

Roger Berkowitz

From Justice to Justification: An Alternative Genealogy of Positive Law

Roger Berkowitz is Assistant Professor of Political Studies and Human Rights and Academic Director of the Hannah Arendt Center for Ethical and Political Thinking at Bard College. Roger's work traces the shifts over time in the idea of justice and, above all, questions what it means to be just in our world. By bringing philosophy to bear on political and legal questions, he explores the origins and contours of real-world problems, from the violation of human rights and the separation of law and justice to the reemergence of vengeance in criminal law. His first book, *The Gift of Science: Leibniz and the Modern Legal Tradition*, was published by Harvard University Press in 2005. He received his Ph.D. from U.C. Berkeley and his J.D. from Boalt Hall Law School.

Related publications include:

- ["Friedrich Nietzsche, the Code of Manu, and the Art of Legislation,"](#) *New Nietzsche Studies* v. 6 (2006). Reprinted in *Nietzsche and the Law*, ed. Jay Mootz & Peter Goodrich (Ashgate, 2008)
- "Revolutionary Constitutionalism: Some Thoughts on Laurie Ackermann's Dignity Jurisprudence," *Acta Juridica* (2009).
- "Thinking in Dark Times," and "Solitude and the Activity of Thinking," both in *Thinking in Dark Times: Hannah Arendt on Ethics and Politics*, ed. Roger Berkowitz, Jeffrey Katz, and Thomas Keenan (Forthcoming, Fordham, 2009).
- "Transcendence & Finitude in Drucilla Cornell's *Philosophy of the Limit*." *Memory, Imagination, Feminism. On Drucilla Cornell*, ed. Renee Heberle and Benjamin Pryor. (SUNY, 2008).

Introduction to the paper given Feb. 16, 2009: From Justice to Justification: An Alternative Genealogy of Positive Law

Berkowitz's seminar paper offers a genealogy of positive law. From the perspective of intellectual history, Berkowitz shows that positive law has its formative impulse not in the English works of Thomas Hobbes and John Austin, but in the German tradition of legal science stretching from Gottfried Wilhelm Leibniz to Friedrich Carl von Savigny and Rudolf von Jhering. As a contribution to jurisprudence, Berkowitz argues that positive law is best understood as a product of science and not, as usually thought, as the

will of a sovereign. As a work of political theory, Berkowitz explores how the subordination of law to social science has hollowed out the ethical center of law as the institutional embodiment of justice.

Berkowitz begins by noting a surprising historical coincidence, John Austin's placement of an epigraph by Gottfried Wilhelm Leibniz on the title page of his *Outline of a Course of Lectures on General Jurisprudence, or the Philosophy of Positive Law*. Berkowitz asks: what is an epigraph from the greatest natural lawyer of the 17th century doing on the title page of the work that has established itself as the *locus classicus* of 19th century legal positivism? On the level of intellectual history, the paper traces the influence of Leibniz's scientific jurisprudence through German legal science of the 19th century to show that the connection between Austin and Leibniz is not incidental. Against the widely held consensus that positive law is rooted in the English positivist tradition stretching from Hobbes to Austin, Berkowitz argues that legal scholars need to search for the foundations of modern law in the rise of the German school of legal science.

In telling the story of how Friedrich Carl von Savigny and Rudolf von Jhering adopted and adapted Leibniz's scientific approach to law, Berkowitz explores the philosophical foundations of positive law in Leibniz's scientific metaphysics. Positive law, he argues, is law that is in need of scientific justification. Lacking any natural or traditional authority, positive law seeks its authority in the objectivity of social science. The rise of legal science and the current prevalence of the social sciences in law schools is, he suggests, a necessary corollary of the victory of positive law.

Finally, Berkowitz argues that the transformation of law into a product of scientific knowledge has had the unintended consequence of furthering the divorce of law from justice that it was meant to remedy. By subordinating law to the ends of the various socio-legal sciences, modern law has subordinated law's traditional concern with justice to the pursuit of diverse social and economic ends: efficiency sought by economics; order sought by sociology; normativity sought by philosophy; and security sought by politics. Once law comes to serve social, economic, and political ends, law—and with it justice—becomes

subservient to its diverse justifications. Law, thus, becomes a means to whatever justified ends it must serve. Law's need for justifications, therefore, means that law loses its traditional connection with justice.

Little has been written in English about either the German school of legal science or the scientific foundations of positive law. For a fuller argument about the relation between science and law, members of the seminar may see my book, *The Gift of Science: Leibniz and the Modern Legal Tradition*.

[Excerpt available at: http://www.hup.harvard.edu/pdf/BERGIF_excerpt.pdf]

Some relevant contemporary sources include:

Patrick Riley, *Leibniz' Universal Jurisprudence* (Cambridge, 1996).

Marianne Constable, *Just Silences* (Princeton, 2005).

Philippe Nonet, "[What is Positive Law?](#)" 100 *Yale Law Journal* (1990) 667-699

James Bernard Murphy, *The Philosophy of Positive Law* (Yale, 2005).

Richard A. Posner, "[Legal Scholarship Today](#)," 115 *Harvard L .Rev.* 1314-1326 (2002)

H.L.A. Hart, "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence," in H.L.A. Hart ed. *Essays in Jurisprudence and Philosophy* (Oxford, 1983).

M.H. Hoeflich, "[Law & Geometry: Legal Science from Leibniz to Langdell](#)," *The American Journal of Legal History*, Vol. 30, No.2 (1986) 95-21

James Hackney, *Under Cover of Science: American Legal-Economic Theory and the Quest for Objectivity* (Duke, 2007).

Martin Heidegger, *The Metaphysical Foundations of Logic*.

Friedrich Nietzsche, "The Problem of Socrates," in *Twilight of the Idols* <http://www.geocities.com/thenietzschechannel/twi.htm#socrates>