach to history proclaims *fiat veritas pereat vita* (272). History seeks objectivity – it turns life into a lifeless object. The extreme pursuit of objectivity masquerades as the heroic virtue of modern man? Is not the modern historian's famed objectivity the source of his strength and evidence of his justice, his »gesteigertes Bedürfniss und Verlangen nach Gerechtigkeit« (285)?

Against this modern boast, Nietzsche declares: »Objektivität und Gerechtigkeit haben nichts miteinander zu thun« (VNN, KSA I, 290). To seek truth above and beyond objectivity; to strive for the doing of justice beyond the neutral and nefarious compromises of fairness. The justice of the just historian – a rare find – takes the scales of justice in his hands and proclaims in the imperative: »denn Wahrheit will er, doch nicht nur als kalte folgenlose Erkenntnis, sondern als die ordnende und strafende Richterin, Wahrheit nicht als egoistischen Besitz des Einzelnen, sondern als die heilige Berechtigung, alle Grenzsteine egoistischer Besitzthümer zu verrücken, Wahrheit mit einem Worte als Weltgericht und durchaus nicht etwa als erhaschte Beute und Lust des einzelnen Jägers« (286–87). The justice of historical truth is founded not in the objective facts of historical research but in the sacred feeling of right: »Nur insofern der Wahrhafte den unbedingten Willen hat, gerecht zu sein, ist an dem überall so gedankenlos glorificirten Streben nach Wahrheit etwas Grosses« (287). The truthful historian must strive for justice.

What is the justice of the historian? It is not objectivity. It is not the explanation of strange things and cultures so that they become less strange. It is not the dissolving of national myths to facilitate the integration and toleration of new ideas and peoples. No, Nietzsche insists that the justice of the historian has its source in the feeling of right and the feeling of difference: »Das Pathos der Distanz, das Gefühl der Rangverschiedenheit liegt im letzten Grunde aller Moral« (KSA XII, 13). Before there was either morality or custom, punishment and justice developed themselves from out of the reaction of the powerful as expressions of their anger at the violation of their commands.

The possibility of justice depends upon the illusion of a pure feeling of right. In the service of life, the historical artist must aim for an artistic justice, one that strives after truth as something great. The historical artist must not simply give back the facts and events of life, but rather must elevate and glorify life. Only then can the historian seduce others to a vision of a noble and justified life. The value of history, its whereto, is to transfigure the everyday into the beautiful, the transcendent, and the just: The value of history »ist, ein bekanntes, vielleicht gewöhnliches Thema, eine Alltags-Melodie geistreich zu umschreiben, zu erheben, zum umfassenden Symbol zu steigern und so in dem Original-Thema eine ganze Welt von Tiefsinn, Macht und Schönheit ahnen zu lassen« (VNN, KSA I, 292). The value of history is to ennoble the world through the art of the telling. The value of history is to lie in the furtherance of life.

9. *Wozu griechische Kunst?* Art is the antithesis to the science of history. If science kills living things through its bursting of illusions upon which life depends, the historical art weaves the isolated and lonely facts of existence into a totality. The history of our world must be made beautiful, luminous, and seductive. In other words, the historian must lie – the activity inspired by love.

To live one must love, for only in the shadow of love can man act: »Nur umschattet von der Illusion der Liebe schafft der Mensch, nämlich nur im unbedingten Glauben an das Vollkommene und Rechte« (VNN, KSA I, 296). Only a history that glimmers and shines will succeed at serving life. Only the beautiful can draw us down from the ideal to the embrace of the real. To make the chaos and pain of the real world love-

able demands the active lie of one who loves that which cannot be loved.

The science of history must become the art of history in order to seduce historical man to life. »Die Kunst ... ist die große Ermöglicherin des Lebens, die große Verführerin zum Leben, das große Stimulans des Lebens.« Art »is the great enabler of the possibility of life, the great seducer to life, the great stimulant of life« (KSA XIII, 521). The absence of art would render life unbearable; hence, for the sake of life, we need art.

What in life is unbearable that necessitates the redemptive power of art? The youthful Nietzsche of the *Birth of Tragedy* discovered the »source of art – and of all *Schein*« to lie in the unbearable Dionysian insight into the necessary suffering and contradiction of the truth of being, the Silenian wisdom that the best thing for man is not to be born and the second best is to die quickly (GdT, KSA I, 36). From his earliest writings, Nietzsche was compelled to the »metaphysical assumption« that »the true being and *Ur-Eine* – as the eternally suffering and full of contradiction – needs the *entzückende Vision*, the lustful *Schein*, for its constant redemption« (GdT KSA I, 38). Nietzsche's dark pessimism – dictating that »there is only one world, and this is false, cruel, contradictory, seductive, [and] without sense ...« – is what he later emphasizes as the central insight of the otherwise brash and romantic youthful work (KSA XIII, 193). Faced with the unbearable pessimism of the world, »[w]e have need of lies« and of art »in order to live[.]« The core thought of Nietzsche's metaphysics is that the unbearable »[c]ontradiction, the bliss born of pain«, is the root of man's unquenchable need for art as the justification for life (GdT, KSA I 47).<sup>1</sup>

<sup>1</sup> See ROGER BERKOWITZ, Friedrich Nietzsche, The Code of Manu, and the Art of Legislation, *Cardozo Law Review* 24 (2003) 1131–1149.

10. *Wozu Rechtsgeschichte?* There is no doubt as to the answer. To make visible the senselessness of law in the most forceful of ways. In the service of life, the historical artist must tell the harshest truth and must spin the noblest lie.

Why is a rose a rose? Because it is.

And yet, to disclose the beauty in the fateful unfolding of fate and pleasure in the painful agony of existence is the unique faculty of the artist. Greek tragedy was such an art, at once faithful to the pain and contradiction in life and simultaneously celebratory of what makes human life great and beautiful. For historical art to reveal and revel in its revolting rigor and yet to

rouse itself to the resplendent – is that a why and a what for?

But such an historical art will, of course, no longer be history: to sanctify the lie and to love the deception – to embrace the glittering wonder [*Schein*] of truth in the stark awareness of its illusion [*Schein*] – is the highest task of the artist. To see law as power and violence and to *glorify* its justice all the same. Thus does justice overcome itself as mercy.

A merciful history born out of love – an untimely thought from the past for the future.

**Roger Berkowitz\***



\* Lecturer am Amherst College,  
Amherst, Mass.  
rsberkowitz@amherst.edu