Nietzsche and Legal Theory

HALF-WRITTEN LAWS

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EDITED BY Peter Goodrich AND Mariana Valverde

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Preface and Acknowledgments

This volume has collective roots. It is the product of a number of meetings, shared interests, colloquies and conversations, and two symposia that turned around our thinking on Nietzsche's value in the study of law. As Brian Leiter has recently remarked of the great nineteenth-century triumvirate of Marx, Freud, and Nietzsche, "only Nietzsche has remained apparently unscathed, his academic reputation and influence at perhaps its highest point ever." The reference that follows that aperçu, however, is limited to Nietzsche's reputation among the philosophers. The present collection attests amply to the fact that despite myriad isolated and incidental citations to Nietzsche, despite the seemingly fashionable quality of his name among certain sectors of legal theory, little by way of analysis or sustained attention attaches to the seemingly mandatory footnote invocations of his name. The Nietzsche effect in legal theory would seem to be that of a law of noncoincidence between nomination and critical appreciation.

The lawyer's resistance to Nietzsche makes it appropriate that the initial encounter between the philosophical author of *The Will to Power* and the academic institution of law should come in the paralegal discipline of criminology. The tradition in law schools has been to treat criminology as an interdisciplinary endeavor, and for this reason it is most frequently taught outside the law school and by nonlawyers. Whatever the case, and despite Nietzsche's many contributions to the study of crime, criminal psychology, and the morality of punishment, he gains almost no mention.

The initial impetus to produce this collection came out of this lacuna within criminology and specifically generated the contributions on crime, morality, and law. The second impetus was jurisprudential.

As for late–twentieth-century legal theory, Nietzsche was everywhere and nowhere. His name was a sufficiently common token to require appropriation, but the nomination was legion and the referencing was seldom if ever followed through. Nietzsche stood for nihilism, romanticism, realism, psychologism, naturalism, and more. Worse still, the access to Nietzsche was secondary. It was the work of Derrida, Foucault, Baudrillard, Irigaray, and Deleuze that formed the primary reference to Nietzsche. He was read through his inheritors. His texts themselves were little more than a shadowy backdrop to deconstruction, genealogy, semiotics, the theory of difference, or the new cartography of a *Thousand Plateaux*. Nietzsche occupied the central position in the French theory that dominated the humanities and eventually impinged upon legal studies in the latter two decades of the past century. Nietzsche was a *fin de siècle* figure whose reputation reached its highest point in the *fin de siècle* that followed his own. For what it is worth, he had predicted that this would happen. It seems appropriate now, in reflecting back upon his influence, to separate his texts from the opinions of his interpreters and followers in a locus as distant and untutored as the legal academy. That is the second motivation for these contributions.

The first three chapters take on and put to rest the common belief that Nietzsche had nothing useful to say about law or legal theory. His passionate attack on moral codes and universal norms is certainly a wholesale attack against both universal moral codes, whether religious or legal, and against Kantian-inspired experiments in formal procedural justice. Jonathan Yovel shows that one can take the persona of Zarathustra as both a preacher and an exemplar of a kind of justice. He proposes a species of lawmaking that does not proceed by way of static norms and fixed prohibitions, but rather by way of life-affirming creativity. Yovel's chapter explores some ways in which the much-maligned notion of the will to power can be used fruitfully to think about lawmaking, and to develop among other things an argument about the ongoing education that Nietzsche's free spirit continually demands of itself as well as of others. He connects Nietzsche more to Marx and Freud than to Heidegger or other conservative philosophy, evoking a "gay science of law," for which law is "designed to further *amor fati* rather than to curtail fate and arbitrariness, to challenge us rather than soothe, pacify, or ultimately rule us." Gay science, with its connotations of irony and play, of openness and affirmation, provides an admirable beginning to the project of addressing the complex and expansive possibilities of reading Nietzsche on freedom and law.

Friedrich Balke and Mariana Valverde both take on the institutions of criminal law with tools derived in large part from the second essay in the *Genealogy of Morals*, the essay in which Nietzsche inverted criminal jurisprudence by insisting that practices of punishment came first and the criminal law — with its moralistic justificatory apparatus — came later, as a post hoc rationalization of procedures that had developed for various accidental and inglorious reasons. As well as constituting a major challenge to the way that criminal law is taught in law schools, the two complementary chapters also show that the genealogical approach to practices of discipline and punishment developed most influentially by Michel Foucault is on one level the carrying out of a research program already sketched out by Nietzsche.

The legal dimensions of medical ethics do not at first sight appear as particularly suited to Nietzschean reflections. Marinos Diamantides' highly original chapter explores some common dilemmas and aporias in current law regarding patient-doctor relations, and shows that the profound arbitrariness marking decisions to authorize or not authorize certain treatment procedures can be explored fruitfully using Nietzschean insights. Along somewhat similar lines, Tatiana Flessas uses some of Nietzsche's reflections on culture to address another area in which legal decision-making is being subjected to a great deal of political and popular discussion, namely the issues surrounding the preservation of reliquaries and the custody of monuments. What makes a ruin into a cultural heritage? At what point does the detritus of previous institutions become property? If the past is multicultural, if aesthetic remains were in effect palimpsests of conquest and recovery, of faith suppressed and regained, who owns the many layered survivals of the past?

Anton Schütz and Richard Weisberg both take on a very old question in Nietzsche studies — "the Jewish question" — but take it far beyond the stale debates about whether Nietzsche was an anti-Semite or contributed unwittingly to anti-Semitism. Schütz shows that despite Nietzsche's attacks on the anti-Semites of his day, some of his writings are marked by a covert Christian-centrism that can be discerned even in his vehement attacks on Christianity. He then goes on to make some very suggestive remarks on the lingering Christian-centrism of law itself, a theme also pursued in Weisberg's study of legality in German-occupied France. Building on earlier work that links Catholicism to Vichy hermeneutics and proffers a polemical warning to those who challenge hermeneutic certainty, Weisberg here builds upon his thesis and demands a reading of Nietzsche's theory of interpretation, his hermeneutics of suspicion, that is ethically accountable.

The politics of reception and specifically the Christian problematic within which Nietzsche worked are also the subject of Adam Gearey's lucid account of the early reception of Nietzsche in England. Gearey takes the unprepossessing figure of the English theologian and political theorist J. N. Figgis and traces the critical impact of Nietzsche upon his pluralist theory of the state. Reconstructing the somewhat surprising confrontation between Figgis and Nietzsche also allows Gearey to question critically the extent to which Nietzsche actually hung onto the Christian concepts of community and law that he seemingly trashed in his more iconoclastic moments.

The final chapter does not provide a commentary on Nietzsche's insights about legality and norms, but rather takes up Nietzsche's professional philological inquiries and uses them to poke gentle fun at a certain jurisprudential habitus, namely, the practice of quickly scanning voluminous texts, distilling essential points, outlining, briefing, and highlighting while discarding or ignoring everything else. Nietzsche's comments about the disappearance of careful reading are used by Peter Goodrich as a starting point for critiquing not so much law's substantive claims but rather its embodied habits, a critique very much in keeping with the fundamentally Nietzschean view that thinking and writing are simultaneously styles of life, ways of being in the world. It is there that the volume ends, with the question with which it began, though here formulated in a more general form.

The opening question was: How have lawyers read Nietzsche? The essays collected here suggest that the answer is "not so well." In fact, they read him rather hurriedly or through secondhand accounts, through the uniquely legal forms of outline, brief, and report. Nietzsche would not be so proud of those methods. They are not very literate; they pay scant attention to philology, rhetoric, or hermeneutics. It is our suspicion that Nietzsche would recommend for lawyers what he proposed for the future of our educational institutions more generally: slow down. Learn to expend time with a text. Read it over again. Return to it. Play with it. Use a little of the skill of the philologist or what we would now term literary criticism to attend in a literate manner to the literary qualities of a text. That is true whether it is philosophical or legal, fictive or administrative, academic or legislative. To know a text takes a considerable effort. It entails no small amount of energy and it involves an extended commitment, a suspension of prior purposes, the passage of unaccounted time.

In the last instance reading is also a shared enterprise. A few acknowledgments are in order. Nietzsche is always and surprisingly controversial. Passions are generated, attachments formed, antinomies acted out. This

volume developed over time and a series of symposia. It took the joint energies of both of the editors to hold the project on course and to discipline each other while also cajoling the authors to rewrite or edit and amend. Our deepest thanks go to the contributors for their patience, their tolerance of delays, their good humor, and their trust.

Introduction: Nietzsche's Half-Written Laws

PETER GOODRICH AND MARIANA VALVERDE

The notion that the word philosophy derives from a combination of the words love (*philia*) and wisdom (*sophia*) is a very modern reading of the term. The root of philosophy is not eros or desire as we currently understand it, but rather a legal conception of friendship as the contract of belonging to a juridically defined group.[1] The "philoi" or friends were members of a group relationship and consciousness, parties to an institution — a family, a city, a state. *Philein* or friend referred to a constitutional category, and to the membership of an established order. That *philein* also meant to kiss was symbolic again of a legal tie, of the kiss of brotherhood or peace (*osculum pacis*) by which members of the group marked their mutual recognition and faith. For Benveniste, a leading authority on the Indo-European roots of romance languages, the secondary meaning of kissing aptly depicted the way brothers were "made into contracting parties."[2] The law of wisdom, both constitution and contract, preceded and governed the desire of thought. Behind the figure of the philosopher thus lies the bond of law.

That the etymology of philosophy leads more or less directly to legality, to a law of wisdom that precedes and dictates both justice and desire, can form an unusual starting point for any attempt to understand Nietzsche's relationship to law. Etymology, in Deleuze and Guattari's nice phrase, "is like a philosophical athleticism," a source of wild arguments and strange necessities.[3] For Nietzsche too, the archaic source of words and their philology, the laws of their historical transmission, was a primary resource

of thought. Philology was *amor fati* or love of fate at the level of distant linguistic causes. It implied a potential knowledge of antiquity, a sense of the symbolic, and an understanding of the old law tables that had yet to be apprehended in their plenitude and overcome. If the philologist was for Nietzsche the lawyer par excellence, the filing clerk or son of the jurist derided in his early works, the philosopher was the exemplar of the Christian legislator promulgating otherworldly norms and the precepts of abstract or unlived truth for the benefit of other people.[4]

Nietzsche says little about law and almost nothing of positive legal norms and yet his work — his project, or as he would have it, his fate — was that of overturning or transvaluing a nihilism that he understood to be profoundly juridical or rooted, in the last instance, in dogma and law. Nietzsche's contribution to legal theory is initially bifurcated. Philippe Nonet made the point a while ago and we will extract it from him. Nietzsche was as critical of the timeless transcendent values of natural law theory as he was of the comparably timeless Kantian ideal of freedom.[5] The doctrine of the will to power might be mistaken as leading to an arbitrary, might-makes-right positivism, but this would ignore Nietzsche's systematic critique of nihilism. First things first, he is not a positivist for the same reason that he is not a *fin de siècle* nihilist: he does not believe that, when the twin Gods of legal philosophy — medieval natural law and Enlightenment liberalism — have been extirpated, any existing law is as good as any other. Some legal codes promote what Nietzsche calls "life" — vivacity, rhapsody; others (Jewish and Christian, liberal and secular) suppress life and deny temporality. "Free spirits," Nonet reminds us, are much rarer than ordinary "freethinkers." They do not lament the death of God, as nihilists are prone to do. They pick up where nihilism leaves off, which is to say they take up the cause of creating new values.

The question of law, in Nietzschean philosophy, is thus both pervasive and appropriately paradoxical: the law that he addresses is a long-term cultural force that gains its power or presence more from its invisibility — its mystery or obscurity — than from any more evident representation. It is perhaps for this reason that Nietzsche is often regarded as having nothing to say of law and yet everything that he says touches upon the jurisdiction of transmitted norms, upon dogma and the permanence of social forms. The inherited hierarchy of good and evil, the tables of the prior law, are not simply a docile social presence or lexical ordering of places but are also and more profoundly the markers of interiority, the available signs of subjective lives.

Nietzsche's concern with law is not with positive law. The positivity that he does attend to is that of an immensely long-lived Christian order, the

tables of Western moral law. In one recent sociological coinage, such a concern with the patterns of social structuration addresses the twin elements of legal subjectivity as an inherited Christian form or law: "the penetrative scheme and the juridical soul."[6] What Murphy usefully elaborates in his account of the historical trajectory of modern law is the surprising coincidence or interdependence of the exterior scheme of norms, the law as hierarchy and legislation, and the inner life of the subject, the interior of affect, of terror and desire. The penetrative scheme establishes the division between inner and outer, between ruler and ruled, and equally dictates that law "is the medium (not yet merely the instrument) of that relation."[7] The site of law's effect is affect: the penetrative scheme, in other words, instituted the subject in the form of the juridical soul, an interiority that could be mapped, monitored, and judged. What mattered within this Christian penetrative schema was that the subject believe, honor, and obey. The juridical subject had to be inculcated both to fear and to love the social presences — the hierarchy, State or law — that manifested the invisible principle of an otherworldly meaning and truth.

Nietzsche starts with the need for decipherment. Inheritance is not only archaic, it is cryptic and requires the patience of the philologist and the candor of the psychologist to unravel. Law is in that sense a symptom, a text, a mode of transmission of relationships and the affections upon which they depend. To address the question of law in Nietzsche's philosophy thus involves an initial and charged encounter with the paradox of a law that precedes the visible and exterior realm of representation and of the appearances of the tables of the law with which legal philosophy has traditionally been concerned. More than that, for Nietzsche the question of law is foundational in historical and psychological senses. It is a question of the archaisms, monuments, and myths that we inherit and inhabit sleepingly, in the mode of retrospect or "backward-looking," viscerally and perhaps unconsciously in the manner of prescriptions and prohibitions passed on without question from father to son, and perhaps more pertinently for the norms of truth, from mother to child.[8] As we will argue it, for Nietzsche, the question of law is a childish question or in the best of senses a puerile endeavor, a search for those early structures of emotion or inculcated patterns of affection that determine our relation to being or, in the Christian dictum, I am in the father and the father is in me.

For Nietzsche the question of law, the pluralist question of which law (*quaestio quid iuris*), poses a dilemma, a question to be sure, but also a quest that James Joyce formulated poetically by asking: "who is the father of any son, that any son should love him or he any son?"[9] What authority, in other words, does the parent really have? Why should they be honored?

What reverence is properly their due? As any parent knows, those are hard questions, they are often unanswerable, they unsettle, upset, provoke, and challenge. They also have their parallel in the questioning of the social foundations of knowledge or the roots of thought. The question of the child is that of why these particular behaviors and accompanying affections are being demanded. Why this God? Why this parent? And subsequently, because childhood never wholly ends, why do I still act as a child and what are the present forms of my infantilization? The questioning of affect or interior relations is mirrored in resistance to the inherited forms of the exterior transmission of authority. To challenge the epistemic rights or taken-for-granted domains of the scholar, the academic, the philologist, or filing clerk repeats in the outer domain of knowledge the healthy and incisively puerile questioning of the inside of the subject. It is to pose the same series of questions, this time directed to the social principle of paternity, to the lawfulness of philosophy, and the legalism that inhabits the philosopher's soul.

Nietzsche's project in his explicit discussion of old and new tables is initially precisely one of upsetting, challenging, breaking, and deposing.[10] The biblical exemplar from which the scene is drawn is that in which Moses destroys the idols that had been created while he went up the mountain to collect the tables of the law. Nietzsche inverts this scene of imposition of a monotheistic law. Here it is the prior law, the old ways, the easy or established dogmas that are to be shattered by Zarathustra's revelations. Addressing the old, the somnolent, the grave and learned, the teachers, scholars, scientists, and lawyers, he begins by observing that they are resting their conceits upon "an old infatuation: all of them thought that they had long known what was good and bad for them . . . I bade them upset their old academic chairs, and wherever that old infatuation had sat: I bade them laugh at their great moralists, their saints, their poets, and their saviours."[11] This statement, although it is only one of countless comparable attempts by Nietzsche to "philosophize with a hammer", and so to formulate the question of law as a question of the transmission of value, can signal the fact that he is concerned to ask a set of questions about the lawfulness of knowledge and the legalism of academic practices that are seldom asked or that are not so much asked as solved by modern liberal philosophy. Suffice it to say that Nietzsche's repetitive, patient, and multiform asking of the question of law was never popular in the Anglophone philosophical tradition and it remains unpopular or against conventional philosophical wisdom to this day.

Parodies and Polemics

From early on Nietzsche's philosophy generated radical responses.[12] His critique of the complacency of English moralism and of the mask of Christian values that such moralism wore was never likely to please the inhabitants of Christian institutions and their intellectual establishment. In offering a description of the geography of thought, Nietzsche observes: "They are not a philosophical race — the English. Bacon represents an attack on the philosophical spirit generally, Hobbes, Hume, and Locke, an abasement and a depreciation of the idea of the 'philosopher' for more than a century."[13] He continues to berate "the muddle-head Carlyle, who sought to conceal under passionate grimaces what he knew about himself: namely, what was lacking in Carlyle — real power of intellect, real depth of intellectual perception, in short, philosophy."[14] Lacking depth or more accurately relevance, the English philosophical tradition offered superficial moralizing and vague pieties rather than knowledge or gay science, let alone music, rhythm, dance, sensibility, or a sense for life. Nietzsche wanted proof of value, evidence of "the colours of existence" in the embodiment of thought, he wanted the exhibition of thinking in vigor and action, a philosophical performativity that appealed more to artists and activists than to scholars and the other legalists of the academy.

The geographical and linguistic roots of philosophical traditions — of genres of law — play an important role in Nietzsche's thought and thus the attack upon the Anglophone — "the diabolical Anglomania of modern ideas"[15] — needs to be placed within its tradition and its geographical and juristic context. Nietzsche was an importation in the Anglophone world. His passion was continental, his style or aesthetic affections were Francophile, his persistence and depth Teutonic. None of these characteristics bode well for his Anglophone reception and the history of the insular rejection of Nietzsche in England and in the United States has been fully if at times somewhat superficially chronicled. We will not add to the histories but will rather address a more symptomatic feature of the rejection of Nietzsche's thought within the liberal jurisprudential academy. What is at issue is something more than a difference of opinions or ideas or even methods. The aphoristic and at times anarchic vein of Nietzsche's challenges to value and law elicit a vehemence of response, so categorical a denunciation that it is hard not to believe that his critique touches core issues and does so in a multiple sense. His overturning of the law tables not only challenges the core principle or foundation of a monotheistic legal tradition, but it does so in a form that seemingly wounds or hurts at a personal level. Value in the sense of sensibility or the sensuous apprehension and subjective worth of the Anglophile philosophers, indeed the

project of a philosophical life within that tradition, that locality and law, are placed in question or posed as doubts.

Writing, ironically enough, in the *International Journal of Philosophical Studies*, Martha Nussbaum, a law professor with a training in philosophy, seems curtly and correctively concerned to police the boundaries of the philosophy of law.[16] Her concern is with Nietzsche as a political thinker, as a legislator, and she starts in the first sentence by raising the dual question of whether he is "important" and whether he is a "political thinker." The answer to both questions is rapidly reported as a resounding no. Nietzsche, the reader of the *International Journal of Philosophical Studies* is synoptically informed, "has nothing to offer [political philosophy]." He lacks seriousness, he is pernicious, he has caused Martha "frustration and disillusionment" and, having nothing to offer should be discarded or thrown out of vogue.

Nussbaum concludes these opening remarks, a paragraph of swingeingly dismissive assessments of Nietzsche's value, by informing the reader that her paper is "somewhat polemical" and at times "ill-mannered."[17] She acknowledges, in other words, that while her paper is concerned with the proper province of the philosopher, with contributions to the realpolitik of legislation and distributive justice, it also belongs to a rhetorical genre and is necessarily an attempt to persuade or convert the reader. While Nussbaum avoids stating anything so obvious, her polemic belongs to the genre of apologies or defenses of the faith. It is a statement of first principles. It marks, consciously and, I suspect, unconsciously, the boundaries of a tradition, the acceptable limen or limit of liberal thought, and ultimately it legislates a proper and, as Nietzsche would doubtless have presented it, a thoroughly Anglophone moral norm of philosophical style, of political projects, and of discursive events.

The figures of inclusion and exclusion, of amity and enmity at the level of ideas, are predictably conventional or gnomic. Nietzsche as opponent, as philosophical iconoclast or simple heretic, is portrayed as a juvenile delinquent. In the first paragraph, we thus learn that Nietzsche "has nothing to offer that is not utterly childish."[18] A few pages on, he has nothing to say "that is any more than the silly posturings of an inexperienced vain adolescent male," and a little later he offers "nothing, I think, that is not puerile."[19] What this childishness entails, even or especially with Nietzsche's "well-fed childhood,"[20] is both an incapacity to legislate and a failure to think seriously.

The figure, technically the *prosographia*, of the child leads easily into the rhetoric of discounting and dismissal. The child by definition does not philosophize, the child needs to be taught, to be disciplined, or in the case

of Nusbaum's analysis chastised. The child is self-evidently not an adult and in Hegel's formulation has not yet entered the province of reason. Nussbaum does not hesitate to make these leaps from the attributes of the inchoate or infantile to the philosophical and political lacunae that they portend. Again, the language is interesting. "Nietzsche has nothing deep to offer us, right or wrong."[21] The child, in other words, plays upon surfaces. Lacking profundity, his thought does not even rise to the level of requiring judgment. Worse still, the child "has not ordered his thoughts," he has ignored tradition, and forgone the criteria of coherence: he has postured, parodied, satirized, and romanticized, but in the end it is all "a confession of emptiness,"[22] "barren of argument . . . [and] destitute of intellectual respectability."[23]

Briefly inverting the rhetoric of Nussbaum's exile and excommunication of Nietzsche provides the initial categories of the tradition that she wishes to defend as adult, virile, and valuable. Nussbaum wants depth. She wants seriousness. She wants order, plenitude, rules, realism, and respectability. Her project is the specification of the normative schema of the liberal political tradition and it transpires that the substance of her critique of Nietzsche is simply that he refused to conform to the basic dogmas of that particular philosophical lineage, that community of *philoi*, those friendships and filiations. According to Nussbaum, the serious liberal political philosopher has to set out the ground rules of political society as it is currently conceived. The seven deadly virtues of her ironically liberal legislative fiat are formulated as a septimal "must." Here, in truncated form, are the imperatives that a realistic and respectable adult doing political philosophy must inhabit:

> (i) He must show an understanding of the needs human beings have for food, drink, shelter, and other resources. . . . (ii) He must give an account of the procedures through which a political structure is determined. . . . (iii) He must give an account of the various types of human liberty that are relevant to political planning. . . . (iv) He must show an understanding of the role played in political life by differences of race, ethnicity, and religion. . . . (v) He must show an understanding of the different ways in which society has structured the family. . . . (vi) He must show awareness of the fact that nations share a world of resources with other nations. . . . (vii) He must have an account of human psychology.[24]

A rhetorical analysis of the denunciation that Nussbaum indulges in can usefully begin with the vehemence of the liberal imperatives that she enunciates. What is the force of Nussbaum's seven imperatives, of the

repeated "must" of the tables of her political desire. There are at least two possible interpretations. At the level of doctrine it expresses the force of the apologetic, it instantiates the articles of faith, and so demarcates the pale or ambit within which political thinking must be confined to remain faithful to reason and so lawful. The force of the septimal imperative is here that of defining the criteria or boundaries of liberal political faith. It is in this regard quite explicitly a question of legislating the superego, the law of the fathers of the liberal tradition and of refusing to challenge their authority.[25]

The liberal tradition concerns freedom and freedom of thought. Is it not a little strange in that context to impose seven laws of thought, seven areas of discourse to which we predicate absolutely and in advance that each and every serious thinker "must make contributions?"[26] Freedom of thought here seems to be conceived initially in terms of a negative liberty — a liberalism that ironically is defined in terms of escape from other modes of expression, other forms of thought. The irony is resident in the notion that liberalism or the positive freedom of thought could usefully, legitimately, or even consistently be restricted to seven imperious domains or areas. That would seem a terrible restraint upon the freedom of the polity as expressed in its most serious self-reflection, namely philosophy.

Returning to Nietzsche, it seems apparent, time and again, one reception after another that his putative puerility is somehow seductive, his emptiness is paradoxically attractive, his so-called infantile thought is ironically deemed a dangerous attachment. It is presumably not entirely destitute, nor wholly empty if it so consistently elicits apologetics or defensive statements of the law. Questioning the law, it is true, draws out the law: Nussbaum's imperatives are in that sense imperious in style and imperialistic in political substance. Imperium and freedom are not, however, in any obvious sense consistent with each other. Quite the opposite unless one interposes a community or congregation and faith whose internal freedom gains expression in external imperium. It is in the mode of the pious that Nussbaum requires Nietzsche to stand at the same altar and worship the same God. While there is no harm in specifying the differences of the liberal tradition, nor in criticizing the misogyny of Nietzsche and for that matter most of the rest of the nineteenth-century philosophical tradition, it is historically inaccurate and ethically implausible to conclude that liberalism is the sum and extent of all possible political thinking. It is a logic that annuls differences and specifically the differences that are yet to come, the not yet thought, the coming community. To assume the universality of liberalism and to assert the vacuity of Nietzsche's thought on the strength of his failure to address the liberal's

problematic, is to legislate the necessity of a specific identity and to accept only those differences which conform to that identity. It is, as Alain Badiou puts it, "the final imperative of a conquering civilization: 'Become like me and I will respect your differences.'"[27]

Nietzsche's Tables

That Nussbaum seeks so swingeingly to erase Nietzschean thought from the canon, and indeed from the very possibility of political thought, past and future, does not bode well for any serious encounter or recognition of Nietzsche within legal thought. Jurisprudence, as a branch of political philosophy, has paid little attention to his thought.[28] He has appealed, if at all, to the more marginal streams of critical legal studies and generally as a talismanic reference rather than an object of sustained textual analysis. Whatever the virtues of the occasional circulation of fragments or aphorisms, Nietzsche has lacked the respectability or legitimacy necessary for inclusion in the legal philosophical canon. Even or perhaps especially in the paralegal disciplines of sociology of law and criminology Nietzsche is surprisingly absent.[29] Nussbaum, in this respect, again represents the tradition, the repressive liberalism of established legal thought and the absence of a reception for one of the most original though least systematic of modern thinkers.

Nietzsche's thought genuinely challenges the liberal tradition or touches core issues relevant to Nussbaum's sense or infatuation with it. The key term in such an equation is probably tradition rather than liberalism. Anachronistic though the notion of tradition qua tradition may seem to liberalism there can be little doubt that it is the tradition of liberalism that is threatened. Her specification of seven articles of liberal faith is in this sense the equivalent of an inscription of a law of law or of tables of liberal commandment. She sets out to describe what the liberal tradition has enunciated as the conditions of the rule of law, both national and international. This description, however, also has a normative value and a prescriptive intention. It is not enough, in other words, to contribute to a discourse on the topoi of liberalism, it is necessary also, though this is a more covert requirement, to contribute according to a pregiven norm of style of argument: it has, for example, to be serious, and it has to adumbrate the criteria of procedural justice.

Tradition is protected because it provides continuity and comfort, in Coke's terms it is "the best inheritance that a man can have."[30] The articles of tradition concern precisely the sites of authority, of precept and faith, which Nussbaum elaborates in her dismissal of Nietzsche. More than that, however, the defense of tradition establishes the sites of enunciation, the

qualifications and the insignia of those who are authorized to speak in the name of the tradition. Not to put too fine a point on it, that is the end product of Nussbaum's polemic: she is concerned to authorize those who can speak on behalf not simply of liberalism but of political philosophy tout court. The seven musts of political thought may not seem obvious acts of legislation but they are nonetheless commandments and their imperiousness is to be correlated in inverse manner to their brevity: tradition is precisely an inheritance, an unspoken norm, a laconic structure of faith that is manifested more in manners or modes of tacit recognition than in overt acts of policing or promulgation. The tables may be the law as an object, but the subject of law, what used to be called the spirit or life of the law, resides in a traditionally established lineage, in sites, qualifications, tone, and other insignia of legal enunciation.

Zarathustra is first and foremost a reformer and his work should be understood most immediately and technically as reformist. First of all, and most explicitly, Nietzsche's concern, when it comes to law, is with overturning the tradition, both the norm and the law of law. In this respect he is quite explicit: "the *creator*, hate they most, him who breaketh the tables and old values, the breaker, — him they call the law-breaker."[31] The Judaeo-Christian roots of this image of law and its destruction were very familiar to Nietzsche. The law and commandments came historically in the form of an image, a set of tables containing a permanent writing that the prophet brought down from above. Paradoxically the tables were immediately broken and then inscribed again and both moments deserve attention.[32]

Within the Western tradition, it is not enough for the law to be written, it has to be written and then written again so as to engender an iconic status or a priority of the one law over the many that it displaces. Thus when Moses is initially confronted with the idols or images of other Gods that have been made during his absence he smashes the tables, punishes the populace, and returns to the mountain to collect the law again. It is the inscription of the second set of commandments that establishes the permanent writing, the licit image, or iconic law. In light of such complexity of inscription, the task of Nietzsche's lawbreaker is a dual one. Breaking the tables would seem simply to incite the inscription of new and more permanent commandments. The reformer, as we will see, thus has to continue breaking the tables because it is the iconic status of the written law that has to be overturned and not simply its mediate manifestation. Merely breaking the tablets of existing law, necessary though it may be in some circumstances, only encourages the writing of new laws with different content but suffering from the same authority crisis, as the French

revolutionaries found out. This is why Nietzsche carefully privileges the positing of values (*Wert setzen*) over the positing of law (*Gesetz setzen*).[33] Law writing is necessarily an exercise in calculative reason, and hence cannot do justice to justice, as Derrida would put it. Nietzsche, in the *Genealogy of Morals*, has this to say: "Setting prices, determining values, contriving equivalences, exchanging — these preoccupied the earliest thinking of man to so great an extent that in a certain sense they constitute thinking as such . . . here likewise, we may suppose, did human pride . . . have its first beginnings."[34] What is important for Nietzsche, in politics, in philosophy, is an overturning of prior and somnolent forms. What is revolutionary is not the writing of new laws and the setting of new tariffs, but rather the spirit of creativity that can be expressed in tablet-breaking but that exceeds and even undermines any positive law. The space of the creator and of writing as a transitive and singular act lies in the space between the breaking of the tables and the inscription of a new table of commandments. It is a space of suspension of law, a before the law that Nietzsche coins the half-written.

The first *incipit* or criterion of reform is that of overturning the old tables, of destroying the idols of the moral law. It is the image of the law, the law as tradition and truth, the law as nature or divine mystery, the twice written law that needs to be broken. The creator, the author, has to break the tables so as to liberate the subject that the exterior law generates and rules from within. To break the interior tables — Sartre talked nicely of breaking bones in the head — required giving up on an antique image or as Nietzsche formulates it, overturning the old infatuation, a "spirit . . . imprisoned in good conscience."[35] This overturning, however, is neither merely destructive nor in any melancholic sense nihilistic. Its purpose is expressly creative. It aims to inscribe and hold open the space of creativity and hence also the possibility and unpredictability of thought: "break up for me, O my brethren, break up also that *new* table."[36] This is not simply a desire to invert, to overturn and substitute the mirror image or inverse form, but rather a clearing of the ground, a smashing of prejudices, the expression of a desire to begin, which is always also a beginning again.

Old and new tables would be equivalents. Smashing the old and substituting the new would not, in other words, offer any genuine novelty nor even any obvious reform but rather would mark the passage from one caste and law to another caste and law.[37] Nietzsche's preference, in the figure of Zarathustra, is for something in between, a potential, a creativity that comes after the old tables have been destroyed and before any new tables have been erected. The key lies in a cryptic yet radical injunction: "This new table, O my brethren, put I up over you: *Become hard*."[38]

Granted the tables, old and new, are to be smashed so as to make way for the poet, etymologically the creator, it would make no sense to say "become a table" but rather Zarathustra demands something much more, which is that the subject become a fate and take on the quality of a law for themselves. The procedure for that *incipit*, that potentiality or becoming, is layered and merits analysis.

Nietzsche begins, as adverted to earlier, with an upsetting or overturning, a disturbance of tradition and law in the form of indicting "an old infatuation," a "somnolence," even a "gloom." The recurrence of the notion of an antique infatuation and the nocturnal qualifications appended to it suggest not simply that the object of love was unconscious but also that it was a melancholic attachment, that it addressed an object of affection that was dead but not yet relinquished. Somnolence is a mode of repetition, a form of looking back, and it shares with infatuation a lack of conscious reflexivity as to why the beloved is loved and more profoundly it precludes knowing what or who is loved. Infatuation is a mode of repetition, it repeats a pattern, or in Freudian parlance it is an object choice predicated upon the repetition of an infantile attachment. If love is an unconsciously generated affect, the result of choices made oneirically or suddenly and without consideration, it repeats. Object choice or Nietzsche's old infatuations are the interior mode or inner form of the tables of the law. That they are infatuations means that they are attachments to old and unthinking beliefs, they are literally images — vestiges or shadows — meaning representations of an invisible or prior law that can only be seen through its material inscription. It is always the task of the reformer to break the images, to work through the unconscious attachment, and this is precisely the task that Nietzsche proposes in breaking the tables and breaking the tables again.

Nietzsche proposes breaking the pattern. That it is termed an old infatuation or love, in a sense a bad love, also indicates that the image operates at the level of affect and attachment, that it is real in the sense of being incorporated and operating as a drive. Infatuation, attachment to archaic images or the inherited terms of the Christian tradition, constitutes poor authorship and weak love. Nietzsche proposes something more, namely the conscious choosing of a love or lover upon the basis of knowledge and creative will rather than default alone. It is again a complex injunction, a transitive and paradoxical command. It requires first a coming to terms with the past, a patient interior philology or an appreciation of those very distant causes that Nietzsche terms fate. First then one must know fate and choose one's fate. It is *amor fati* that Nietzsche boldly proposes when he suggests that the jurist start to love and best of all, offers the injunction:

"*learn* to love oneself."[39] To love oneself, to risk stating the obvious, one has to know oneself in the same sense that to break the tables one has first to find them and then decipher them so as to know what it is that is being broken and so given up.

To break the interior tables or pattern of affect that the penetrative scheme, the old infatuation has always already inscribed requires love, both desire and action. To know, for Nietzsche, is precisely to move from infatuation to love, from images to texts. It is this profoundly erotic relation to the world that Nietzsche elaborates most fully in his concept of "gay saber" or gay science.[40] To know someone or something is to learn to love them, to know them patiently, repeatedly, and over time, and thence to fall in love. To learn to love is exemplified for Nietzsche in the method of listening to and learning to love a piece of music, though it could equally be a book, a friend, a place, a painting or even the law as a strange object of desire. In aphorism 334 of the *Gay Science*, Nietzsche spells out the work of coming to know and love a piece of music. We have "first [to] learn in general to hear, to hear fully, and to distinguish a theme or a melody." We have then "to exercise effort and good will in order to endure it in spite of its strangeness." We need patience, and indulgence. We need time. Eventually "there comes a moment when we are accustomed to it, when we expect it, when it dawns on us that we would miss it if it were lacking," and it is then that "it goes on to exercise its spell and charm more and more." It is then that we "become its humble and enraptured lovers, who want it, and want it again." One must learn to love and for Nietzsche, "it is thus with us . . . not only in music: it is precisely thus that we have learned to love everything that we love."[41]

Contrary to most interpretations of Nietzsche, the method of knowing, the ideal of loving, that Nietzsche proposes is far from romantic. It is a labor, a working through, a patient and erudite attention, an almost microscopic focus, the philologist's gaze, turned upon a person or object for itself. Far from being romantically engaged or infatuated with an image that conceals a hidden cause — an archaic structure, an old table, a parent, a former self — Nietzsche regards the end product of love not as the romantic choice between purity or death, but as friendship.[42] The product of learning to love and so coming to know is not idealization of the object of love but rather knowledge, an epistemic amity, or in juridical contexts a knowing more of the law rather than a simple and ineffective discarding of one set of tables for another. Friendship, in Nietzsche, requires the passage through love to the relative quietude of something accepted because genuinely known. It is defined as gay science precisely because it combines eros and knowledge. It is a mode of leaning, which Nietzsche coins as erudition

in eroticis and its significance lies in being more than mere infatuation or narcissistic projection. It takes the subject out of itself, it is an art, an active principle of will. It is ideally humorous and light rather than sleeping, profound or heavy. If somnolence is the dream, then infatuation is the fantasy, and Nietzsche was always very precise that neither the Christian's dream nor the scholar's fantasy were adequate contributions to the future: "there are Gods, but no God."[43] By the same token one might say that there are tables but no table, laws but no law, and each of those laws is ideally, in Nietzsche's terms, for itself.

Legal tradition, as inheritance or precedent, is predicated upon a species of unity, upon a source or mystery and its protection by prophets, interpreters, and lawyers. Even the liberal tradition, and especially through its concept of the rule of law, is engaged in promoting an identity, an identity that will be projected upon dissenters or imposed philosophically by means of rhetorical force. More importantly, the tradition, the table of the law, is codified in canonic texts, and in obligatory questions or areas of discourse. The tables of the law, in other words, are simply a representation of a prior and singular mystery. Tradition is thus philosophically protected but its transmission depends as much upon embodiment as upon codification. In this aspect the text is a relic, a sacral object and aura that gains a more popular expression in the myriad lesser things that convey the heaviness of inheritance, its residues of death. Law is inhabited somnolently and gloomily though signs, through all the uniforms, emblems, portraits, architectures, and reverent tones by which the tables of tradition, the law of the past, appear for us.

Nietzsche is again very clear and upsetting, as only a philologist really could be, in his view of the past: "O my brethren, not backward shall your nobility gaze, but *outward*. Exiles shall ye be from all fatherlands and forefather-lands."[44] Again there is a complexity, an exorbitant irreducibility to this representation of redeeming the past by letting go of it. Just as the new tables also had to be destroyed, so too, in inverted form, the past has to be known and understood so as to be relinquished. In Nietzsche's own words: "it is my sympathy with all the past that I see it is abandoned."[45] Emphasis needs to be placed upon the word sympathy because for Nietzsche the philologist, just as much as for Freud the psychoanalyst, the past has to be known for it to be overcome. Sympathy precedes abandonment, just as the passage to friendship is through love. We cannot, in other words, cease the repetition or get beyond the patterns that somnolence implies, if we do not know that we are repeating and particularly if we do not know what it is that we are repeating. It is for that reason that Nietzsche required not less but rather more knowledge of the law tables.[46] One cannot know

without sympathy and one cannot abandon without knowledge of what it is that is being let go.

Finally, if the tables, old and new, are overturned, if each subject is a law for itself but also an iconoclast of the self, then what is left? Taking Nietzsche at his word, the destruction of the new tables portends not simply an abandonment of the past and specifically the form of the tradition, its repetitive mode of thought, but also sympathy and genuine generosity. The past is: "a bridge, a harbinger, a herald, and a cock-crowing."[47] The destruction of the tables, idols or preinscribed norms does not mark a lack — it could only do so for the traditionalist, the legalist — but rather it institutes a sympathy toward what came before with a view to what will follow: "your children's land shall ye love . . . Unto your children shall ye make amends for being the children of your fathers: all the past shall ye thus redeem."[48]

The space or temporality between the old and the new, between the parent and the child's children, is a space between, it is duration and intensity, an event experienced as potential, as something outside of calculus and law. Nietzsche is very specific, he seldom wastes words: "This however is the other danger, and mine other sympathy: he who is of the populace, his thoughts go back to his grandfather, — and with his grandfather, however, doth time cease."[49] The space of potentiality, of will, is literally familial and generative, a "messy and contentious" bodily space of generation.[50] Nietzsche's critique of the old tables is thus in part to be understood as an attempt to address the most immediate of responsibilities, the event of birth, love of our family, love of our friends, and our desire to will a continuing relation to them. The polity is not so large if conceived in such terms: just as the past runs out with the grandparents, the future belongs to our children's children. It is not death that should concern us but much more our sympathy for what is to come, an immediate and vital issue, a relational or living question, a matter of coming to know what is in its plenitude and potential.

Envoi: Law as a Way of Life

It remains to ask a version of Nussbaum's question. Does Nietzsche really have anything to offer to legal thought? We characterized Nietzsche earlier as a reformer, and *Thus Spake Zarathustra* is in one sense very much a reformist text. It is the work of a philologist, a textualist, and so most immediately it is an iconoclastic project. Such a project has a quite technical meaning. For Nietzsche, an understanding of the tables of the law is a matter of the immediate, of the written, and of the status and function of writing as a transitive act. The old infatuations are precisely the unques-

tioned icons, the distant images, the visible reliquary of the past that appeals if at all to the backward looking. For the philologist, the extra-textual image, the visible vestiges of the distant past and faith, are distractions from what is written and from the careful reconstruction of the text and of its transmission to present and future. The icons, the idols of the past that the moralists worship, the ready made tables of law, are all obstacles to a close, patient, and attentive reading of what is actually there. More than that, however, the image is static whereas writing is transitive, a point that Nietzsche again makes with exquisite tact: "now sitteth [Zarathustra] here and waiteth, old broken tables around him, and also new tables — half-written."[51]

When Nietzsche incites the breaking of the old tables and then the breaking of the new tables as well it is clearly the symbol of engraving, the inscription in stone, the writing not for the self but for others and for all time that he wishes to overturn: "Oh my brethren, break up, break up for me the old tables."[52] It is historically the graven image, writing as sculpture, as the dictate of the past, that he opposes. "O my brethren, there are tables which weariness framed" to which he adds: "From weariness yawneth he at the path, at the earth, at the goal, and at himself; not a step further will he go, — this brave one!"[53] Overturning the old tables is here again a call to life and will, an invocation that Nietzsche explicitly formulates in terms of waking the sleeping, inciting the weary, and arousing the slothful. Their conjoint sin is that of loving the past, the dead, more than the living, and it is that pious desire for death, for "the backworld" that gains expression in a law of the final or complete inscription, for the already fully written, for the image of a graven law. The fully written, the seven protocols, are in one sense an expression of nihilism, of a weariness or slothfulness that attaches itself to the old tables precisely so as not to have to write for ourself, so as not to have to feel for ourself, so as not to have to deal critically with who we have become.

The concept of the half-written is peculiarly Nietzschean. It evokes the act of composition itself, it marks the labor of writing, and signals the in-between that writing addresses. The half-written is a potential, it is nascent or becoming, an inchoate form that is necessarily before the law. It is what Nietzsche elsewhere terms the great "Perhaps" of the future. It is also a style, the rhetoric of the unfinished, of the fragment, the poem and the aphorism.[54] So, too, the half-written is quite possibly what Nussbaum so vigorously castigates in Nietzsche under the rubric of the childish, the puerile, and the adolescent. The half-written is childish, however, only in the sense of being process rather than product. It brilliantly articulates a refusal of any table or list of the law drawn up in advance and imposed for

no stronger reason than that it is already there. Such refusal of the list, of the prior tabulation, and of the finished writing as such is precisely the way of the perhaps, the route of the interpreter, and the opportunity of the poet. It may seem childish, even playful, but then Zarathustra's message is that it is precisely for children, for our children, that we should write, and in a sense one might postulate: how better to do so than childishly?

The child for Nietzsche is precisely the site of law's application.[55] The poet teaches law to children, and the child is the expert in the half-written. How little indeed we adults allow ourselves to spend time with the half-written, time with the child. One might further interpret the tables of law, the lists, as a corruption of play. The lists are simply a precondition. They announce the actors and the drama that will be performed, but they are not the play, they simply precede the performance. Law's lists are similarly the tabling of impending trials, a roll call of litigants and a tabulation of the courts and judges before whom they will appear. Nietzsche's interest is not in the formal announcement, in the listing, but rather in the event, the motion: "And lost be the day to us in which a measure hath not been danced. And false be every truth which hath not had laughter along with it."[56] The dance was "with head and legs" and it in its turn inverts the solemn glossatorial marching of the body toward death. The jurist's heavy drill, the dead hand of the law, compares less than well with the incitement to dance by which Nietzsche intends both a lightness and rhythm of being and also engagement, connection, and a rhetorical community that would encompass and comprehend the paradox of a Dionysian philologist.

Although music, theater, and dance were historically closely linked to law, these references are now so distant as to be deemed of no worth to the liberal account of how the polity must be thought.[57] It is possible in this context to make the somewhat trite observation that those who write or more likely who dream of writing the tables of the law are unlikely to be happy with the breaker of the tables. It is hardly a recompense of their success. More pertinently, the disjunction signals an important antipathy that is somewhat opaquely coded in the opposition of the infantile to the adult, the serious to the light, the prosaic to the poetic, the juridical to the hedonistic. Underlying these inverse equivalences is an opposition between differing conceptions of what philosophy is for. We began by noting that within the Indo-European tradition, the word philosophy had its roots in law. Nietzsche's jurisprudential radicalism lies at least in part in explicitly reviving that connection in his history of the old and new tables. Returning to the origin is also, however, a way of escaping it.

Philosophy has another use within the polity, another role for the reformer, which is equally antique though somewhat less familiar within

contemporary institutions. It is that of the philosopher as sage, and philosophy as a care of the self, as a way of life.[58] What is childish in Nietzsche is perhaps best explicated as belonging to a very ancient conception of the philosophical life. For Nietzsche, the philosophical project is a practice, a lifestyle and as he came to formulate it: "The time will come when, in order to perfect ourselves morally and rationally, we will prefer to have recourse to Xenophon's *Memorabilia* rather than the Bible, and we will use Montaigne and Horace as guides along the path to the understanding of the sage. . . ."[59]

To begin again and to begin with the foundational issue posed by law, the question of how to live, is precisely to pose the question of infancy, language, and experience. Nietzsche came to philosophy through philology, the earliest discipline of law whose subject matter is the transmission of texts – scripture and law – across time and culture. Philology also signifies the law of language in the sense of the protocols of transmission and inculcation of earlier cultural forms. His attachment to Xenophon's discussions of how to live as well as his passion for the poets and their mapping of interior states, the laws of affect, signifies more than anything else a fascination with how we become who we are. To understand that most profound of legal issues, the inculcation of the subject as an object of reflection and of rule, requires a patient and extended deciphering of our affects as expressions of law. Our access to such laws of transmission of legal affects is most direct in infancy because it is in relation to the education of children that such norms are most directly symbolized and most simply formulated. In learning the early laws of our behavior, as also in recollecting how we learned to love the objects of our affections, we unearth the soiled tomb or dusty table of what is law for us.

Notes

1. Emile Benveniste, *Le vocabulaire des institutions Indo-Européenes* (Paris: PUF 1969), vol. 1 at 337–342; Pierre Macherey, "Le 'Lysis' de Plato: dilemme de l'amitié et de l'amour," in Sophie Jankélévitch and Bertrand Ogilvie, eds., *L Amitié: Dans son harmonie, dans ses dissonances* (Paris: Autrement, 1995)
2. Benveniste, *Le vocabulaire*, vol. 1 at 341. On the contract and the kiss of peace or brotherhood, see the Nicolas Perella's excellent book, *The Kiss: Sacred and Profane* (Los Angeles and Berkeley: University of California Press, 1969); and on laws of kissing, see Peter Goodrich, "The Laws of Love: Literature, History, and the Governance of Kissing," *NYU Rev. Law and Soc. Change* 183 (1998):24.
3. Gilles Deleuze and Félix Guattari, *What Is Philosophy?* (London: Verso, 1994), 8.
4. On the figure of the philologist as a jurist and epigone, see, in particular, Friedrich Nietzsche, "Homer and Classical Philology," in Nietzsche, *The Future of our Educational Institutions* (Edinburgh: Foulis, 1910); and Nietzsche, "We Philologists," in Nietzsche, *The Case of Wagner* (Edinburgh: Foulis, 1911).
5. Philippe Nonet, "What is Positive Law?" *Yale Law Journal* 100:669–71.

6. W. T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: OUP, 1997), 10–15.
7. Murphy, *Configurations*, 11.
8. Luce Irigaray, *Marine Lover of Friedrich Nietzsche* (New York: Columbia University Press, 1995); and also Irigaray, "*Ecce mulier*? Fragment" in Peter Burgard, ed., *Nietzsche and the Feminine* (Charlottesville: University of Virginia Press, 1994). Irigaray offers a brilliant reading of Nietzsche's critique of Christian nihilism and specifically of masculinity as a mode of being.
9. James Joyce, *Ulysses* (Harmondsworth: Penguin, 1965), 207: "Fatherhood, in the sense of conscious begetting, is unknown to man. It is a mystical estate, an apostolic succession, from only begetter to only begotten. On that mystery and not on the Madonna which the cunning Italian intellect flung to the mob of Europe the church is founded and founded irremovably because founded, like the world macro- and microcosm, upon the void. Upon unlikelihood. *Amor matris*, subject and objective genetive, may be the only true thing in life. Paternity may be a legal fiction. Who is the father of any son that any son should love him or he any son?'
10. Nietzsche, *Thus Spake Zarathustra* (Edinburgh: Foulis, 1914), 239–263.
11. Nietzsche, *Zarathustra*, 240.
12. For a careful study of Nietzsche's reception in England, see David Thatcher, *Nietzsche in England 1890–1914* (Toronto: University of Toronto Press, 1970). On the allure and threat of Nietzsche, see John Figgis, *The Will to Freedom* (London: Longmans, 1917); and for unrestrained enthusiasm, see A. R. Orage, *Friedrich Nietzsche: The Dionysian Spirit of the Age* (Edinburgh: Foulis, 1906); as also Henri Lichtenberg, *The Gospel of Superman* (Edinburgh: Foulis, 1910). For a review of the Nietzsche wars in Germany, see Steven Ascheim, *The Nietzsche Legacy in Germany 1890–1990* (Berkeley and L.A.: University of California Press, 1992).
13. Nietzsche, *Genealogy of Morals* (Edinburgh: Foulis, 1923), 210–211.
14. Ibid., 211.
15. Ibid., 252.
16. Martha Nussbaum, "Is Nietzsche a Political Thinker?" *International Journal of Philosophical Studies* 1 (1997):5. For a similar rhetoric and invective in relation to a thinker whose work cannot be taken up here, see Nussbaum, "The Professor of Parody," *The New Republic* 37 (Feb. 22, 1999).
17. Nussbaum, "Nietzsche," 2.
18. Ibid., 18.
19. Ibid., 5, 9.
20. Ibid., 10.
21. Ibid., 3.
22. Ibid., 4.
23. Ibid., 3.
24. Ibid., 2–3.
25. It bears note that Nussbaum is not alone in this polemic. Luc Ferry and Alain Renault, eds., *Why We Are Not Nietzscheans* (Amherst: University of Massachusetts Press, 1997) provides another striking example of the denunciation of Nietzsche as puerile. To trace the roots of their relation to Nietzsche, see Luc Ferry and Alain Renault, *La pensée 68* (Paris: Gallimard, 1985), translated as Ferry and Renault, *French Philosophy of the Sixties: An Essay on Antihumanism* (Amherst: University of Massachusetts Press, 1990).
26. Nussbaum, "Nietzsche," 2.
27. Alain Badiou, *Ethics: An Essay on the Understanding of Evil* (London: Verso, 2001), 24–5.
28. For rare examples of attention to Nietzsche in jurisprudence, see: Edgar Bodenheimer, *Power, Law, and Society: A Study of the Will to Power and the Will to Law* (New York: Crane, Russack, 1973); Nonet, "Positive Law," op. cit.; Adam Gearey, "We Fearless Ones: Nietzsche and Critical Legal Studies," *Law and Critique* 184 (2000):11; Adam Gearey, *Law and Aesthetics* (Oxford: Hart, 2001); Douglas Litowitz, *Postmodern Philosophy and Law* (Lawrence: Kansas University Press, 1997); Richard Posner, "Past Dependency, Pragmatism, and Critique of history in Adjudication and Legal Scholarship," *U. Chicago L.Rev.* 67 (2000):573–606; and *Nietzsche and Legal Theory*, a symposium issue published in *Cardozo Law Review* 24 (2003). It bears notice, perhaps, that fleeting references to Nietzsche are not

uncommon in critical legal texts, but such references do not generally indicate any sustained engagement with Nietzsche. For useful discussion of this phenomenon of citation without influence, in this case with respect to the jurisprudential nonreception of Habermas, see W. T. Murphy, "The Habermas Effect: Critical Theory and Academic Law," *Current Legal Problems* 42 (1990):135.

29. David Garland, *Punishment and Modern Society* (Chicago: Chicago University Press, 1990) has the briefest of reference to Nietzsche who clearly is not a "theorist" of punishment or sensibility, which are the topoi of the study. Stuart Henry and Dragan Milovanovic, *Constitutive Criminology: Beyond Postmodernism* (London: Sage, 1996), another work that might be expected to address Nietzsche, symptomatically makes no such references. Even Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), who also offers a species of theoretical anthropology of law, makes no significant reference to Nietzsche.
30. Sir Edward Coke, *Institutes* (London: Rivington, 1648), vol. 3, liiia.
31. Nietzsche, *Zarathustra*, 260 (III.26).
32. The classic study of this writing and rewriting of law is Arthur Jacobson, "The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences," *Cardozo Law Review* 11 (1990):1079.
33. Nonet, "Positive Law," 671.
34. Nietzsche, *Genealogy of Morals*, translated by Nonet.
35. Nietzsche, *Zarathustra*, 259–60 (III.26).
36. Nietzsche, *Zarathustra*, 251 (III.16).
37. Thomas Mathieson, *The Politics of Abolition* (London: Martin Robertson, 1974), part 1: The Unfinished.
38. Nietzsche, *Zarathustra*, 262 (III.29).
39. Nietzsche, *Zarathustra*, 235.
40. Nietzsche, *The Joyful Wisdom ("La Gaya Scienza")* (Edinburgh: Foulis, 1910). The title translates better as *Gay Science* and so in subsequent references it will be referred to as *Gay Science*. For discussion of this text as a species of jurisprudence, see Adam Gearey, *Law and Aesthetics* (Oxford: Hart, 2001), ch. 3; and on the history of the gay science, see Goodrich, "Gay Science and Law," in Victoria Kahn and Lorna Hutson, eds., *Rhetoric and Law in Early Modern Europe* (New Haven: Yale University Press, 2001).
41. Nietzsche, *Gay Science*, 258–259.
42. Ibid., 258.
43. Nietzsche, *Zarathustra*, 247 (III.11).
44. Ibid., 248 (III. 12).
45. Ibid., 246 (III. 11).
46. A point well and elaborately made by Gillian Rose, *The Dialectic of Nihilism: Post-Structuralism and Law* (Oxford: Blackwell, 1995).
47. Nietzsche, *Zarathustra*, 247 (III.11).
48. Ibid., 248 (III.12).
49. Ibid., 247 (III.11).
50. The "messy and contentious" generation of theory is borrowed from Anne Bottomley, "Theory Is a Process and Not an End," in Janice Richardson and Ralph Sandland, eds., Feminist Perspectives upon Law and Theory (London: Cavendish, 2001).
51. Nietzsche, *Zarathustra*, 242 (III.3).
52. Ibid., 246 (III.10).
53. Ibid., 246 (III.17).
54. On the aphorism, see for a particularly fine analysis, Tatiana Flessas, *The Ownership of Time: Culture, Property and Social Theory* (London: London School of Economics Ph.D., 2003), ch. 3 "Cultural Property Defined, and Redefined as Nietzschean Aphorism."
55. This point is brilliantly and lengthily elaborated in Desmond Manderson, "From Hunger to Love," *Law and Literature* 16 (2003):101.
56. Nietzsche, *Zarathustra*, 256 (III.21).
57. On the early modern history of the theater of law see Paul Raffield, *Images of Law: The Inns of Court, Common Lawyers, and the English Constitution 1558–1660* (Cambridge: Cambridge University Press, 2004).

58. The most important statement of this concept is to be found in Pierre Hadot, *Philosophy as a Way of Life* (Oxford: Blackwell, 1995). His work takes something from Foucault, *Care of the Self* (New York: Pantheon, 1992). Also important in any contemporary discussion of this thematic is David Halperin, *Saint Foucault* (New York: Oxford University Press, 1995).
59. Nietzsche, *Human, All Too Human* (Edinburgh: Foulis, 1911), vol. II.2.86, 241–2 (Socrates).

CHAPTER 1

Gay Science as Law: An Outline for a Nietzschean Jurisprudence

JONATHAN YOVEL

> Therefore he desired to be farther satisfied what I meant by *law* … because he thought Nature and Reason were sufficient guides for a reasonable animal, as we pretended to be, in showing us what we ought to do, and what to avoid.
>
> — Jonathan Swift, *Gulliver's Travels*

> What are you really doing, erecting an ideal or knocking one down?
>
> — Friedrich Nietzsche, *On the Genealogy of Morals*

This chapter examines not merely how a Nietzschean critique of law would look had Nietzsche ever applied his genealogical method to the question of law, but also what positive function Nietzschean philosophy may ascribe to law — and how law must then be transformed. The methodological parable imagines a "postgenealogy" or "post-*ressentiment*" phase of the human condition, akin to the Marxist "postrevolutionary" phase: how would law look for the Person of Power — overman or otherwise — who needs to live among others? How is normativity possible —

what are its forms and functions — in a social world that has undergone a reevaluation of all values? This chapter traces three possible models for conceptualizing law in Nietzschean terms, each requiring a radical shift from traditional (in different contexts: liberal, Christian, bourgeois) conceptions. The first one is *play*: law as affirming and embracing the essence of the Dionysian, which is perpetual becoming. Play requires us to let go of law's role as the curtailer of arbitrariness. The second model is that of *resistance*, framed by Nietzsche's analysis of power and Deleuze's distinction between active and reactive forces. The insight here is that power requires resistance, and it is law's primary function to empower the other in order to invest value in meeting and confronting him; thus the monism of the will to power not only does not do away with normativity in the public sphere but actually requires it — but for goals opposite to those of liberalism. Resistance is linked to the third model, fashioned after Nietzsche's model of *education*: here, law performs not as a socializing agent but rather as a liberator of authenticity. Its function is analogous to that of a mentor whose role is ultimately to encourage the pupil into coming into her own will, shedding *ressentiment* and bad conscience in an active, nonconscious way; in its relation to consciousness it moves in an opposite direction to that of psychoanalysis. A fourth consideration is then offered, the role of normativity in self-overcoming, or self-legislating; namely, how does normativity figure in the will to power's most significant challenge?

While these models work from an interpretation of the will to power as becoming, the last two are especially dependent on the active-reactive distinction. The cornerstone is not to confuse power with representations of power. It is not the will that desires power (as an object of desire that would necessarily involve a representation of power), but *power that wills* becoming. In dealing with this metaphysical question I expound on a similar interpretation, originally offered by Deleuze; however, in my discussions of education and resistance I break with Deleuze's claim that the will to power has nothing to do with any notion of struggle. If this discussion of the will to power is missed, or if it is wrong, the main argument of this article is invalid. Therefore, in order to test its fruitfulness, I use the following discussion of law in a Nietzschean sense to offer a solution to Kafka's riddle in *The Trial*, sequentially placing the parable of the seeker of the law in front of its closed gates in a certain ethical narrative that begins with Plato's fable of the cave, continues with Zarathustra's emergence from his own cave, and finally culminates or deteriorates to Kafka's cave, where law resides but cannot be accessed.

The Death of Law?

At the outset of his essay *Le Surhomme dans le Souterrain* — the "Overman in the Subterranean" — the French philosopher René Girard frames a

discussion around the following question: "*Que devient le surhomme quand il a tué la Loi? Est-il condamné a la folie*? [What becomes of the overman once he has killed law? Is he condemned to madness?]"[1] What Girard has in mind, probably, is a paraphrase modeled after a famous passage of Nietzsche's *The Gay Science*, with "Law" substituted for "God": Have you not heard of the madman who lit a lantern in the bright morning hours and, like Diogenes searching for an upright man in the agora, ran to the marketplace and cried:

> "I seek Law! I seek Law!" Whither is Law? I shall tell you: we have killed him — you and I. But how could we do this thing? Where are we moving now? Are we not plunging continually, in all directions? Is there still any up or down? Do we smell nothing as yet of the legal decomposition? Law is dead, and we have killed it.[2]

From somewhere high above the agora we may hear the echo of Nietzsche's own prophetic voice prophesizing, in the "Destiny" section of *Ecce Homo*: "all power structures of the old society will have been exploded."[3] Nietzsche's prophecies, we must keep in mind, are *untimely* meditations. He is "pregnant with future."[4] Does his philosophy of power indeed call for a view of a future society, when some individuals — few, perhaps — have crossed the bridge and, with Zarathustra's guidance, transcended the psychology of *ressentiment* and bad conscience? What is law to them?[5] May this, and not some grand European plan, be a true reading of his proclamation "it is only beginning with me that the earth knows *great politics*"?[6] What forms of normativity are useful for the Dionysian higher person who is emancipated from morality and reactive science and able to confront the chaotic nature of the cosmos and innocence of existence, look them squarely in the eye, and affirm them?[7] And how are we to understand Nietzsche's amazing dictum, in *Beyond Good and Evil*, that "[g]enuine philosophers … are commanders and legislators?"[8] For unlike in Kant, here not reason legislates but the *will*. This point requires some clarification.

The questions "how can law be the case?" or "how is normativity possible?" must be understood here in their its distinctly Nietzschean, not Kantian, sense. It was Kant's strategy to begin inquiries with the question "how is any synthetic a priori sentence — such as a normative one — possible?" and then move on to the conditions that generate it.[9] Normativity is thus taken as a given, and the conditions of its existence form the problem for philosophical inquiry. In Nietzsche's strategy the question is turned on its head. It is not the possibility of the case that the inquiry revolves around, because nothing is a priori: all is a product of the will to power, the drive to become more, to perpetual *becoming*. And so the emphasis is on the

first word of the question, the *how*: What are the forms of normativity, in either collective or individual contexts, for free spirits, persons whom genealogy and *amor fati* freed from *ressentiment* in all its manifestations?[10] Ostensibly such persons have no use for law to direct their action. Nietzsche does not follow Socrates in seeking some abstract sense for things. The question he formulates is not "What is x — beauty, virtue, anything?" The question is always "What is x *to me*? To the Person of Power? To the other?" Approaching any such x through the critical method he invented and termed "genealogy" allows for its reevaluation it in a new, post-*ressentiment* life. This is how Nietzsche deals with language, cognition, morality, science — any phenomenon that is the case, for they all owe their existence to the will to power. Owing to his genealogy, Nietzsche was possibly the first human to conceive a radical break between the *origin* of any institution, such as morality or law, and its reconstructed *purpose* or *function* in terms of the will. This is how law and normativity will be dealt with here: as forms that must justify themselves for a life of Freespiritness, emancipated from *ressentiment*. Thus there is a derivative relation between Nietzsche's metaphysics, or moral psychology, and any normative exegesis. I explore that relation throughout the chapter and reply to certain objections in the conclusion.

In what follows I offer a discussion of Nietzsche on the assumption that collective action, contrary to his tastes and distastes, is a case to which Nietzschean philosophy pertains — if indeed a derivative one in relation to the main questions of moral psychology and power. The worthy person, whether a veritable *Übermensch* or not, will also live in society. It will be among and against others that his will to power must be exercised, measured, challenged, and overcome. Zarathustra's teachings are not for solipsists nor, ultimately, hermits. He must perforce emerge from his cave in order "to be more," teach, exist. He must bring this gift to humanity, not unlike Plato's slave who, having escaped from the cave and experienced truth, went back to share it at the cost of his life. Everything about Zarathustra's story is contrary, except for that point: although truth is found in the cave's loneliness, it must be projected outside, among the others. Zarathustra emerges as the herald whose fruit has ripened, but he is not yet ripe for his fruit.[11]

Three Models of Law

I now wish to turn to the main part of my argument, which consists of three models for Nietzschean discussion of law and normativity. We must keep overarching questions in mind as we follow these models: When are we talking about law's content? When are we talking about legality's form?

And when are we transcending the Weberian category of legality and procedural justice to suggest a different kind of normativity altogether?

The three models that are briefly discussed here are: play, resistance, and education. There is another discussion of normativity that Nietzschean philosophy begs for, namely the question of the tension between normativity and *self-overcoming*. In the entirety of the Nietzschean corpus the question of self-overcoming seems deceptively close to what we may term traditional (or in some instances Christian, and in others, Stoic) ethical discourse. Yet it suggests a different kind of normativity altogether, one that is not translatable into the social sphere, and accordingly will not be dealt with here.[12]

Play

In "The Lottery in Babylon," a radical story by Jorge Luis Borges — who, like Nietzsche, breathed the "strong air of high places" — all of life's aspects are governed by a periodical lottery. The question of distribution is governed by chance, but not — as in bourgeois society — merely by such chance conditions as hereditary birth. Rather, the lottery periodically confers anything and everything that society may confer, until the next round is held. As Borges' protagonist narrates:

> Like all men of Babylon, I have been proconsul; like all, I have been slave. I have known omnipotence, ignominy, imprisonment. Look here — through this gash in my cape you can see on my stomach a crimson tattoo — it is the second letter, Beit. On nights when the moon is full, this symbol gives me power over men with the mark of Gimmel, but it subjects me to those with aleph, who on nights when there is no moon owe obedience to those marked with the Gimmel … once, for an entire year, I was declared invisible — I would cry out and no one would heed my call, I would steal bread and not be beheaded. I have known that thing that the Greeks knew no — *uncertainty*.[13]

Certainty, stability, and predictability are the most salient, distinctly bourgeois features of modern law and, in most cases, the basis for its notions of liability and responsibility. In a sense, that is what all law is about: reducing — even minimizing — the arbitrariness of life. We have law because, spontaneously, "things happen." Contract, explains Wolfgang Friedmann, is about defying arbitrariness in the form of private insurance that allows parties to perform in certain ways with some guarantees of the future — reliance and expectation will not be left to arbitrariness.[14] Once the will of legal agents is institutionally expressed (think about contracts,

property, family) both civil and criminal law supply a denouncing language and negative incentives for the infliction of unbargained action (or "harm"), unless some other social objective like the efficiency of exchange allows agents to destabilize an otherwise entrenched situation (e.g., "efficient" breach of contract or "taking" of property interests).[15] Indeed, so obvious these features appear to some philosophers of law, that stability and certitude are habitually and casually dealt with as inherent legal values, in distinction from what may otherwise be termed law's "content," its contingencies: those aspects of it that regulate justice, distribution, procedure, and so on. In bourgeois societies, Augustine's Aristotelian dictum that law's telos is the general good or general welfare axiomatically translates into a meta-interest, namely that of securing stability. If law cannot be merely a reflection of natural order, as Aquinas argued, it can establish a social and cultural order to translate and replace the lack of metaphysical justice, of recompense and retribution, with enforceable, *stable* social terms.[16] Stability and predictability — not merely security — are the opposite of danger.

Conversely, in Borges's Babylon, the lottery is an interpolation of chance into the order of the social universe. As such, corruption and error are not merely tolerated but even encouraged. What kind of people, from behind a veil of ignorance, would choose the perpetual return of the lottery as their perpetually returning "original position"?[17] Nietzsche's Person of Power has no use for order metaphysics. Sufficiently powerful to face and confront a chaotic universe, fashioning and categorizing it for self-proclaimed, authentic rather than decadent purposes of the will, she rejects the sense of security that the construction of order produces in society.[18] The overman will gaily embrace a chance to measure his will, to become more, to perpetually keep becoming being, without any guaranties of certainty. Cast in every possible social contingency, the lottery as law is the will's ultimate opportunity for perpetual reinvention.[19] In its truly radical form, gay science can become law if and only if it sheds law's bourgeois content and forms — property, contract, family — and reverses its internal values. Instead of security, certainty, and constraint, it must mirror the will to power, becoming a medium for overcoming oneself and becoming more. When Deleuze redefines Nietzsche's conception of tragedy as the joy of multiplicity and diversity — an aesthetic, not moral concept, that involves experience rather than sublimation or dialectic or the absolution of suffering — it is Dionysus who emerges to affirm "even the most bitter suffering," that which our prevailing conceptions of law and the state are trusted with the task of shielding us from.[20] The lottery as law is the utter rejection of dialectics, Christianity, and the Kantian notion of the

subject-reason as legislator. "The dicethrow affirms becoming."[21] Deleuze spells it out: "The will to power in principle does not suppress chance, but on the contrary, implicates it. For without chance it would have no plasticity, nor metamorphosis."[22] Furthermore, think about the perpetuity of the lottery as an actual manifestation of the eternal return, and we realize *amor fati* in its most consummate form (this is a problematic point and I am not asserting it as of yet: In what sense does chance ever return?). Consequentialism, along with its notions of success and failure and its dependence on representations, are utterly rejected for the joy of law, the dice throw, but only once the dice thrower makes the leap that Zarathustra teaches, and overcomes the confines of human psychology:

> Shy, ashamed, awkward, like a tiger whose leap has failed: thus I have often seen you slink aside, you higher men. A throw had failed you. But, you dice-throwers, what does it matter? You have not learned to gamble and jest as one must gamble and jest. Do we not always sit at a big jesting-and-gaming table? And if something great has failed you, does it follow that you yourselves are failures? And if you yourselves are failures, does it follow that *man* is a failure? But if man is a failure — well then![23]

Law's gaiety reaches a level that the Person of Power will willingly embrace. The others, however, will shun this antipode to all they understand by law as institutional justice as an obvious, dangerous absurd.

Intermezzo: Law and the Will to Power

Before proceeding to further explore metaphors and models for law in possible Nietzschean senses, a certain interpretation — or more precisely, focusing remarks — concerning the will to power are in order. At the outset stands Deleuze's comment in pointing out a common mistake among philosophers prior to Nietzsche, namely equating the will to power with some scheme of representation. Grammatically, in the sentence "the will desires power" the use of the word "power" entails a representation of something that the will desires. This indeed is a mistaken reading generated by a linguistic blunder. *It is not the will that wants power, but power that desires*: "*pouvoir est ce qui veut dans le vouloir* [power is that which wants in the wanting.]"[24] Indeed it is exactly the decadent will, ridden by *ressentiment*, that desires power. The will to power is the drive to become more, a mode of being that is constantly becoming. The model of law as resistance, dealt with next, breaks from Deleuze on his unequivocal pronouncement that the Nietzschean notion of will to power has nothing to do with the notion of struggle.[25] The reason he gives is that the will

to power's distinct performance is the creation of values — as opposed to merely reactive opposition to established values — a performance with which struggle has nothing to do; the only values struggle caters to are those of the "triumphant slave," never the active expression of forces. Instead, he says, "power is essentially creative and giving."[26] In this Deleuze declaws Nietzsche. I wholly agree that through power the will bestows sense and value. However, there is no a priori reason why this would not involve struggle — internal or external, physical or intellectual, or all of the above — or even violence in sublimated and nonsublimated forms. The will needs to bestow, the power wills: because that is done on the backdrop of resistance, because there are other personalities in the world who also *are* will to power (strictly speaking, we should not say "have" will to power, the relation between person and will not being possessive) struggle may more often than not be the will's manifestation as well as power's performance in the world. Nietzsche sought to distance himself from Hobbes, but on this point I do not see, contra Deleuze, that he has succeeded.

Armed, as we were, with this interpretation, let us explore two further related models or metaphors for law: resistance and education.

Resistance

Ah, the others! What about *us* — those others? If the Person of Power is to live, not alone but among others who would not be able to sustain gay law as they cannot fully sustain gay science, what account of law could we have then? Recall the premise: we are in a society of the future, a postrevolutionary one that in many respects may have changed surprisingly little. Nietzsche's revolution is not political in the ordinary sense; it is the reevaluation of all values, primarily existential and ethical, and derivatively a social emancipation of the will to power from *ressentiment* and order-metaphysics, to form new values and new meanings. Its space is primarily the psychological space. The social space relates to it only derivatively. Nevertheless, the question in its Hellenic form stands: How to shape law and society in view of the correct way to live, even if that way of living is reserved to few elevated more-than-humans whose superior power is the closest thing that secular philosophy ever came to the Calvinist notion of grace?

One answer, I think, is grounded in the Nietzschean notion of resistance. For that a few further words about Nietzsche's philosophy of power must be introduced. When analyzing power, Nietzsche is quick to consider that the will acts in mediums. He allocates considerable work to the relation between the will to power and that which it faces, acts upon, and confronts. In distinguishing between active and reactive forces through which the will operates, Deleuze emphasizes the different roles that Nietzsche allocates to *consciousness* on the one hand and to *instinct* and

spontaneity on the other. The active instinct is "reaching out to power."[27] Consciousness — human consciousness, at least — is bound by representations and language. Dionysian power, the power to transform, through appropriation, domination, and the like, is not conditioned on reacting to given circumstances, and thus avoids being dominated by them. The first lesson of being confronted with a resistant and regulating medium is learning to confront it and resist its temptations (e.g., of promises of redemption, material wealth, or passivity and slave morality).[28]

While *reactive* forces respond to their context and in this way are dictated by them, *active* forces find their own mediums for action. There is a catch, however. Force needs resistance in order to matter, to grow, and to be challenged. In a paragraph whose importance to the understanding of Nietzsche's mechanics of power can hardly be exaggerated, he spells it out:

> [S]trong nature … needs objects of resistance; hence it *looks for what resists.* … The strength of those who attack can be measured in a way by the opposition they require: every growth is indicated by the search for a mighty opponent. … *The task is not simply to master what happens to resist, but what requires us to stake all our strength, suppleness, and fighting skill — opponents that are our equals.*[29]

Thus the will is measured in the scope of its challenges. But the active will is not satisfied by those challenges it happens to come by. For the challenge to be worthwhile it must be the most powerful possible, and so the Person of Power must cultivate the will to power of those who are not. In debate, the Person of Power will make the best of his opponent's position, nourish it, then go after the strong points or strongest version or interpretation. Kasparov must play Karpov, then Deep Blue. The philosophical problems most worthy of engagement — and Nietzsche spoke of problems as something a philosopher challenges to single combat — are the toughest ones. Of himself, he asserts:

> I only attack causes which are victorious. … I have never taken a step publicly that did not compromise me: that is *my* criterion of doing right.[30]

In society, the law that best serves the Person of Power is that which challenges him to discover and perfect his active powers. Such, for instance, is law that empowers the other to best prepare him for such "war."[31] Law must elevate the other's own powers to the fullest of their potential (the overman, of course, has no presupposed potential: a potential for him would be power-constraining rather than a horizon for development).

The Person of Power will not rely on social norms to serve him in overcoming or in dominating: that is the way of *ressentiment*. Instead she will form law that will make the best out of that which she must stand up to, namely the others. Nietzsche is no closet liberal: the principle of law as empowerment of the other is strictly a means for the will to become more, for the power to will.[32] Law does not empower the other as a subject, although through empowerment the other might discover his own power and so much the better. The other — the person enslaved by the psychology of *ressentiment*, be he called slave or master — needs not be empowered to become less contemptible, yet it is because of his contemptibility that he must be elevated. *Empowerment of the other is the active will's maxim in the exact sense in which the elevated will categorizes natural phenomenon and shapes cognition and language* — namely, creating the environment for the best possibilities for the will to cast itself in the world, both natural and social. A will to power that will not face adequate challenges will degenerate and stagnate. A classical philologist, Nietzsche expressed this trap through the fall of the Roman civilization to the weakling, the slave morality of Judea later transformed into Christianity and then liberalism. The authentic will to power is ever active, ever strives to become more, find and carve authenticity in defiance of the resisting medium that imposes itself. Below, I exemplify this point through Kafka's parable of the seeker of law, whose will to power acts wholly reactively and consciously, and explore how this medium of resistance — law, for that is the representational object that tempts and corrupts the seeker — would be confronted by a will to power that would resist rather than give itself in to it.

Resistance is also at the crux of the following discussion of Nietzsche's seemingly paradoxical model of education. Resistance, one might say, is education's internal grammar — a relation we shall return to presently.

Education

The third model for law I wish to discuss is a social interaction that Nietzsche devoted as systematic a study to as any, namely education.[33] I imagine that had he ever got to working out the role of law in some future society peopled by some, yet few, *Übermenschen*, his untimely meditations concerning it might have taken on analogous characteristics. For sure, education in Nietzsche is not a pleasant process, and how it precisely generates the reevaluation of all values and the development of post-*ressentiment* power-psychology is not completely clear; nor its role in guiding man over the bridge to overman. Zarathustra may be bringing humanity the greatest gift ever given it, but he is not sure how it can be administered and realized. Nevertheless, as an exercise, certain aspects of the model of education can be extrapolated as such.

The main point about Nietzsche's approach to education (almost, if not quite a theory of education) is the following: education in its true form is not about socialization — which produces only "herd animals" — and certainly not about knowledge. Instead, the goal of education is to encourage the development, embracing, and carving of authenticity (*Wahrhaftigheit*). This in fact requires shedding ideology, conventions of knowledge, and socialization, a requirement not unlike Francis Bacon's talk of the purification of thought from various "idols" generated by the public sphere (e.g., language) that cause "a wonderful obstruction to the mind."[34] Nietzsche developed this approach to education on the background of a German society that, responding to the requirements of the social revolution and a growing state bureaucracy emphasized technical, scientific, and professional (including military) instruction. "[T]he young man learns to 'grind': first prerequisite for future efficiency in the fulfillment of mechanical duties (as civil servant, husband, office slave, newspaper reader, and soldier."[35] Yet, while revolting against technocratic schooling, Nietzsche's program is not a humanistic approach to education, even when he invokes humanistic educators such as Socrates, Goethe, Schiller, and Schopenhauer as role models. Its aim is to push the student toward molding herself, coming to terms and affirming her own will to power: its goal is authenticity, not presupposed notions of virtue. As explained above, this requires overcoming representations (of knowledge, of values and notions of the good life, etc.); the goal of education is formal in the sense that it is about the construction of a free spirit, not its encumbrance with any presupposed content that, by definition, is a form of conformity.

While the following paragraph is oft quoted, it is likewise misinterpreted as liberal in its invocation of the concept of liberty. In analogy to Freudian terms, the liberation is not from the other, nor from the id, but rather from the super ego, the guardian of *ressentiment* and obscurer of the true reality of power:

> Your educators can be nothing more than your liberators. And that is the secret of all education: it doesn't provide artificial limbs, false noses or eye-glasses — on the contrary, what could provide these is merely pseudo-education. Education is rather liberation, a rooting out of all weeds, rubbish and vermin [read: *ressentiment*, morality] from around the buds of the plants. …[36]

Liberation how? Certainly not through preaching or arguing. Education for Nietzsche is a subtle and wily manipulation of the will to power. In a perforce cursory nutshell, there is a sense in which it may be characterized as a shift from mentoring to rebellion. While liberal education and indeed

any form of collective education is geared toward the production of conformist students, Nietzschean education is about the self-discovery of power through what we may call "constructive repression" — a developing power's encounter with a formidable one (the latter in Nietzschean, not social, terms). An autocratic mentor may be assigned to a student, gradually oppressing her through discourse. No reactive — conscious — forces are encouraged in the student to realize and act on her situation. The student may become subservient at first, but through her active powers she begins to emerge against the mentor's manipulative power (again we encounter the theme of resistance discussed above). The struggle is not about truth or falsehood — still decadent, reactive concepts — but about power; and the student begins her emancipation when she realizes and experiences it as a matter of will to power rather than of normativity. To this end the educator himself

> never says what he himself thinks, but always what he thinks of a thing in relation to the requirements of those he educates. He must not be detected in this dissimulation; it is part of his mastery that one believes in his honesty. … Such an educator is beyond good and evil; but no one must know it.[37]

No one shows the student the way to power — education is a tragic process and tragedy is, after all, not discourse or narrative but action. Dominated by the mentor's power, the student doesn't realize that it is all about her — that her private Zarathustra shows her, instead of telling her, the way to growth and authenticity. *Ressentiment* and bad conscience — Nietzsche's forms of neurosis and psychosis — are the pitfalls that await her: they justify her subjugated position and ascribe it to some normative reason other than a realization of power relations. She thinks it is his fault — *ressentiment* — or her fault — bad conscience — until, if all works out well, she realizes the innocence of existence and the perversion of *ressentiment*. The student's will then finds its active power and rebels against that of the mentor. She is not merely liberated from bad conscience and *ressentiment* but, at that stage, from dependence upon religious, moral (read: Kantian), social, and every other kind of entrenched normativity. That is the beginning of freespiritness.

With regards to law, by way of analogy, what education does for designated students during a finite period, law can attempt to do on a general and perpetual basis. Can it be law's purpose and function to bring out the most in people, in terms of the will to power, the will to be more? What will such law look like? Will it be oppressive, domineering, begging not simply to be overthrown but that its pretense for legitimization is the main

challenge for every member of society? Can the whole of society, to paraphrase Shakespeare into unrecognisibility, become a schoolroom with law as the universal mentor, discharging oppression and expecting to be challenged?

The education and resistance models of law are interlocked, the former dependent on the mechanics of the latter. Education is a method, almost a system of using resistance to cultivate the active will to power toward authenticity. In their applications they seem to go in almost opposite directions, and no wonder: while resistance concentrates on the *other*, in an attempt to nurture her to growth and power as a form of medium for the will to act against, education concentrates on the Person of Power. Education is also typically Nietzschean in its dependence on uniquely gifted educators rather than on a social, technocratic system of instruction. Interestingly, both are about empowerment — and law as empowerment — from distinctly nonliberal positions. Freespiritness, perpetual becoming, and authenticity use models of struggle and liberation only instrumentally. And even if — for Nietzsche — too much talk of empowerment might smell of liberal inclinations, would that be such a detriment for everyone?

We have now looked at law in possible Nietzschean terms conjoined by an underlying notion of the emancipation of authenticity from decadence. In play, law liberates from cowardice, certainty, stability — it is the way to *amor fati*. In education, it is the progenitor of authenticity against the falsehoods of socialization. In resistance, it creates the terms on which the will to power may grow, challenge, and measure itself, freed from decadent notions of reactive struggle and slave-morality dominance. In a fascinating way, all three are cast and reflected in Kafka's famous parable of law's gates. Based on the previous discussion, Zarathustra provides us with an interpretative key to a Nietzschean reading of *The Trial* as a jurisprudential, and indeed tragic case for gay science.

Law and a Genealogy of Parables: Zarathustra's Answer to Kafka's Riddle

How would the Person of Power act were he the seeker of law in front of its sealed gates in Kafka's *The Trial*?[38] In the ethical history of Western thought, Kafka's parable continues the lineage of cave parables that begins with Plato's bounded slaves;[39] continues with Nietzsche's Zarathustra, who emerges from his cave to bestow his gift on a reluctant humanity; and finally challenges all accepted notions with Kafka's tragicomic seeker of law. At philosophy's inception in the polis, truth was to be found outside the cave — Plato's slave must escape it to experience truth — but impossible and ultimately destructive inside it (this, of course, by Plato's account.

The sophists would claim that outside the cave there is no truth, as truth is a linguistic and rhetorical construct necessarily constituted within discourse — the basis for the polis, not its antithesis).[40] Contrariwise, Zarathustra must withdraw from humanity to the solitude of his cave to "hear" of God's death. In a parallel motion to Plato's slave — who returns to the cave to recount his discoveries — Zarathustra must eventually go and preach among people.[41] The slave is slain, Zarathustra chased out of town by a menacing jester — what of Joseph K, then? With Kafka's parable of the law, the cave is as unreachable as the castle or America/Amerika in his other novels. More significantly, we learn two new, urgent things about the cave and its evolving recurrence: that inside the cave there is law, and that we are barred from entering it. What gives? May Zarathustra supply an answer to the paradox — based on play, or on overcoming socializing education, and more than all on a further interaction of resistance?

Recall that the seeker of law is never allowed into law's cave, wasting his wretched days in futile attempts to gain admittance through begging, bribery, rhetoric, and hanging around. In Nietzschean terms the seeker is pure consciousness, and his action is purely reactive; wholly dominated by the circumstances, no power within him initiates independent action. He accepts hierarchy, knowledge, common sense, and to the end of his days he attempts to rationalize, to make sense of things. This will never do for the Person of Power who will grasp, and indeed expect, the absurd. She will refuse to merely react to a circumstance. She may attempt to force her way in, overcoming the fear of the succession of awful guards. More to the point however, she may primarily overcome her own need to be admitted to law and walk away from its deceitful temptations. To accept law's existence and allure, to continue to try and reach it is to accept subjugation. Indeed, Joseph K, completely driven by reactive forces throughout his encounters with law, finally acts: to avoid law's complete appropriation of his life, and at the same time to overcome himself — his fears, his beliefs in justice and order, his reactiveness, bad conscience, *ressentiment* — he himself must be the one who summons the awkward executioners who eventually butcher him. Recall that, in the last chapter of *The Trial*,[42] on his birthday and exactly one year after his initial arrest, K solemnly awaits them, attired in ceremonious black. He later urges these sinister escorts to avoid the beat policemen — law's agents and most obvious manifestations — on their hallucinatory passage to the desolate quarry where they will finally do him in. For a while, K — more resourceful perhaps than the seeker at law's gate yet as powerless — accepts law's purported rationality, its procedural justice. He attempts to gain admittance and touch his trial, even struggle with it on its own social and institutional terms. That act of

rationalization is — in Nietzschean terms much before it became a source for complexes in Freudian senses — an act of self-bondage, a sin of alienation and thus of decadence. K, through experience rather than deliberation, ultimately frees himself once law's true and absurd nature is revealed to him, its guise of normativity unveiled. Qua will, K is then able, for the first time, to actively act rather than react, even at the price of his own destruction. He discovers the Dionysian. With proper adjustments, K approaches his tragedy — we are mindful of the Nietzschean interpretation of course — in a manner reminiscent of a parable by one of modernity's major Dionysian writers of discontent, Yukio Mishima:

> [F]or the core [of the apple] the only sure mode of existence is to exist and to see at the same time. There is only one method of solving this contradiction. It is for a knife to be plunged deep into the apple so that it is split open and the core is exposed to the light. … Yet then the existence of the cut apple falls into fragments; the core of the apple sacrifices existence for the sake of seeing.[43]

Joining the mythical line that stretches from Plato to Nietzsche to Kafka and beyond, Mishima offers his own cave parable — a lonelier version than any. His own art of living — his Socratic philosophy — was somatic; a writer who strove to touch reality beyond language's mediation, he frequently spoke of his body and muscles in terms similar to those of the apple parable. Like Mishima, who later committed *seppuku*, ritual suicide, Joseph K frees himself from the need to realize, to be subservient to normativity and to representations of facts, to act within law and by its behest. He, himself *as* will to power, finally asserts in front and in spite of law — the most modern of all of history's promises, yet one of its most treacherous menaces.

Such is the will to power as an emancipating force. What is this critical notion, and how is law related to it? Before concluding, I wish to expound on this issue beyond Nietzschean thought by comparing it with two other canonical cases of early modernity.

Law as Ressentiment, Ideology, Neurosis: Bondage and Emancipation in Nietzsche, Marx, and Freud

> Although I can at least confine
> Your vanity and mine
> To stating timidly
> A timid similarity
>
> — W. H. Auden, "Law Like Love"

Let us draw a loose triangle, less than rigorous yet hopefully illuminating for this discussion of radical reconceptualizations of law, between three vertices of modernism/postmodernism: Marx, Nietzsche, and Freud. I wish to explore how through different treatments and vocabularies a certain modality emerges — the basic modality of modernity, ranging from enlightenment to postmodernist critiques. It is, in Habermas's terms, no less than the "project" of modernity: a project of liberation, of emancipation, from certain conditions of bondage, primarily psychological and derivatively material and social (at least in Nietzsche and Freud) that is reinforced by a legitimizing language (law) and of which, through the use of a new critical metaphysics, we are offered separate — and limited — kinds of emancipation.[44] That modality is shared in turn by postmodern thought, with the addition that while modern critique looked to feudalism and early modernity as the sources and cases of bondage, postmodern critique looks for those created or reinforced by modernity itself. In this important sense modernism and postmodernism share a similar ethos even as each responds and invokes a different pathos. The three thinkers cursorily discussed here sowed the seeds for modernity's introspection: Marxian thought — an epitome of modernity — begot such movements as critical theory, several forms of feminism, deconstruction, and critical legal studies as much as those owe to Deleuze, Foucault, McKinnon, and Derrida; while Freud and Nietzsche have been appropriated by critique to such an extent that their constitutive membership in modernity is often overlooked.

Hence these three constitutive cases present the basic problem of modernism — to use the Rousseauistic language — in terms of chains, bonds, or similar metaphors.[45] All three offer complex (and mutually exclusive) conceptions of liberation and authenticity, which they attempt to support with the distinct manner in which these are attainable, even as they diverge on essential questions of human agency and subjectivity, as well as on the metaphysics that push their respective critiques (for an obvious divergence, Marx deals with a universal class that will ultimately embrace all persons, while Nietzsche is interested in few singular individuals whose emergence is the goal of culture).[46]

Thus Marx works his way through dialectic materialism to present the fault of alienation and exploitation (technical, not moral terms) of the proletariat in capitalist society, and further investigates how the superstructure is perpetually reconstructed and reinforced by culture and a legitimizing language for the relations of production. The most visible manifestations of this ideology, whose chief function is to obscure the relations of production and class struggle, are law and religion. Law is thus the

superstructure's guardian, an inherently political social structure of power. Advanced Marxian theory analyzes law as bourgeois not merely in its content, but — and this is what makes "revolutionary" a radical concept — in its forms, as argued by Evgeny Pashukanis.[47] In the dictatorship of the proletariat, not just the content of law but most of its forms will undergo transfiguration and eventually disappear — contract, property (and thus inheritance), family, tort, tax. Perhaps even what Weber and Habermas characterized as the very category of legality will cease to function as a socially legitimizing language, once the substructure no longer requires it. The critique of law is emancipating: it helps reveal the true nature of the relations of production and act on that realization.

Nietzsche probably never gave Marx a serious reading, yet it could be argued that there is a similar structure here. Morality — both in its psychological and social-institutional forms such as religion and law — provides a legitimizing language for *ressentiment* (and also for its nasty cousin, bad conscience) and veils the true, and ultimately innocent nature of power and of existence. Nietzschean genealogy, through which social phenomena are critiqued because of their perverse origins and fabrications, is a mode of emancipation on two of the levels that interested Marx: knowledge and action. Yet if in Marx emancipation is ultimately social and political (although it is psychological, too), in Nietzsche only the individual matters, once he overcomes the shadows of the dead God and comes into his own power. Anything collective belongs to the herd: we encounter Nietzsche as an antipolitical thinker rather than an apolitical one (although he is, to an extent, both; this important interpretative point is dealt with in the conclusion, below).

Here, then, are the familiar metaphysical frameworks: dialectic materialism, will to power, Oedipus and the unconscious. Here are their respective states of bondage: the relations of production in bourgeois and capitalist societies; morality, cowardice, and the shadows of the dead God; neurosis, psychosis, complexes. The respective legitimizing languages that allow and reinforce the bonds are the languages of the superstructure, law and religion; morality (and religion); social institutions, shame, and conventions that inhibit, twist and otherwise distort sexual development (including, again, religion). And finally, the respective liberating process, the new languages leading to emancipation (each case in its idiosyncratic, and partial sense), are revolution, genealogy, psychoanalysis. All three structures are widely disparate. As metaphysical approaches they are mutually untranslatable, and they rely on and are constituted by different linguistic apparati, metaphors, and imagery. Marx's sphere is the social, while Nietzsche held only contempt toward political movements, liberating

and otherwise (nationalism, utilitarianism, socialism, anti-Semitism), and Freud unlocks key relations between society, culture, and the construction of the self. The list of idiosyncrasies may be further enumerated. And yet the three cases express a similar basic *grammar* — to repeat, an ethos, if not quite a pathos — of bondage and liberation/authenticity. This grammar supplies them with a direction, is a constitutive part of their meaning, and despite the significant idiosyncrasies makes them members of the same community or "project." Although the unifying principle is formal, there is one concept that is relevant — indeed, focal — to all three cases, even when there are necessary discrepancies concerning what it means and entails: namely, authenticity. I would not go so far as to claim that there is a shared syntagmatic level (the differences being, as it were, on a paradigmatic level),[48] yet that is the direction the argument takes.

If Marx considered knowledge, or consciousness, to be shaped by action (i.e., the relations of production), in Nietzsche the case is more complex. As a critique of culture, Nietzschean philosophy offers genealogy as a powerful tool for existential (not social) liberation, the "first step toward free spiritness." In that sense Zarathustra can act as a secular priest. Not so, however, in his more ambitious task, when he proclaims "I teach you the overman."[49] For the overman cannot be taught; the psychological revolution that overcomes mere *Homo sapiens* cannot be done through that limited creature's consciousness. That and conscious knowledge — knowledge that mistakes its representations for truths about the world — belong to decadence, cowardice, and slave morality, as opposed to the freedom of instinct. Thus, while traditional as well as modern science is about *representations* — grasped and arranged according to cognitive patterns — the formation of knowledge in Nietzsche (a typical performance of the will to power) is as radical as anything, and lies at the heart of his "gay science" of perpetual becoming. Yet neither Nietzsche nor Zarathustra — with all their phraseology of legislators, teachers, preachers — ever quite tell us how the overman is to be begotten: unlike in Marx's revolution and in Freud's psychoanalysis, we have no clear notion of how the bridge to the overman is to be constructed or crossed. Nevertheless, for the Person of Power to become a free spirit, whether a full-fledged *Übermensch* or not — or not yet — he requires genealogy to emancipate his psyche from *ressentiment* and its manifestations: morality, religion, cowardice, and science in its reactive forms, especially representational science regarding linguistically formable "truths" about the world.

Indubitably, there are grounds to object to this unifying perspective. These may be partially satisfied by further refinements. While starting from imagery, metaphor and language, this analysis also partially glosses

over them. The notion that language reveals some logical deep structure is one of the things that Nietzsche, for one, sought to refute. The main defense I can offer is twofold: first, my observation is not reductionist; there is no vocabulary into which the different cases are translatable. Idiosyncrasies prevail. The second is that I do not argue that anything is *like* anything else: I point out to what constitutes membership in the project of modernity and how it is cast in different and incompatible languages. This is significant once we realize not only modernity's complex, fragmented, incomplete project, but also its relation to law. For law is modernity's premier vehicle: at no other time prior to the legitimizing invention of the notion of procedural justice was law so much the language of social relations.

Law is not merely discourse but a framework for action, and the rationalizing relations between science — gay or otherwise — and action require closer attention. Both the Nietzschean and Marxist positions are framed, to a significant extent, by their accounts of the relationship between action and knowledge: Marx framed those through dialectic materialism, and Nietzsche through gay science. Gay science is not reactive and not merely "about": even if described in terms of knowledge, it is knowledge formed by the will according to its own goals and purposes.[50] Knowledge is a transient premise and a mean for the will's action, and as such a product of the will. Cognitive categories, the modes in which the world is perceived, according to Nietzsche, are not derived from the world nor from reason, but from the will to power: hence they are not necessary, nor are they representations in any traditional sense (they are action), and up for the will to form rather than fool itself into notions of "discovery." Gay-scientific activity is acknowledged creation.[51]

Marx, initially, considered knowledge a derivative of action, not a condition for it: revolution will occur spontaneously, or almost so, in scientifically predictable ways given to historicist inquiry. The proletariat is the "philosophical class" not through its awareness but through praxis, as an embodiment of action. The most difficult counterexample to this principle is Marx's own teachings and their role in shaping historical action, an irony dealt with in later writings (as well in the establishment of the International), which Lenin further developed and used in the principle of the avant-garde and the party.[52] The analogous problem in Nietzsche sometimes creates the notion that the overman should be understood as a regulative ideal rather than an attainable goal: for in fact, with all of Zarathustra's bravado, his promise "I teach you the overman"[53] is not merely left unfulfilled (for to "teach" means "to create" or even "to tempt" rather than "to represent," as we saw above in the discussion of Nietzsche's

philosophy of education), but it is not clear that either Zarathustra or Nietzsche know how to go about fulfilling it.[54] Nevertheless, both Marx and Nietzsche show us, to employ the Rousseauian terminology, our chains; both generate a language to talk about them that is both revolutionary (social revolution versus the reevaluation of all values) and metaphysical (materialism versus the will to power), and both take on Hegel, even when Nietzsche thought he was arguing mostly against the progenitors of decadence both ancient and modern, Socrates and "Old Kant."

Like Nietzsche, Freud considers consciousness the territory of the ego effected by external influences, although Nietzsche's concern is more the superiority of instinct and the emancipated will.[55] Like Marx and Nietzsche, Freud offers action — psychoanalysis — to emancipate from the crippling bondage of neurosis. In one sense, the scope of Freud's project is more limited. In his clinical activity he is concerned with fixing some of the discontents of bourgeois society,[56] not — like Marx — to destroy it, or — like Nietzsche — to transform and elevate, not society but persons (how this "smells of dialectics"!).[57] Yet next to Freud the medical doctor there is the critic of culture, the analyzer of collective myopia through myth, religion, and other cultural diseases. While Nietzsche's radicalism is surely more pronounced, Freud's metaphysics of the subconscious brought Oedipus (and its descendents) to the forefront of critical thought much more than Zarathustra ever brought the overman. Yet for all of its originality in matters psychological, Freud's work shares with Nietzsche the derivative structure of the social and the political, expounded in the conclusion, below. Like Marx and Nietzsche, he offers a metaphysical vocabulary and a menacing truth hidden under layers of defense mechanisms. *Ressentiment* weakens us and masks the threatening, chaotic nature of reality through science and religion, somewhat like Freudian defense mechanisms and the syndromes they generate hide Oedipus. This framework may be gingerly cast in social and even institutional contexts, as do Lacan and the jurist Clinton Francis in his work on "property as neurosis."[58] And both Nietzsche and Freud offered what they insisted upon terming "science" (is there a language more modern than that?) to overcome the pits into which their "patients" fall: gay science and psychoanalysis, leading to a postrevolutionary stage on their separate terms. In their critical, sober versions, none of these promises redemption. They have not incorporated into modernity that theological temptation. For Freud, law — represented by its agent, the superego — is reinstated and internalized; but law and other social institutions become, in turn, patients themselves — candidates for a risky subversive psychoanalytic critique. For Marx, revolution eventually leads to the abolition of law and the

state. As for Nietzsche, whatever his philosophy has to tell us about law must be read in his general philosophy's critical, even spiritual, space. As such it is an urgent, emancipating challenge, a matter not of politics or of the state in any Hegelian sense, but truly as gay science.

Before parting, this last point must be given proper attention. For there is a preliminary question overlooked until now, that must be dealt with for any discussion of Nietzschean jurisprudence to be possible: namely, how is Nietzschean normativity possible at all? Given the powerful arguments that politics, law, and collective action are simply not the case for Nietzschean philosophy, we should conclude with addressing this objection that, left alone, threatens to undermine the entire approach.

How Is a Nietzschean Jurisprudence Possible? Two Methodological Remarks on Derivative Philosophy

How far-fetched is the idea of a Nietzschean jurisprudence — or a political or social philosophy — to begin with? Several commentators, most recently Martha Nussbaum,[59] consider such exegesis sham. Their argument rests to a large degree on the relative absence of the constitutive elements of legal and political thought from the Nietzschean textual corpus. Indeed, Nietzsche devoted very limited work to law. Reviving the Hellenic question of, "What is the good life, and how should everything else be structured to support it?" his project was about the reevaluation of all values. It is the worthy individual that matters, not society, and law is inherently social. The higher person, the Person of Power, will be able to accept and face the chaotic nature of the cosmos, carving cognitive models for categorizing and manipulating it according to her will and benefit; but she will never mistake them for saying something true in any metaphysical sense about the world, nor enslave herself to language. Nor will she mistake law's instrumental use of a legitimizing language to represent some transcendent, or transcendental truths about justice. Barring morality, Nietzsche's analysis of the public sphere was rarely of institutions, and he frequently held collective action — including at times language itself — in little else than contempt.[60] Barring a few observations,[61] the only systematic treatment of law — in the second article of the *Genealogy of Morals* — is offered more by way of a proto-genealogy than an application of genealogy to law as a social institution or a rationality-claiming principle of order.[62]

Nussbaum's claim goes further, enumerating the traditional and modern questions that political philosophy usually deals with — procedural justification, liberty, diversity, justice, and so on — then proceeding to catalog the topics of Nietzsche's writings. She concludes that on the matter of

politics (and hence on law) Nietzsche was intellectually sterile. While the list is not arbitrary, I think that the test Nussbaum applies may be objected to on two accounts. The first is that there is a difference between an apolitical thinker and an antipolitical one and Nietzsche, who dreamt of "great politics" and was vehemently opposed to anti-Semitism and to German nationalism, was more the latter (Nussbaum reads him inversely: a grumpy antipolitical person writing an apolitical philosophy). The second is that if Nietzsche did not tackle law and politics as he did moral psychology, language, metaphysics, and culture, this was more by way of inclination and taste than a tenet of philosophical program. Granted — and it is imperative to keep this in mind — any Nietzschean discussion of politics must be a derivative of his monistic metaphysics of the will to power. This is what metaphysical monism entails: that the explanatory apparatus of everything that is the case be grounded in the monistic principle. The question of what use a monist has for normativity in any sense other than simple instrumentality troubles other monistic schools of thought, such as utilitarianism (consider the problems that "rule-utilitarianism" runs into) or material dialectics. Nussbaum argues that, for Nietzsche, politics and law simply are not the case. But the fact that there is little treatment of these topics in his writings is a weak indication, overruled by the monist presumption. How can the main principle by which societies regulate collective action and the individual's relation to others and to the collective not be entailed by moral psychology? Nietzsche wrote untimely meditations, not a gospel that excludes apocrypha.

And yet, the point can be overstressed. As Nussbaum shows, the treatment of law and suchlike institutions is certainly not a core problem for Nietzsche. Unlike his apolitical tastes, Nietzsche's antipolitical inclinations indeed stem from his philosophy — which was not initially designed for the treatment of public affairs. And yet it treats those without fail: culture and morality, history, language, religion and science, among others. Moreover, more than any thinker before him, Nietzsche contributes to the blurring of the lines between the private and the public. Law cannot help but fall under this new, radical shift. The comparison to Marx and Freud, offered above, as well as to other constituent cases of modernity/postmodernity, offers a broader framework in support of this claim.

And so: the death of law? Nietzsche had little use for law in any traditional, or modern, and at any account *ressentiment*-begotten, pre-reevaluation sense. And yet a Nietzschean kind of normativity, along the lines suggested above, justifies a recreation and recasting of legality in post-*ressentiment* terms. As long as we reconceptualize and reshape normativity in Nietzschean terms — gay science as law — law should not be thought of as

merely an aspect or a shadow of the dead God, as in Girard's parable.[63] Granted, it is law that looks very different from anything we know, designed to further *amor fati* rather than curtail fate and arbitrariness, and challenge us rather than soothe, pacify, and ultimately rule us.

> Others say, others say
> Law is no more,
> Law has gone away.[64]

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Notes

1. René Girard, "Le Surhomme dans le Souterrain: Les Strategies de la Folie: Nietzsche, Wagner et Dostoievski," *Sprit* 212 (1995)5–28.
2. See Friedrich Nietzsche, *The Gay Science*, (Walter Kaufmann trans., 1974), book 3, para. 125. References to Nietzsche's works follow the standard citation to aphorism or paragraph number, not to page number.
3. Friedrich Nietzsche, *Ecce Homo, Why I Am a Destiny*, para. 1, in *Basic Writings of Nietzsche* (Walter Kaufmann, ed. and trans., 1968). Unsurprisingly, impending explosion was Nietzsche's favorite metaphor for genius in general, as well as for himself. See, e.g.:

   > *My conception of genius* — Great men, like great epochs, are explosive material in whom a tremendous energy has been accumulated; their prerequisite has always been, historically and physiologically, that a protracted assembling, accumulating, economizing and preserving has preceded them — that there has been no explosion for a long time. If the tension in the mass has grown too great the merest accidental stimulus suffices to call the "genius", the "deed", the great destiny, into the world. Of what account then are circumstances, the epoch, the Zeitgeist, public opinion!

   Friedrich Nietzsche, "Skirmishes of an Untimely Man," para. 44, in *Twilight of the Idols and The Antichrist* (R. J. Hollingdale, trans., 1968).
4. Nietzsche, *Genealogy of Morals*, 2nd essay, para. 16.
5. Support for almost any interpretative claim may be found in Nietzsche's scattered writings, including, even, distinctly political and even egalitarian principles for the distribution of burdens. Under the heading "My Utopia" we find a distinctly Nietzschean turn on the concept of marginal utility, where law-as-economics meets Oscar Wilde: Nietzsche metes out burdens to those "who suffer least from them; hence, to the most obtuse, and then, step by step, up to those who are most sensitive to the highest and most sublimated kinds of suffering and who thus still suffer when life is made easiest." Friedrich Nietzsche, "Human, All Too Human," para. 462, in *The Portable Nietzsche* (Walter Kaufmann ed. and trans., 1968).
6. See "Why I Am a Destiny," para. 1, in Nietzsche, *Ecce Homo.*
7. The notion of *Übermensch* — the "overman" in Kaufmannese — is so far-reaching that Nietzsche is frequently content to apply much of his discussions and parables to "relatively superhuman type[s]," see "Why I Am a Destiny," para. 5 in Ecce Homo; or "Forefathers and Creators of the Overman." See Friedrich Nietzsche, "The Blissful Isles," para. 110, in *Thus Spoke Zarathustra* (Walter Kaufmann trans., 1978).
8. Friedrich Nietzsche, *Beyond Good and Evil,* para. 211 (Walter Kaufmann trans., 1989).

9. This is the initial sense of "rationalization," before it acquired its Freudian pejorative sense.
10. By analogy to bourgeois society, we may think of a psychoanalysis that would seek to free the subjects from neurosis and allow them to face and accept Oedipus. For discussion see section 4 below.
11. See "The Stillest Hour," para. 44, in *Zarathustra.*
12. The question of self-overcoming, too, must stem from the interpretation of the will to power expounded above. Nevertheless, as the Nietzschean notion of self-overcoming must be studied against a critical backdrop of classical ethics, Christianity, and psychoanalysis, it is quite beyond the scope of this work.
13. Jorge Luis Borges, "The Lottery in Babylon," *Prairie Schooner* (John M. Fein trans., Fall, 1959), reprinted in *Labyrinths: Selected Stories and Other Writings* (Donald A. Yates and James E. Irby, eds., 1962), 30 (emphasis added).
14. See Wolfgang Friedman, *Law in a Changing Society* (abridged ed., 1964), 90–91.
15. For the conceptual language that underlies most of the theoretical discourse of the relations between efficiency and other social norms or objectives see Guido Calabresi and A. Douglas Melamed, Property Rules, *Liability Rules, and Inalienability: One View of the Cathedral*, *Harv. L. Rev.* 85 (1972):1089. See also Ian Macneil, "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich' Classificatory Apparatus," *Nw. L. Rev.* 75 (1981):1018; Macneil, "Relational Contract as Sociology: A Reply to Professors Lindberg and de Vos," *Zeitschrift für die gesamte Staatswissenschaft (Journal of Institutional and Theoretical Economics)* 143 (1987):272–290 (reviving Durkheim's vision of a "unified" social science of "exchange in the context of relations"); Hanoch Dagan, *Unjust Enrichment* (1997) (relating efficiency arguments to social value-preferences).
16. Nietzsche does not believe in any inherent purpose to law, and warns that all action is constantly reinterpreted to new ends, taken over, transformed, and redirected by some power. See *Genealogy of Morals*, 2nd essay, para. 12. Nevertheless, Nietzsche's background suggests that in dealing with law generically, the version he assumes is a bourgeois reading of law, which is the way law has been redirected, recast, and reinterpreted in the culture from which the particular interpreter (Nietzsche himself) speaks.
17. See John Rawls, *A Theory of Justice* (1971), 136–150.
18. The usage of a feminine gender-specific here seems to require some explanation: it has generated comments and criticism in a previous version. The matter is simple, really: while Nietzsche himself wrote of *Übermensch* — overman in the most excellent Kaufmannese — there is nothing in the logic of his arguments themselves that justifies that specification. That Nietzsche occasionally expressed disgraceful and even misogynic attitudes toward women is reprehensible, but has nothing to do with his philosophy. Nevertheless, ascribing to him — as opposed to his philosophy — gender-neutrality, would be a mistake. It would not be a mistake to ascribe it to me. Therefore I use alternating feminine and masculine gender-specific terms whenever describing situations in my own voice and making my own arguments, but not when describing or discussing Nietzsche's positions.
19. Law itself may change with every drawing of the lottery: from a dictatorship of the proletariat to Plato's meritocratic Republic, from Thomas More's *Utopia* to Kropotkin's decentralized communes and syndicates; from clericalism to plutocracy to anarchy. These are secondary, or meta-changes, where the change affects not merely a person's status within a normative system but the system.
20. Gilles Deleuze, *Nietzsche and Philosophy* (Hugh Tomlinson trans., 1983). The quote is from Friedrich Nietzsche, *La Volonté de Puissance* [*The Will to Power*](Henri Albert trans., 1941). This is a French selection from the *Nachlass* — Nietzsche's unpublished fragments — that is not identical with the edition that was published in English as *The Will To Power* (Walter Kaufmann and R. J. Hollingdale trans., 1987).
21. Deleuze, *Nietzsche and Philosophy*, 25.
22. At times, Deleuze's prose rivals Nietzsche's own: "*La volonté de puissance comme principe ne supprime pas le hasard, mais l'implique au contraire, parce qu'elle n'aurait sans lui ni plasticité, ni metamorphose*." Gilles Deleuze, *Nietzsche et la Philosophie* (Deuxième ed., 1967), 59 (trans. by author).
23. "On the Higher Man," para. 14, in *Zarathustra*.
24. Deleuze, *Nietzsche and Philosophy*, 81.
25. Ibid., 81–82.

26. Ibid., 82 (translation by the author).
27. Nietzsche, *The Will to Power*, para. 657.
28. More than anything else, I think this distinction explains Nietzsche's necessary rejection of the Darwinian model of evolution, which he regards as wholly reactive, even if some sections feign evolutionary explanations. See *Gay Science*, para. 110.
29. "Why I Am So Wise," para. 7, in *Ecce Homo* (emphases added).
30. Ibid.
31. Ibid. Note however that Nietzsche "never attack[s] a person; only the person as … a strong magnifying glass with which one can render visible a general but creeping calamity" (such as Wagner's "falsity, the half wittedness of instinct in our 'culture,' which mistakes the subtle for the abundant. …" Ibid.).
32. For a short elaboration on the relation between will and power, see supra Part 3.
33. See Nietzsche's series of lectures, *Über die Zukunft Unserer Bildungsanstalten* [*On the Future of our Educational Institutions*], in 2, 3 *Nietzsche Werke: Kritische Gesamtausgabe* (Giorgio Colli and Mazzino Montinari eds., 1973) (note that "*Bildung*" means "education" as much as it means "formation"); also Friedrich Nietzsche, *Schopenhauer as Educator* (James W. Hillesheim and Malcolm R. Simpson trans., 1965). For various perspectives on Nietzsche's writings on education see *Nietzsche's Legacy for Education: Past and Present Values* (Michael Peters, James Marshall, and Paul Smeyers eds., 2001). I am not aware of an English language collection, but a useful collection in Hebrew is Friedrich Nietzsche, *Masot al hinukh le-tarbut* [*Essays on Education*] (Jacob Golomb ed. and trans., 1988), which also includes the editor's introduction.
34. Francis Bacon, *Novum Organum* (Joseph Devey ed., P. F. Collier & Son, 1902 [1620]), 31.
35. Nietzsche, *Will to Power*, para. 888.
36. *Schopenhauer as Educator*, supra note 46, p. 6.
37. Ibid., para. 980.
38. Franz Kafka, *The Trial* (Breon Mitchell trans, 1999 [1925]).
39. See Plato, *The Republic* (H. D. P. Lee, trans., 1955), book 7.
40. See Jonathan Yovel, "In the Beginning was the Word: Paradigms of Language and Normativity in Law, Philosophy, and Theology," *Mountbatten J. Legal Stud.* 5, 1 (Dec. 2001):5.
41. See "Zarathustra's Prologue," para. 6 in *Zarathustra*.
42. This assumes that the novel has a conclusion. One of the chief interpretative questions regarding *The Trial* is: why don't Joseph K's tribulations go on forever, why must he be physically destroyed when the book ends? To recall, Kafka never finished his work on *The Trial*, and available editions, edited by either Max Brod or subsequent editors, chose what materials to include in the narrative, from the available ones in Kafka's estate, according to various criteria (Brod, for instance, included only whole chapters, except for the unfinished — and crucial — chapter 8. Likewise, there are some variances in the order of chapters and episodes). I think this point is, on the whole, ineffective: there is a novel called *The Trial*, or at least a few versions of it whose respective differences make little or no difference for the attractiveness of my Nietzschean interpretation of the novel. A more complete interpretation, developing from the above argument, must await its own opportunity.
43. Yukio Mishima, *Sun and Steel* (John Bester trans., 1970), 65.
44. "Emancipation" and "liberation" are used here interchangeably, in their most technical senses, detached from the laden senses they hold in standard historiography of modernity.
45. Curiously and tellingly, this loose family of metaphors of bondage that originates with Plato and emerges in Rousseau, Kant, Marx and Engles — chains, bonds, confinement, prison — preponderated into the paradigmatic language of postmodernism, as well. See, e.g., Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1975).
46. In the following, discussion of Freud refers, inter alia, to Sigmund Freud, *The Ego and the Id* (Joan Riviere trans., 1990 [1923]); *A General Introduction to Psychoanalysis* (G. Stanley Hall trans., 1920), *New Introductory Lectures on Psycho-Analysis* (W. J. H. Sprott trans., 1933); and that of Marxist thought may be referred to Karl Mark and Friedrich Engles, *The German Ideology* (1998 [1846]), as well as Pashukanis, supra note 4.
47. See Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (Chris Arthur ed., Barbara Einhorn trans., 1978). Legal concepts, according to Pashukanis, validly express the economic relations of the substructure; their demise is therefore contingent on revolutionary — i.e., material — changes in the latter. No real change is possible on the ideological (and

linguistic) level alone — so much for the "politically correct" extrapolations of the Sapir-Whorf hypothesis. Law will eventually die out with the state, but until it does it will remain mostly bourgeois, even in socialist regimes. See Pashukanis, supra note 4 (the basis for this materialist analysis is in chapter 2 of Karl Marx, *Capital*, vol. 1 [1867]). This of course in stark contrast to Stalinist jurisprudence that insisted on socialist law being something totally different than bourgeois law ever since the revolution "inflicted a death blow to bourgeois law," and Pashukanis was accordingly liquidated in 1937. See *Soviet Legal Philosophy* (John N. Hazard ed., Hugh W. Babb trans., 1951), 287. The question is of supreme significance for socialist jurisprudence and its conception of the state, and especially for the Trotskyite notion of perpetual revolution.

48. On the application of the concepts of syntagmatic (semio-narrative) and paradigmatic (discursive) levels to modalities of legal discourse and practical reasoning see Jonathan Yovel, "Analogical Reasoning as Translation: The Pragmatics of Transitivity," *Int'l J. for the Semiotics of Law* 13 (2000):1. For a full account see Algirdas J. Greimas, *The Social Sciences: A Semiotic View* (1990), published also as *Narrative Semiotics and Cognitive Discourse* (1990). Note that I do not make here a different "Greimasian" claim, namely, talking of the modality of bondage-critique/praxis-emancipation as a "deep structure" of modernity, as opposed to its communicative "level of manifestation." See id.
49. "Zarathustra's Prologue," in *Zarathustra*, para. 3.
50. On the complexity of "aboutness" relations in legal theory, see Jonathan Yovel, "What Is Contract Law 'About'?: Speech Act Theory and a Critique of 'Skeletal Promises'" *Nw. U. L. Rev.* 94 (2000):937 (explaining that once X is cast or conceived as being "about" Y, the respective meanings of X and of Y — what each truly entails — are shaped by the "aboutness" relation and are not identical to their pre-"aboutness" meanings); see also James Boyd White, *Justice as Translation: an Essay in cultural and Legal Criticism* (1990).
51. See Nietzsche, *Gay Science*, paras. 110, 111.
52. Vladimir Ilich Lenin, *State and Revolution* (1978 [1918]).
53. "Zarathustra's Prologue," in *Zarathustra*, para. 3 passim.
54. For the uses of temptation and rhetoric in Zarathustra's quest, see Jacob Golomb, *Nietzsche's Enticing Psychology of Power* (1989).
55. See Nietzsche, *The Will to Power*, 524; Nietzsche, *Gay Science*, 357.
56. This does not mean that the basic tension between egotistical psychology and culture — the producer of guilt — is "fixable."
57. See "The Improvers of Mankind," para. 3 in Nietzsche, *Twilight of the Idols*.
58. Clinton Francis, "Power-Optics: A Genealogical Method For the Study of Debtor-Creditor Law in Eighteenth- and Nineteenth-Century England," in manuscript, on file with the author.
59. See Martha Nussbaum, "Is Nietzsche a Political Thinker?" *Int'l J. Phil. Stud.* 5(1) (March 1997):1.
60. In this I implicitly reject a prevalent view according to which language is an institution, on the ground, inter alia, that it requires us to broaden the sense of the term to include every social phenomenon or convention, upon which it becomes unhelpful. On this question see Jürgen Habermas, *Erkenntnis und Interesse* [*Knowledge and the Human Interest*] (1968); John Searle, *The Construction of Social Reality* (1995).
61. Notably in Nietzsche, *Human, All To Human*, (R. J. Hollingdale trans., 1996 [1886]), para. 459. A few other scattered discussions and metaphors are discussed below.
62. See Nietzsche, *Genealogy of Morals*, 2nd essay, para. 5–12.
63. See Girard, supra note 5.
64. Auden, supra note 53, at 90.

CHAPTER 2

From a Biopolitical Point of View: Nietzsche's Philosophy of Crime

FRIEDRICH BALKE

Although Michel Foucault's reading of Nietzsche is involved in the reasoning of this essay, I will not be dealing with the topics most philosophers focus their attention on when they praise or severely criticize Foucault's so-called Nietzscheanism. As a matter of fact, Foucault made a rather scholarly use of Nietzsche. By "scholarly" I mean that he did not celebrate *à la française* the famous will to power as the principle of a heroic vitalism like so many of Nietzsche's enthusiastic readers throughout the last century. What really interested Foucault was the less apparent aspect of this famous "principle of a new evaluation" as Nietzsche himself conceived of the will to power. Foucault did not seek this principle in the mountainous regions where Zarathustra and his author preferred to live; instead he searched for it in those environments of enclosure where the air is impure and almost no sunshine penetrates. As we all know, around 1800 the prison was starting to become the preeminent instance, the model and ideal, of all the enclosed environments used by the so-called disciplinary societies to organize their (vital) forces.

All his assertions to the contrary cannot obscure from the reader that in the case of the criminal, Nietzsche, in both his affects and his thoughts, moves again and again into a zone of indifference, which at the same time is a zone of the utmost difference. In his writings Nietzsche takes both the

position of the highest and, we have to add, the healthiest and the position of the lowest and most underprivileged, alternating abruptly and in an unusual way between the two. Nietzsche dismisses the crime but not the criminal. Although the criminal is without an essence and all the moral ways of suppressing him are of course forbidden for a free spirit and immoralist, Nietzsche substitutes for this lack of essence what we may describe as an empirical knowledge of the criminal, which shares common ground, as we shall see, with all the philosophies in the age of human sciences. Despite his lack of essence, the figure of the criminal can well be the subject of a philosophical form of inquiry. We can follow the example of Jacques Derrida, who in his *Spurs* attempted to collect the "large number of propositions which treat of the woman" in Nietzsche's philosophy — statements that encompass a whole range of stylistically different modes of expression — and try to collect and analyze Nietzsche's various propositions about the criminal and what he perceives to be criminal behavior. In this way we can resume the variety of references "in a finite number of typical and matrical propositions"[1] and at the same time seek the internal logic of the theses we derive from Nietzsche's texts, a logic that, I believe, can best be described as *biopolitical*.

In his writings on the modern will to knowledge, Michel Foucault characterizes the biopolitical discourse as one of the most decisive turning points in the history of "western man." "For the first time in history, no doubt," Foucault writes, "biological existence was reflected in political existence; the fact of living was no longer an inaccessible substrate that only emerged from time, amid the randomness of death and fatality." What Nietzsche conceived as "great politics" and "great health" are obviously affected by the crossing of the "biological threshold of modernity." "Modern man is," as Foucault argues in an allusion to Aristotle's famous definition, "an animal whose politics places his existence as a living being in question."[2] Nietzsche is undoubtedly the philosopher of this modern man and his politics insofar as he no longer grafts as was done throughout the philosophical tradition of premodern Europe the good life (*bios*) onto mere physical existence (*zoe*) (what Foucault calls "substrate"), but conceptualizes the content of good life as the result of processes that continuously intervene into the "bare life" (*zoe*) and give it form. The categories Nietzsche uses to determine the nature of these life-forming processes constantly shift between the semantics of cultivating and the semantics of breeding.

The provocation of biopolitics for any kind of legal theory has been clearly stated by Foucault, who points out that biopolitics "would no longer be dealing simply with legal subjects, over whom the ultimate

dominion was death [by the sovereign state-power], but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself."[3] Following this line of reasoning, Foucault makes an interesting statement that is more or less addressed to lawyers and reproaches them for living in a certain state of self-deception with respect to the role of law under the biopolitical conditions of modern societies. I have to add that the statement is provocative not only for professional lawyers but also for the general observer of modern societies, who witnesses steadily increasing juridical prescription at every level of modern life. Foucault writes: "We have entered a phase of juridical regression in comparison with the pre-seventeenth-century societies we are acquainted with; we should not be deceived by all the Constitutions framed throughout the world since the French Revolution, the Codes written and revised, a whole continual and clamorous legislative activity: these were the forms that made an essentially normalizing power acceptable."[4]

I would like to point out that the discrepancy between law and norm, or between law and normalizing processes, which Foucault emphasizes, is also discernible in the "great politics" envisaged by Nietzsche in his late works. This "great politics"[5] requires a type of philosopher who acts as a "legislator." In the late texts and notes published after his death — in *Ecce homo* as well as in the so-called *Will of Power* compilation of *Studies and Fragments* — Nietzsche refers repeatedly to the philosopher as the "legislator of the future." "For us the philosopher must be a legislator. New types."[6] These statements are quite obviously in contrast to the view of Nietzsche and his relation to legal theory that, for example, Edgar Bodenheimer propagates when he openly accuses Nietzsche of "legal nihilism": "The outstanding characteristic of this phenomenon is an erosion of the belief in law as a beneficial institution of societal organization."[7] This thesis completely ignores the *new role* played by *law* in the context of what Foucault calls an "essentially normalizing power." Professor Bodenheimer misinterprets the new function that law acquires in the process of establishing this normalizing power as a complete loss of law. A careful reading of Foucault allows us to correct this perspective. In reality we live in a society in which the power of law is not simply diminishing but is being integrated into the mechanism of differently functioning power processes. Foucault classifies these new power processes under the term *norm* (as opposed to *law*).

Nietzsche was very aware that the role of legislation had completely changed when he described the new philosophical legislator a "legislator of evaluations,"[8] and not simply of laws! *Evaluations* (*Wertschätzungen*) indicate the presence of what Foucault calls an "essentially normalizing power," which is the prerequisite for our societies' acceptance of the "clamorous legislative

activity" of our political institutions. In Foucault's analysis normalizing power operates in a comparative field — a space of high inner differentiation whose borders are flexible and shifting. The social "value" of human beings is therefore not permanently fixed by unchangeable, eternal laws defining justice, but constantly redefined as a result of normalizing, of their readjusting themselves to statistically obtained average norms. The zone of normalcy is produced by a "value-giving measure,"[9] as Foucault refers to it. Nietzsche's high regard for the creation of *distance* — in every respect — is a reflection of the problem that modern "egalitarian" societies produce differences that are no longer simply guaranteed by the cosmological or ontological order of things. As the difference to all the differences — within the zone of normalcy — a boundary is drawn against the abnormal — the paradoxical status of this class of the *abnormal* results from the fact that on the one hand it is part of the normalcy zone, but on the other hand its "elements" have to be vigorously expelled from this zone. The zone of normalcy is in a permanent state of pushing its boundary away and approaching it; it oscillates equally, so to speak, between the spontaneous tendency toward the largest possible expansion of the spectrum of normalcy and the certainty that a boundary has to be drawn "somewhere."

While "petty politics," as Nietzsche refers to it, has the task of organizing and regulating the field of normalcy internally, "great politics," which he discusses under the topics of "discipline and breeding" ("*Zucht und Züchtung*"), begins at the frontiers of this field. "Great politics" defines its relation toward the abnormal, and that is why the criminal becomes an object of Nietzschean reflection. The ambivalence that Nietzsche feels toward the wide range of abnormal phenomena that are only relatively, comparatively separated from normal phenomena is embodied in a certain sense, as we shall see, in his view of the figure of the criminal. Criminals are the abnormals par excellence because they are objects of great fear and great admiration simultaneously. The former evil turning out to be the abnormal has a right to flowers, as we can learn from Baudelaire. When the normal and the abnormal, the healthy and the pathological, are substituted for the former "ethically" based difference of good and evil, permitted and forbidden, a new politics of exclusion is required — one that no longer simply rejects all abnormal phenomena but judges them according to how they contribute to the improvement, or better, the enhancement of the productive forces or the complexity of modern society. "Great politics" as conceived by Nietzsche is essentially *politics of selection* (*Auslese*) that systematically shifts between the poles of screening (*Aussieben*) and extinguishing:[10] a selection of positively evaluated abnormalities over those that are negatively

evaluated. The "question of [the relative] rank,"[11] that Nietzsche discusses again and again in his late writings can no longer be answered with reference to nobility or the upper classes but only by the social technique of judging individuals according to their faculties and expected development (covering chances and risks) on a scale of "degrees of normalcy" (Foucault). The basic permeability of the boundary between the normal and the abnormal, the continuity between these two states which are only relatively different, has to be considered the fundamental prerequisite in the history of knowledge and power for what Nietzsche envisioned with his concepts of "great politics" and the "legislative philosopher," that is, the *evaluating philosopher*.

So, what statements does Nietzsche make about the criminal? What styles does he bring into play when writing of the criminal? Does he share with him a certain "solidarity," a certain "common sense"? And on the other hand, under what circumstances does he reject the criminal? Is it possible to define the figure of the criminal before the purpose or the various purposes of punishment are discussed, which immediately brings us to the vast field of "legal theory" and again to the historically shifting status of "the legal" and law.

1.

Nietzsche's first statement about the criminal deals with *punishment*. A criminal, though we may have completely different feelings about this morally, exists only insofar as there is a "will to punish." The will to punish is rooted in the moral will, which aims at making individuals *responsible* for their acts. Following the example of Spinoza and his complete revolution of ethical common sense, Nietzsche considered one of his main philosophical tasks to be the elaboration of "the theory of complete irresponsibility," as he refers to it in *Human, All Too Human*. He states at the beginning of aphorism 105: "The man who has fully understood the theory of complete irresponsibility can no longer include the so-called justice that punishes and rewards within the concept of justice, if that consists in giving each his due."[12] The right to punish derives from the metaphysics of free will, which Nietzsche criticizes throughout his philosophical works as one of the "four great errors."[13] According to Nietzsche, the right to punish — whatever purpose may be linked to it historically or culturally — should be considered the necessary supplement of a moral point of view that is apparently deeply rooted in everyday experience as well as in philosophical tradition — a moral view that without the support of penal measures would not have been so effective historically. If we abolished the "fable of intelligible freedom" and the moral conviction based on it, we could also

do away with the specific penal law this fable necessitates. I could stop here and finish my remarks with this purely negative result. Yet it is quite astonishing that Nietzsche, although denying the right to punish and its collateral moral theory, does not exclude the figure of the criminal from his writings. The criminal continues to play a significant role in Nietzsche's philosophy and "legal thinking."

This is evidently not one of those contradictions in Nietzsche's thought that commentators have so often observed and severely criticized. The reason for his ambivalent position toward the criminal is based much less on a philosophical than on an "empirical" observation of the attitude of society and certain experts toward criminal acts. The philosophical endeavor to reveal punishment, as Nietzsche writes in *Zarathustra*, "as what revenge calls itself: it feigns a good conscience for itself with a lie"[14] has been followed by the juridical and, as we shall see, medical experts of modern societies since 1800. These experts are confronted with a question that was also taken up by Nietzsche, who expressed it in its most laconic form when he wrote in *Beyond Good and Evil*: "Is it not sufficient if the criminal be rendered *harmless*? Why should we still punish?"[15]

2.

A certain immoralism is not a privilege of the philosophical "free spirit," but simply the expression of a tendency in the modern age that Nietzsche on the one hand, especially in his early writings, eagerly welcomes for philosophical reasons (its consequences for the metaphysics of the free will) but on the other hand considers a symptom of moral "sickliness" (as opposed to mere sickness), "decadence," "fatigue," or "weakness of the will." The criminal is absolved — at least partially — not only by the philosopher but also in a certain sense by society and by criminal justice itself, which "functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in nonjuridical [in fact "normalizing"] systems." In other words: "We punish, but this is a way of saying that we wish to obtain a cure."[16] Punishments, of course, continue to be imposed, but in actual practice the function and meaning of punishment have fundamentally changed. This is recognizable by the fact that the status of criminals is being brought closer and closer to that of the ill, or more specifically, the mentally ill or insane, and the sentence is perceived as a *therapeutic* prescription. "… within the very judicial modality of judgement, other types of assessment have slipped in, profoundly altering its rules of elaboration."[17] To judge is no longer to establish the truth of a crime but to determine the mental status and the degree of responsibility of its perpetrator.

In section 201 of *Beyond Good and Evil*, Nietzsche expresses his suspicion that the identification of crime and (mental) illness is in itself a symptom of cultural sickness. He writes: "There is a point of diseased mellowness and effiminacy in the history of society, at which society itself takes the part of him who injures it, the part of the *criminal*, and does so, in fact, seriously and honestly [that is to say, by way of elaborating scientific discourses on the anthropology of criminals]. To punish, appears to it to be somehow unfair — it is certain that the idea of "punishment" and the "obligation to punish" are then painful and alarming to people. "Is it not sufficient if the criminal be rended *harmless*? Why should we still punish? Punishment itself is terrible! — with these questions gregarious morality, the morality of fear, draws its ultimate conclusion."[18] In the passage I have just quoted, Nietzsche puts the words "criminal" and "harmless," that is, "not dangerous" ("*ungefährlich*") into italics. In doing so, he explicitly calls attention to the anthropological concept of the *potentially or virtually dangerous individual* on which the new system of penal justice is based. With the concept of dangerousness (in French: *dangerosité*) criminology no longer views the crime on the level of manifest acts that have to be punished more or less severely according to the law but from the perspective of the "risk" posed by an individual, that is, his inclination to commit a crime, which can be measured in degrees of probability. Criminal justice and its judgments seek to reconstruct a criminal act not only, or not primarily, for the purpose of punishing the perpetrator, but to gain insight into his motivation, which can no longer be attributed to his free will but has to be sought in new, deeper sociopsychological causes (such as "instinct," "unconsciousness," "environment," and "hereditary disposition").

Nietzsche's second statement regarding the criminal can therefore be reconstructed as follows: the criminal is the "dangerous individual" par excellence, and it is because of this dangerousness that the philosopher has to show great interest in him. He cannot simply reject him on moral grounds, because the philosopher himself in Nietzsche's understanding is a "preparatory human being" and therefore deeply obliged to follow the maxim "*live dangerously*" — obliged to such an extent that Nietzsche, in *Ecce homo*, finally draws the conclusion that later became famous: "I am no man, I am dynamite."[19] It is quite interesting to observe that this self-characterization was not Nietzsche's own invention but an aphoristic version of a passage from an article on *Beyond Good and Evil* published in 1886 in the Swiss journal *Bund*. Nietzsche quoted the passage at length in a letter to Malwida von Meysenbug dated September 24, 1886. The title of the article was "Nietzsche's Most Dangerous Book," and the author of the

article used the dynamite metaphor not only to express forcefully the dangerousness of Nietzsche's thinking but also to distinguish between the virtuality of his dangerous philosophy and an actual outbreak of this danger: "The spiritual dynamite like the material one," it says, "can serve a very useful purpose; it is not necessarily used for criminal purposes."[20] Thus, Nietzsche and those who wrote about his works did not take up the notion of dangerousness or risk by chance, as it was one of the key concepts to emerge in the discourses of criminal anthropology in the course of the nineteenth century.

3.

Nietzsche claims in section 202 of *The Dawn* that we stand "before the irrefutable insight" into the "physiology of the criminal" and "that there exists no essential difference between criminals and the insane" when the criminal ceases to be the enemy of society and is treated as a mental patient. If this is the case, we can no longer, as Nietzsche writes, "maintain our detestable criminal codes" and will have to replace them by appropriate measures to heal the criminal or at least render him harmless. The philosophical problem resulting from this is that it seems no longer possible to establish "principles of a new evaluation" or to "reestablish *order of rank*."[21] An essentially normalizing power that is on the way to completely transforming the modality of criminal judgment is an essentially relativizing power. Nietzsche clearly noticed the epistemological implications of this new type of shifting opposition and also identified the field of knowledge in which this new normalizing approach to treating moral facts had been elaborated, that is, *modern physiology*, which claims that it is necessary to have knowledge of pathological or "morbid" states in order to explain the "normal" functioning of an organism. I quote from a note Nietzsche wrote in 1888: "It is the value of all morbid states that they show us under a magnifying glass certain states that are normal — but not easily visible when normal. Health and sickness are not essentially different, as the ancient physicians and some practitioners even today suppose. … In fact, there are only differences in degree between these two kinds of existence: the exaggeration, the disproportion, the nonharmony of the normal phenomena constitute the pathological state."[22]

In many unpublished notes concerning the generation or "breeding" of the so-called strong or firm type, Nietzsche draws the philosophical consequences from this normalizing epistemology. The strong type and the weak or fatigue[23] type do not exist, as one might first think, as two separate figures in permanent opposition to each other; rather, the strong type has to be wrested from the weak type in a permanent, never-ending struggle.

One can only acquire strength and health, above all "great health," by constantly passing through states of weakness, sickness, and "corruption" and overcoming them. The second to last section of the *Gay Science*, in which "great health" is defined, makes this point very clear: "*the great health*" is a physiological state, "that one doesn't only have, but also acquires continually and must acquire because one gives it up again and again, and must give it up!"[24] That is why those who in this sense may rightly be called healthy are, as Nietzsche puts it, "dangerously healthy," that is to say, they find themselves in a paradoxical situation as they are always risking their health in the effort to acquire it. The state of "great health" therefore remains temporary. Nietzsche does not ask: What is health? but rather: How do we acquire health? or as he writes in a note from 1888: "How does one become stronger?"[25]

It is quite astonishing to observe that Nietzsche, while adhering to the normalizing physiology developed by Broussais, Claude Bernard, and others, rejects without exception theories affirming the equality and comparability of all human beings. The "new philosophers," as he calls the "free spirits" who share his views, "desire precisely the opposite of an assimilation, an equalization: we teach estrangement in every sense, we open up gulfs such as have never existed before."[26] After closing the gulfs between the just and unjust, the permitted and the forbidden, the good and the evil, that were created by traditional criminal law and its ethical supplement, Nietzsche as the most radical exponent of the "new philosophers" tries to establish the "principle of a new evaluation," the reverse of which is the annihilation of the nonvalue. As has often been remarked, the introduction of the concept of value into law is not at all an innocent undertaking. The German neo-Kantian philosopher Heinrich Rickert, a famous adherent to the concept of value (*Geltung*) in ethics and jurisprudence, points out that the "true act of evaluation is negation."[27] If the main task of the new philosophy envisioned by Nietzsche is to strengthen life continually, this cannot be done without simultaneously excluding life that "does not deserve to be lived," in the words of Karl Binding, a German penal law specialist. The new philosopher regards himself as authorized for the "Annihilation of Life Unworthy of Being Lived."[28] It is quite obvious that Nietzsche's philosophical biopolitics and particularly his writings that were published after his death under the title of "Discipline and Breeding" are a paradoxical effort to reestablish a new and radical antagonism within the zone of normalcy, paradoxical insofar as the normalizing power only accepts, so to speak, "weak" and constantly shifting differences.

So Nietzsche's third statement about the criminal is the result of his *dichotomizing* him. It is true, Nietzsche argues, that we are all potential

criminals as we are all more or less ill, more or less weak. More important philosophically, however, is the attitude we adopt toward our physiological sickliness. We have two alternatives: *either* we accept our poor constitution as an inevitable fate and — following the law of the least effort — try to correct or manage it by applying norms of "relative health" from the field of normalcy *or* we find the courage to open up a "new gulf" and create a new great health *on the basis* of the physiologically generalized sickliness. Sickliness, or the disposition to commit a crime, then has to be regarded as a fundamentally ambivalent phenomenon: it may not be rejected from a simple moral point of view or treated with methods that afford the ill only a relatively better status; rather, it has to be regarded as a *resource* for what Nietzsche calls the will to power. In section 740 of the posthumous compilation Nietzsche sums up the main points of his philosophy of crime, which is obviously not, although this has sometimes been stated polemically, a criminal philosophy. In this text Nietzsche distinguishes between criminals who "are a part of the concept of 'revolt against the social order'" and what he calls "the race of criminals" ("*die Rasse des Verbrechertums*"), which he does not characterize empirically but simply refers to as a certain species. Now, from the perspective of a free spirit the philosopher must be regarded as a "criminal," or better, "law-breaker" because he does not respect moral common sense and, as Nietzsche puts it, "finds something in our society against which war ought to be waged — he awakens us from slumber." Although Nietzsche uses terms of war when speaking of the criminal act, in the entire text he does not give any examples of this kind of act; on the contrary, he explicitly reminds his readers that "one should beware of assessing the value of a man by a single deed," and refers to the authority of the political actor par excellence (at least in the nineteenth century), Napoleon: "Napoleon warned against this. For our *haut-relief* deeds are quite especially insignificant."[29]

As I have just mentioned, the "exceptional criminal," whom Nietzsche values highly and exemplifies by pointing to the great political immoralists of Renaissance times, stands in sharp contrast to another type of criminal, who is supposed to be "racially" conditioned and poses in Nietzsche's view apparently such an enormous threat that he is willing to help society to oppose him. He does so by explicitly allowing the social order "to wage war against him even before he has committed any hostile act," and adds in brackets: "first act as soon as one has him in one's power: his castration." So we are faced with the seeming paradox that Nietzsche on the one hand justifies the exceptional and rare criminal as a rebel who declares war on society, claiming he should not be punished or even held in contempt for his action, but on the other hand joins the despised society and its

institutions in the fight against the "race of criminals," who like the exceptional criminals are not judged by the acts they commit but by their *disposition* to commit acts in the future. As an analyst of symptoms, the philosopher has to prove his ability by distinguishing between entirely different sorts of criminals: the criminal who acts out of strength and without remorse and the criminal who may act in a similar fashion but, as Nietzsche writes in the famous section of *Zarathustra* on the "pale criminal," would not be able to endure the image of his deed "after it was done."[30]

But why does Nietzsche criticize the "pale criminal" so scathingly? Is it not likely — and this is precisely the argumentation that criminologists use in their discourses — that pale criminals, of whom there are many, do much more harm to societies in a statistically measurable sense than the few supercriminals who may attract the attention of the public for a short period of time? Nietzsche would answer: even if this were the case, weak criminality has to be rejected from a philosophical point of view because it bears the signs of sociability. The weak criminal is morally or socially weak because he cannot endure the image of his deed after he has committed it and because he cannot *resist* the impulse, the deep-seated urge, that causes him to perpetrate the act. The weak criminal shows weakness both before he has committed the crime and afterward. He is too weak to resist his instincts and thus does not fulfill the criterion of nobility to which Nietzsche is so obliged. The weak criminals, the members of the "criminal classes" (Francis Galton), do not attract attention with spectacular deeds or monstrous dispositions but simply with the statistic frequency of their acts. Rejecting the phenomenon of so-called mass criminality or minor criminality, Nietzsche affirms in philosophical terms a distinction that according to Foucault's analyses in his recently published lectures on *The Abnormals* strongly influenced the development of the discourse of forensic psychiatry in the nineteenth century, a discourse that focused in the beginning on the exceptional criminal or the "monster" to explain the phenomenon of great crimes without causes and ended with the figure of the so-called degenerated criminal, whose acts are not monstrous but occur in the dust of events and are characterized by their instinctiveness and social frequency. As a result of this development, the meeting of crime and insanity is no longer the exception but the normal case: minor crimes and minor insanities that are barely visible and have to be examined carefully.

Nietzsche's concept of decadence as well as his descriptions of the "phenomena of degeneration" are based on the psychological notion of a "morbid immorality," which the philosopher explicitly distinguishes from states of manifest insanity.[31] Decadence gives him much to worry about because he conceives of it as a disease that afflicts seemingly normal and

healthy individuals and can be symbolically connected with phenomena that are characteristic features of the cultural normalcy of modern societies — their way of life, so to speak. But as the "normal types" can eventually become accustomed to unfavorable socio-moral conditions, the "higher types," "the lucky strokes of evolution, perish most easily as fortunes change. They are exposed to every kind of decadence: they are extreme, and that almost means decadent."[32] "Criminality reaches its peak," he argues in a fragment from 1888, "where *fatigue* dominates, where people work foolishly … in the sphere of commerce and industry. *Overwork*, *fatigue*, need for *stimulation* (vice), increase of irritability and of *weakness* (so that they become explosive)."[33] The cultural normalcy of these pseudodiseases causes such a spread of crime or criminal inclination that Nietzsche does not see any other alternative than to defend the social order against the onslaught of what he calls the "unsocial beings"; the fight against this order is only justified in the eyes of the philosopher, however, if it is led by the few exceptional criminals or "custom-" and "law-breakers," the "privileged" ("*Wohlgeratene*"). "We *need* the abnormal, we give life a tremendous *choc* by these great sicknesses."[34] The abnormal is justified if it can be linked to the "higher type," if it occurs as a *choc* "given" by abnormal individuals, the "*new* barbarians," who have an "excess of strength";[35] but it has to be eradicated if it occurs as an almost imperceptible process of "intoxication" of the organism.

We can close this chapter by pointing out that it is far too easy to impute to Nietzsche an antisocial affect, as has often been done. Influenced by the studies of Francis Galton, the author of the famous *Heredity Genius*, which has come to a certain honor again in our days, Nietzsche persistently conceives of society as a "herd" and the ethical convictions of its members as a "herd morality." However, as Foucault has shown, such a *pastoral* perspective on the social is typical for the development of the European "governmental rationality" or "governmentality," which is the term that encompasses all activities aiming to shape, guide, or affect the conduct of some person or persons. Governing is therefore not bound to the juridical form of political sovereignty but entails the exercise of power beyond the juridical constitution.[36] We have to realize that these techniques of governing (oneself[37] and others) include a wide range of measures including, in the age of biopolitics, interventions in the modality of human reproduction, which Nietzsche discusses under the title "Discipline and Breeding." Nietzsche's pastoral politics distinguishes between *three fundamental "social" ranks*, which are at the same time *classes of normalcy*. At the top are the "higher" or even "highest" types, whom Nietzsche also calls the "future masters of the earth"; they inhabit a zone of

positively evaluated abnormality. Below that zone stretches a vast stratum made up of socially organized individuals who share, as Galton describes it, "the comfort of closest companionship."[38] Nietzsche designates them as the "herd," whose instinct "considers the middle and the mean as the highest and most valuable: the place where the majority finds itself. … The herd feels the exception, whether it below or above it, as something opposed and harmful to it."

As the herd is "incapable of leading itself," it needs a political "shepherd," someone who actually belongs to the group of higher types but "lowers" himself to become the "*first servant*" of the herd. The herd "has therewith transformed a danger into something useful."[39] It is very important to observe that Nietzsche repeatedly states that "there is nothing sick about the herd animal, it is even invaluable"; its incapability of governing itself is neither a moral fault nor a disease, but provides an opportunity for the higher types to act — directly or indirectly —[40] politically, that is, to leave their hermitage in the higher regions and serve the herd. Nietzsche's great politics aims at completely changing the role of the political shepherd. He is no longer considered the first servant of the herd, but the inaugurator of what Nietzsche calls "the experiment of a fundamental, artificial and conscious breeding of the opposite type" of the "herd animal."[41] Obviously, this clearly biopolitical perspective does not reject the normal in favor of the exception. An essentially normalizing power does not allow any exception, any excellence or peak performance that is rooted outside the zone of normalcy or acquires its value or specific profile by simply ignoring the normal range of faculties and performance. "To view the contemporary European makes me very hopeful: an audacious ruling race is developing on the basis of an extremely intelligent herd mass."[42] Unless this basis (*Breite)* is itself "extremely intelligent," and Nietzsche makes this unmistakably clear, the biopolitical option will not have the slightest chance of succeeding.

This biopolitical option, on the other hand, is accompanied by the permanent threat of a steady "declining" of the "herd mass" or "a consistent growth of mediocrity" through the influence of the *third rank*, the "lowest kind." What is true for the highest kind also applies to the lowest kind:[43] It is not separated from the middle or normal zone by insurmountable boundaries, but constantly crosses into it. The way these ranks relate to one another can only be understood in terms of dynamics, or better, *energetics*. Those who live in the zone of normalcy, or in Nietzsche's terms, consider the middle region to be the most valuable, have to mobilize their energy constantly to stay where they are, that is to say, to avoid rising too high (the risk of solitude) or sinking too low (the risk of becoming a criminal). In

order for the "opposite type and its virtue," that is to say, the highly valued "superman" to be extracted from the herd masses, it is necessary for normal life to receive a "tremendous *choc*," that is, to be confronted with the possibility of losing all strength, of experiencing weakness and fatigue, of falling into decadence. Only under such conditions will the herd masses, Nietzsche calculates, be ready to cooperate with the new masters of the earth (who are no longer the old rulers, the "first servants" of the herd) to "breed" an even higher type of man and thus accomplish the philosophical task of biopolitics.

4.

Nietzsche's final statement about the criminal regards the criminal resisting the biopolitical discourse. This is a statement Nietzsche adopts directly from Francis Galton. In the chapter entitled "Criminals and the Insane" of his *Inquiries*, Galton makes the following strange observation: "The deficiency of conscience in criminals, as shown by the absence of genuine remorse for their guilt, astonishes all who first become familiar with the details of prison life. Scenes of heartrending despair are hardly ever witnessed among prisoners; their sleep is broken by no uneasy dreams — on the contrary, it is easy and sound; they have also excellent appetites."[44] Despite his preoccupation with a dynamic or energetic worldview based on the great fear of individual and social fatigue, or in physical terms, of entropy, there is evidence supporting the hypothesis that Nietzsche was very much attracted to the image of a higher state of being beyond all vital movement, all "élan vital," knowing that this sort of "serene tranquility" was an assault on the productivist, modern industrial society because it obviously weakened its forces for further collective development and "social improvement."

We know that in his *Genealogy of Morals* Nietzsche regards the "bad conscience" as the "gravest and uncanniest illness"[45] that has developed from the "self-enclosure" of man by society, a process that Nietzsche — long before Freud — also describes as "the *internalization* of man" or his "inpsychation."[46] The parallel that Nietzsche draws between society and prison is fully clear: the formerly "prowling" man who now has a bad conscience is confined within his inner self; he is cut off from all connections to the outside. He has become a "desperate prisoner,"[47] a prisoner of himself. If a bad conscience is the (moral) sickness par excellence, then the lack of this sickness in those who are literally put into jail is a sign of hope for all the metaphorical prisoners who suffer from the "cage" of civilization. "Generally speaking," Nietzsche argues along the lines of Galton, "punishment makes men hard and cold; it concentrates; it sharpens the feeling of

alienation; it strengthens the power of resistance."[48] "It is precisely among criminals and convicts that the sting of conscience is extremely rare; prisons and penitentiaries are *not* the kind of hotbed in which this species of gnawing worm is likely to flourish."[49] "Criminal psychology," which emerges in Germany around 1800 in the context of what is called the philosophical movement of German Idealism, acquires long before Galton and Nietzsche the conviction that remorse and the will to improve morally do not flourish under conditions where the punishment of the prisoner resembles the crime committed. According to criminal psychology, which is deeply rooted in the concept of moral education by aesthetic means (means that are supposed to address and shape the perception and sensation, the so-called lower faculties, of the human soul), punishment "is supposed to possess the value of awakening the *feeling of guilt* in the guilty person."[50] For criminal psychology it is no longer the body of the prisoner but his "soul" that becomes the main target.

For Spinoza, Nietzsche remarks with this conceptual background in mind, "the world… had returned to that state of innocence in which it had lain before the invention of the bad conscience."[51] Nietzsche, who saw in Spinoza his only true philosophical predecessor, does not hesitate to compare his ethical theory with the behavior of those prisoners upon whom Francis Galton reflects in his *Inquiries*: "Mischief-makers overtaken by punishments have for thousands of years felt in respect of their 'transgressions' *just as Spinoza did* [Nietzsche puts the last four words into italics to stress the importance of this comparison]: 'here something has unexpectedly gone wrong,' *not*: 'I ought not to have done that.'"[52] What disturbs Nietzsche about the criminal is his tranquility as a prisoner. Nietzsche's last statement about the criminal is therefore an almost lyrical transcription of the reflection of Galton's that I have quoted above, an apostrophe, which at the same time is a kind of address to himself. We find several versions of this transcription in Nietzsche's unpublished notebooks. He chose one of them for *Zarathustra*, in the fourth book of which Nietzsche's alter ego says to his shadow, which is desperately looking for his "home": "'Even a prison at last seems bliss to such restless people as you. Have you ever seen how captured criminals sleep? They sleep peacefully, they enjoy their new security.'"[53]

Certainly, in the context of *Zarathustra* a person's restless search for a home, any home, is immediately perceived as a "danger" because it prevents him from permanently transcending, from moving beyond the position he has reached. This, however, is precisely the duty of what Nietzsche calls the "superman," who always tries to move beyond himself, who is in a permanent state of self-transgression and self-enhancement.

Yet in the end we have to admit that we cannot be too sure whether Nietzsche's philosophy can be reduced to what the nineteenth-century discourse on the "human motor" (Anson Rabinbach) required it to be. In a letter Nietzsche wrote from Rapallo in December 1882 to his friend Overbeck, his main concern, as in many of his letters, is once again his permanent illness, from which he only recovers in very rare moments. "If only I could sleep!" Nietzsche writes, describing the devastating effects of the previous summer (the "affair" with Lou Salomé) on his psychological state: "I have suffered … as of a madness," he writes to Overbeck, "I am being broken on the wheel of my own feelings," thus describing his state with a reference to an ancient and cruel method of punishment. And he adds: Even "the strongest doses of my opiates help me no more than my six-to-eight-hour marches."[54]

Notes

1. Jacques Derrida, *Spurs: Nietzsche's Styles* (Barbara Harlow trans., 1979), 95.
2. Michel Foucault, *The Will to Knowledge: The History of Sexuality*, vol. 1 (Robert Hurley trans., 1978), 142–43.
3. Ibid., 143.
4. Ibid., 144.
5. Friedrich Nietzsche, *The Will to Power* (Walter Kaufmann ed. and trans., 1968), 512 (n. 978).
6. Ibid., 512 (n. 979).
7. Edgar Bodenheimer, *Power, Law, and Society: A Study of the Will to Power and the Will to Law* (1978) 1.
8. Foucault, *The Will to Knowledge*, 509 (n. 972).
9. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., 1995), 183. "It measures in quantitative terms and hierarchizes in terms of value the abilities, the level, the 'nature' of individuals."
10. And thus produce a great amount of "refuse" or "waste" of human material, as Nietzsche quite frankly states. See Friedrich Nietzsche, *Ecce Homo* (Walter Kaufmann ed. and trans., 1989), 257.
11. Nietzsche, *The Will to Power*, 457 (n. 857). The German text literally says only: "question of rank."
12. Friedrich Nietzsche, *Human, All Too Human* (Marion Faber and Stephen Lehmann trans., 1994), 73 (n. 105).
13. See Friedrich Nietzsche, *Twilight of the Idols: Or, How to Philosophize with a Hammer* (Richard Polt, trans., 1997), 30–37.
14. Friedrich Nietzsche, *Thus Spoke Zarathustra: A Book For Everyone And No One* (Richard Hollingdale trans., 1969), 162.
15. Friedrich Nietzsche, *Beyond Good And Evil: Prelude to a Philosophy of the Future* (Helen Zimmern trans., 1964), 125 (n. 201).
16. Foucault, *Discipline and Punish*, 22.
17. Ibid., 19.
18. Nietzsche, *Beyond Good And Evil*, 125 (n. 201).
19. Nietzsche, *Ecce Homo*, 326.
20. Letter to Malwida von Meysenbug, September 24, 1886, in Friedrich Nietzsche, *Sämtliche Briefe: Kritische Studienausgabe*, vol. 7 (Giorgio Colli and Mazzino Montinari ed., 1986), 258.
21. Nietzsche, *The Will to Power*, 457 (n. 854).

22. Ibid., 29 (n. 47). In brackets Nietzsche adds the name of the physiologist Claude Bernard, who, following the physician Broussais, drew from this theory the physiological consequences of a fundamental continuity between health and illness, or normal and pathological states.
23. See Anson Rabinbach, *The Human Motor: Energy, Fatigue, and the Origins of Modernity (1990)*.
24. Friedrich Nietzsche, *The Gay Science* (Josephine Nauckhoff trans., 2001), 246 (n. 382).
25. Nietzsche, *The Will to Power*, 485 (n. 918).
26. Ibid., 516 (n. 988).
27. Quoted from Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998), 137.
28. Title of the book Binding wrote in 1920 with Alfred Hoche, the professor of medicine. This work was published — a not unimportant fact to mention — by Felix Meiner, "one of the most distinguished German publishers of philosophical works up to our days." Ibid., 136.
29. Nietzsche, *The Will to Power*, 392 (n. 740).
30. Nietzsche, *Thus Spoke Zarathustra*, 65.
31. See Friedrich Nietzsche, "Nachgelassene Fragmente 1887–1889," in *Kritische Studienausgabe* vol. 13 (Giorgio Colli and Mazzino Montinari ed., 1988), 429.
32. Nietzsche, *The Will to Power*, 363 (n. 684).
33. Nietzsche, "Nachgelassene Fragmente 1887–1889," 430.
34. Nietzsche, *The Will to Power*, 408 (n. 778).
35. Ibid., 478 (n. 899).
36. Michel Foucault, "Governmentality," in *The Foucault Effekt: Studies in Governmentality* (Graham Burchell, Colin Gordon, and Peter Miller, eds., 1984), 87–104.
37. Nietzsche's concept of the "severest self-legislation" necessary "to rear a master race, the 'future masters of the earth.'" Nietzsche, *The Will to Power*, 504 (n. 960).
38. Francis Galton, *Inquiries into Human Faculty and Its Development* (1908), 49.
39. Nietzsche, *The Will to Power*, 159 (n. 280).
40. "The highest men live beyond the rulers, freed from all bonds; and in the rulers they have their instruments." Nietzsche, *The Will to Power*, 518 (n. 998) — This reverses the "democratic" situation, where the highest men are expected to become rulers and function as instruments of the majority's will or the "common sense."
41. Nietzsche, *The Will to Power*, 501 (n. 954).
42. Ibid. (n. 955).
43. Ibid., 500 (n. 953).
44. Inquiries into human faculty, *supra* note 30, p. 42.
45. Friedrich Nietzsche, *On the Genealogy of Morals* (Walter Kaufmann and Richard Hollingdale trans., 1989), 85 (n. 16).
46. Ibid., 57 (n. 1).
47. Ibid., 85 (n. 16).
48. Ibid., 81 (n. 14).
49. Ibid.
50. Ibid.
51. Ibid., 83 (n. 15).
52. Ibid.
53. Nietzsche, *Thus Spoke Zarathustra*, 286.
54. Letter to Franz Overbeck, December 25, 1882, in *Sämtliche Briefe*, vol. 6, *supra* note 13, p. 312.

CHAPTER 3

Pain, Memory, and the Creation of the Liberal Legal Subject: Nietzsche on the Criminal Law

MARIANA VALVERDE

Why should anyone read Nietzsche's texts and use them to pursue inquiries about the foundations of the criminal law? Is it just a matter of adding one more institutionally self-interested entry to the long list of commentaries we already possess: "Nietzsche and women," "Nietzsche and the Jewish question," "Nietzsche and art," and, now, "Nietzsche and legal theory."

There are two reasons why Nietzsche's highly speculative comments on punishment and the criminal law deserve our attention and our thoughts. First, the lens of the criminal law is appropriate for a novel reading of some of Nietzsche's theories because — as Nietzsche, the antilawyer par excellence, himself pointed out — the key categories of the criminal law (individual culpability, moral autonomy, and the free will) are also the key categories of liberal governance generally. As has been pointed out by a number of theorists, the free will that is constructed through and for the criminal law today, and which is inextricably rooted in Christian notions of individual moral responsibility, is a fundamental pillar of governance across spheres. Beyond the law, and beyond religion, one sees the free will being interpellated at every turn: in diet advice telling us how to boost our "willpower," in easy-to-remember bullet points that would make Nietzsche rue the day he came upon "the will to power," in retirement

savings commercials that incite the free rational prudent subject presumed to lie within our breast to defer gratification, and in parenting manuals that, contrary to older and kinder religious views, assume that the arrival of children is always fully and wholly willed by their parents.[1] That the free will, always invoked as if its ontology were on a par with that of the liver, is the historically contingent result of a great deal of often coercive governance, is not an insight that is unique to Nietzsche — Lacan is only one of numerous contemporary thinkers who have also explored the genealogy of the (modern, liberal) free will. But Nietzsche's work highlights neither individual psychic traumas nor structural historical trends — the two most common types of explanations given by critical theorists of individual freedom. Instead, he highlights the key role of certain lowly practices — practices of punishment and practices around indebtedness and contracts — associated with the criminal law. Hence, in a book addressed mainly to scholars of legal processes, it is worth reflecting on Nietzsche's unique contribution to the more generalized poststructuralist effort to decenter and contextualize the free individual of modern liberalism.

The second reason why Nietzsche's imaginative decentering of the free liberal subject deserves to be widely read and discussed is that, going beyond the critique of individual freedom pioneered by Marxist and by psychoanalytic thought in different ways, Nietzsche's fanciful genealogy of the moral and rational subject of modern legality decenters temporality itself — or more specifically, opens up the black box of memory, raising questions about what might have been the conditions under which the capacity to make promises and thus bind the future emerged. Psychoanalytic thought, which of course emerged out of the same cultural ground that nurtured Nietzsche, has certainly pondered the question of how memory is fabricated and how it comes to undergird all practices of human responsibility; but its inquiries have been sharply limited by the parameters set out by Freud — the generic baby's desires, the timeless oedipal conflict. Historically existing assemblages are from the psychoanalytic point of view rather epiphenomenal. Nietzsche's thoughts about the emergence of memory and responsibility run on a somewhat different — though sometimes convergent — track, and I will here show that his insights are much more directly useful from the standpoint of legal studies, since they avoid the conflation of social norm, private rule, and state law that is characteristic of psychoanalysis,[2] and instead highlight the work that specific legal practices have done in fabricating the modern individual subject — the subject who has to be able to remember before he can even contemplate such "originary" acts as agreeing to a social contract.[3]

The key text that outlines Nietzsche's partial genealogy of the categories that criminal law, and especially punishment, brings to the overall task of constituting the modern individual — subjective guilt or remorse, objective culpability, the free will, and the (imputed and usually unspoken) ability to remember past deeds and their consequences — is the second essay of the *Genealogy of Morality*. Very broadly, this traces the grandiose moral and legal principles of the criminal law back to their inglorious roots in practices of indebtedness and debt recovery, including the physical pain inflicted on insolvent debtors. This essay is less well known than the famous first essay, in which Nietzsche develops the argument that Christian morality exemplifies the negative, unhealthy effects produced by the operation of "reactive" rather than "active" forces.[4] But in some ways the second essay is more relevant to our own day. The first essay makes large normative claims about the nastiness of Christian and other moralities, claims that were more timely in the 1890s than today. But it is the second essay that outlines the psychic, social, economic, and (later) legal mechanisms by which the moral mentality of negativism and envy managed to found firm institutions and thus become hegemonic in Europe. The key such mechanism is said to be "bad conscience" or guilt — not so much objective legal guilt but the related phenomenon which is the feeling of guilt, the internal censor that makes us ashamed of having desires and prevents us from acting in direct and open fashion, leading instead to backbiting and to puritanical condemnations of other people's pleasures.

Although the richness of the hybrid legal/moral/social category of guilt is perhaps more apparent to a German speaker, since *Schuld* means both "guilt" and "debt," nevertheless, even in English *guilt* is a multi-faceted term with diverse governance effects. To give only one example: Contemporary social movements, especially in the United States, have been riven by conflicts running to a large extent on the fuel of liberal guilt, and on worries about the debt that the privileged owe to the oppressed — the reactive, inward-focused inquiry into one's political purity that often takes the place of effective, outward-focused political action in many of today's political struggles. Nietzsche's genealogy of the modern self, a genealogy that brilliantly exposes the workings of liberal guilt, is thus of importance to progressive, postidentity politics and political thought.

I will return at the conclusion to the applicability of some of Nietzsche's insights to current issues around collective guilt, reparations, *ressentiment*, and so on. But let us begin by reading the "Guilt" essay, juxtaposing it with some insights about temporality — and specifically, about the temporality of the common-law system — drawn from the essay on the uses and abuses of history. This juxtaposition is designed to illuminate the machinery

of subjective guilt and personal responsibility that, while by no means monopolized by the criminal law, is in our own postreligious era more solidly held up by law — "law" here including popular discussions about legal cases, discussions that often focus on the feelings of both victims and criminals more than on the objectivist legal standards of guilty verdicts — than by Nietzsche's bête noire, religion.

The essay on historicism from which I draw is the same essay that Richard Posner reads for its comments about the necessarily backward looking dynamic of law.[6] While not disagreeing with Posner's skeptical view of the obligatory historicism — or more accurately, obligatory fake historicism — of the common law, and also strongly concurring (for different reasons) with his interest in connecting Nietzsche to the legacy of American pragmatism and suggesting that there is a "native" American way of using Nietzsche that does not require continental philosophy, I choose here to focus not on historicity, obviously a fundamental feature of all law but especially of the common law, but rather on the related and less discussed problem of binding the future. Binding the future, the problem that the second essay of the *Genealogy* tells us emerged with and for the earliest human societies, was eventually successfully addressed through a combination of the two specifically human technologies that Nietzsche's work constantly pondered: language and moral (subjective) guilt. Language is of course the medium of law as well as the medium of literature, and much could be done to further "law and literature" discussions through reading Nietzsche; but in this article I will mainly focus on the second fundamental human technology, namely the collection of techniques for governing oneself and other selves that is guilt, in both its moral (subjective) and its legal dimensions.

The Temporal Animal and the Practices of Debt

Nietzsche begins the essay on guilt by asking the question beloved of philosophers since Aristotle: What distinguishes humans from other animals? For Christianity as for other ideologies of eternity, the human "distinction" is the immortal soul — an entity that Nietzsche believes has not died or will not die with the Christian god, since, in the nick of time, it has been successfully secularized, modernized, and legalized as the "free will" of law. And a key switchpoint in the network that produced the secularization and legalization of the Christian soul is a certain ability to grasp temporality. For Nietzsche, humanity is distinguished from other animals not on the basis of its share in eternal life or eternal principles but, on the contrary, through its peculiarly human awareness of the passing of time, of temporality. This temporality is described not in metaphysical terms, as

philosophers since Augustine have done, but, on the contrary, as intertwined with, and indeed based on, an economic practice that, like other economic practices, is routinely ignored by philosophy generally: making promises and repaying one's debts: "To breed an animal which is entitled to make promises — is that not precisely the paradoxical task which nature has set herself with regard to humankind? Is that not the real problem *of* humankind?" [7]

Why is the ability to make promises — the condition of all forms of political obligation — said to be paradoxical? Why is it unlikely that humanity would naturally evolve a capacity to make promises in the same way that it developed the capacity to walk on two legs? Because forgetfulness, Nietzsche tells us — as he imagines the peaceful state that he personally would enjoy if only he could forget— is the default setting of animal spirits. A passage from the second of the "Untimely Meditations" (or, in another translation, "Thoughts out of Season") is useful here.

> Observe the herd as it grazes past you: it cannot distinguish yesterday from today, leaps about, eats, sleeps, digests, leaps some more, and carries on like this from morning to night and from day to day, tethered by the short leash of its pleasures and displeasures to the stake of the moment, and thus it is neither melancholy nor bored. … The human being might ask the animal: 'Why do you just look at me like that instead of telling me about your happiness?' The animal wanted to answer, 'Because I always immediately forget what I wanted to say' — but it had already forgotten this answer and hence said nothing, so that the human being was left to wonder.[8]

Now, while Nietzsche always stresses physicality as against souls and other spiritual fictions, nevertheless, it is crucial to underline that for Nietzsche humans are not just physiological entities. Unlike modern thought in general, Nietzsche does not engage in the simple pleasures of rejecting spiritualism only to presuppose and assume materialism, vulgar or not.[9] Nietzsche deconstructs the spirit/matter, soul/body, culture/nature binaries by considering the thought that humans are a special kind of animal, specifically, a temporal animal. We are not (atemporal) herd animals, he states. Being part of a herd means not having to worry about the future — and that in turn means not feeling a need for language. Language is the crucial technology that allows humans, as nonherd animals, beings who are inevitably embodied and thoroughly physical but are also potential free spirits, to acknowledge and to manage temporality. (And it is important to note that, for Nietzsche as for Heidegger, temporality cannot be overcome

by humans, contrary to the fantasies of Plato and later metaphysicians. Nietzsche would say that temporality can only be embraced; I would say, with Foucault, that it can be managed, through legal as well as other inventions, but the key point of agreement is that it is "comical," as Nietzsche puts it elsewhere, to think humans can or should overcome temporality.)

As Rousseau and other eighteenth-century philosophers pointed out, and as was well known to Nietzsche the philologist, the question of the origin of language is necessarily paradoxical: How can beings who do not have language come to feel the need for language? And how can one think up concepts if one does not have words? The question of the "origin" of language is ineluctably paradoxical, and so the question of language cannot be solved as long as it is being asked in terms of origin. And exactly for the same reasons, the task of "breeding" a political animal, that is, an animal that is able to manage the future in advance by making promises, is ineluctably paradoxical. If one's inquiry takes that eighteenth-century format — What is the origin of the social contract? — one is necessarily caught up in the paradoxes that classic contract theory tries to sideline by such clever tricks as imagining that all stakeholders might somehow be able to give up their rights exactly at the same moment, even though there was no prior authority to synchronize this crucial move (Hobbes) or by imagining a "veil" that does not impede communication but which obscures specific characteristics and interests not only from others but even, implausibly, from oneself (Rawls.) Nietzsche thus takes us beyond the unsolvable dilemmas of classic liberal contract theory, without pausing to draw attention to his own deconstructive feats, by rephrasing the question. He does not ask about origins. He asks about neither mythological nor historical origins, but rather about the contingently developed practices that might have had the effect of creating in humans something that herd animals do not need to have, namely, a sense of temporality — temporality regarded by Nietzsche not as some spiritual link to the infinite but as a mixed blessing, a burden as much as an advantage, both because we can never really "grasp" time, and because the limited way that we can get a hold of time makes us unable to enjoy the pleasure of the moment.

For Nietzsche, we are paradoxical, ridiculous,[10] tragicomic beings who are at our best when we realize that the claims made since Genesis to special status in Creation and to some inner link with the Infinite are, however necessary for human survival, necessarily ridiculous. Humans are not pure spiritual beings. And yet, we are not all nature. We necessarily look on the herd from outside, with some ironic distance.[11] (This gently ironic distance is precisely what is textually demonstrated, not merely invoked, in Nietzsche's description of the herd.) Contrary to vulgar materialist views,

then, and contrary also to "postmodern" thought, for Nietzsche, having discovered that God is dead and that the immortal soul is a fiction does not thereby mean that humans live "tethered to the stake of the moment." Herd animals cannot even forget, just as they cannot laugh; for them, everything just goes by in a flash. But among humans, who are keenly aware of time and mortality (as is shown by the considerable energies spent on intellectual projects denying time), "forgetting is a strength."[12]

"Active" forgetfulness requires work. Nietzsche tells us that the excess of historicism, the fetishism of origins and memory from which Germans collectively suffer, has blinded his contemporaries to the fact that "without forgetting, it is utterly impossible to live at all. Or, to express my theme even more simply, there is a degree of sleeplessness, … of historical sensibility, that injures and ultimately destroys all living things, whether a human being, a people, or a culture."[13]

If active, more or less purposeful forgetting is a condition of the possibility of healthy individual living and healthy collective culture, nevertheless, forgetting, like the proverbial doorman, has to be selective. Some sensations are kept out, or as the Freudians would say, repressed, and by that same process other things are remembered. "And precisely this necessarily forgetful animal, in whom forgetting is a strength, now has bred for himself a counter-faculty, memory, by means of which forgetfulness can be suspended in certain cases — namely in those cases where a promise is to be made."

The most basic form of memory is thus what he somewhat obscurely calls "the memory of the will" — the not wholly cognitive sense that one has to do something in relation to a specific person.[14] This memory of the will is the practical, embodied, neither totally physical nor purely intellectual precondition of making and keeping promises. And it is the interpersonal practices of promising and making good on those promises that form the basis of political society, as well as of morality.

As David Owen noted, Nietzsche here gives us a "contractual psychology of power."[15] Now, Nietzsche's privileging of contract forms and private law generally could easily be misread as simply another, more embodied version of social contract political thought — of the legalistic narrative, first told by Hobbes, according to which human beings first developed the idea of contracting with one another, with state institutions (and especially the criminal law) emerging only later. But this would be to seriously underestimate the depth of Nietzsche's renunciation of the liberal subject and all his works.

Nietzsche's pragmatist *avant la lettre* account puts the sociolegal practices of debts and promises at the beginning, with the liberal political

subject, the subject who can be counted on to fulfill his promises, being then reread as a product of the sociolegal technology of the contract. Choosing the capacity to make promises as that which distinguishes humans from other animals, far from reenacting liberal social contract theory, turns it completely on its head. Making promises does not come naturally to animals, and hence not to humans either. The necessary precondition of promises and contracts, namely the will's memory, has to be manufactured — and is in fact fabricated in and upon the body, as a physical entity, through physical punishment, as we shall see in a moment. Only later does a capacity to remember facts and moral values as well as debts emerge as a feature of the (now more than animal) mind.

First, then, there is the practical situation of owing someone. This creates a need to install in the human mind some mechanism to allow the debt to be repaid. The mechanism has two parts: first, simply remembering the power relationship of the debt ("I owe you"); second, after much experience of repaying debts out of fear of punishment, we become able to feel guilty if we forget or renege on debts and contracts.

Key to Nietzsche's argument is the contingent fact that the German word *Schuld* means both guilt and debt. This facilitates the genealogy considerably, allowing Nietzsche to quickly jump from the primal fear of the fate that Shylock proposed for his creditor — the cutting out of a pound of flesh — to the internalized fear, the self-disapproval that is subjective guilt — not only the Christian's feeling of guilt, which is Nietzsche's main interest in this book, but also the legal machine of *mens rea*, guilty intent. Of course guilty intent, in the common law at any rate, is regarded as technically distinct from subjective guilt and remorse; but Nietzsche is here emphasizing that which Christianity and the secular law have in common, rather than contemplating the differences between them. And since remorse is always important at the final, sentencing stage whether it was important during the trial or not, Nietzsche's emphasis on the links connecting objective (economic) debt, subjective feelings of indebtedness or guilt, and legal guilt is directly relevant to today's criminal law. "Responsibility" could be regarded as the name of the ill-defined, large-scale network that has economic debt, subjective remorse, and legal guilt as three of its links. Thus, after the account "the will's memory" in the first section, the second section begins with the following sentence: "Such is the long history of the origins of *responsibility*."

Responsibility — which many analysts have argued is the fundamental feature of the liberal and especially the neoliberal subject[16] — does not easily and smoothly grow from the social interactions of informal private contract, however. There is a long and contingent chain of events and

juxtapositions by which responsibility becomes effective, politically as well as ethically, by being tethered to Christian (or liberal) guilt. Let us reconstruct these steps. Aside from the determinate and fragile form of memory that is "the will's memory," what else is required for humans to be able to make promises, to acquire the right to make promises from the social contract to the marriage contract? What is required is nothing less than the reshaping of concrete human capacities, through the action of the contract and its particular interpellation of human subjects, into a set of homogenous, comparable, even quantifiable bits. Now, why do humans have to be turned into disciplined individuals, into chunks of abstract labor, into interchangeable or at least comparable units? What is it about the contract and its promise of performance that facilitates or affects[17] this rather astounding feat of human evolution?

The answer is that "in order to dispose of the future in advance in this way, how much man must first have learnt to distinguish necessity from accident! To think in terms of causality. … To be able above all to reckon and calculate!"[18] Making calculations about future outcomes requires flattening out specificities and separating out what contract law would call "unforeseeable" events. We need to posit causality as a general ontological machinery because we need to be able to count on a future that will remain essentially the same even if certain particularities are different. After all, if we make a promise to hand our house over to a buyer by signing a contract, we are predicting that the experience of living in houses will remain much as it has been — and that the banking system will keep its rules, that the dollar will not suddenly collapse, that there will not be a communist revolution that declares the abolition of private property, and so on.

Engaging in contractual relations both facilitates and requires, then, a full-fledged ontology and a generalized historical narrative, both centered on the presumption of continuity, even sameness. And — a key step — the calculating subject of liberal political thought is itself produced (as an entity that can be counted and counted upon by others) by the same process that constructs the world of interpersonal obligation as predictable and measurable: "it was by means of the morality of custom and the social straitjacket that man was really *made* calculable." So, the individuals assumed by liberal theory to exist, calculating minds already installed and functioning, in the state of nature, are in fact produced through the very activity of calculating.

> For that [calculating] to be the case, how much man himself must have become calculable, regular, even to his own mind, so that finally he would be able to vouch for himself as future, in the way that someone making a promise does![19]

> While liberal political theory sees things from the standpoint of a ready-made free fraternal subject who calculates, decides, and acts, if we look at the process from the other side — from the standpoint of the masters, a standpoint erased from Rawls-type accounts — then we see the subject as itself a calculable entity; we see it, contrary to Kantian dogma, as an object rather than a subject.

This insight into the simultaneous creation of the free liberal subject and the disciplined docile subject was of course deployed and utilized in Foucault's well-known account of the disciplinary and disciplined individual: the calculable prisoner of Bentham's panopticon penitentiary; the schoolchild sitting up straight, learning to write with the pencil held just so; the uniformed and uniform soldier, whose time spent on drill has little to do with the necessities of the battleground and everything to do with the nation-state's need for a certain kind of citizen, a citizen who feels free but can quickly be turned into an abstract unit. Nietzsche's musings on that wonder of modernity, the citizen who is free and who calculates but is also himself a calculable object, clearly constitute the necessary foundation stone for Foucault's analysis of the modern subject whose feeling of individual autonomy is paradoxically furthered rather than undermined by the myriad techniques of discipline, measurement, and monitoring developed in modern societies that is described at length in Foucault's *Discipline and Punish*. And it is perhaps necessary to point this out here, since Foucault had a habit of not naming or acknowledging his sources, outside of interviews, and since *Discipline and Punish* has had such a profound influence on contemporary theories of criminal justice. But let us go back to the *Genealogy*.

Debts, Nietzsche goes on to say, do not occur only between individuals. There are also collective debts, as when we say "Canadians today owe the civility of our political institutions to the foresight of our largely obscure ancestors" (for example!).[20] That we owe some kind of debt to our ancestors is of course a very common trope in premodern political and ethical systems; but it is also a more salient feature of modern political life than the antiancestor advocates of the fraternal social contract, from John Locke to John Rawls, care to admit. This debt to ancestors cannot ever be fully repaid, and the thus necessary exercise of discretionary mercy that is set in motion when a collective acknowledges the futility (or, in better cases, the injustice) of trying to rigidly enforce every debt becomes an object lesson teaching us that we owe more to "the community" than we can ever repay.[21] The debt we owe to the historical collective, then, works on the citizens' sensibility constantly, and helps to manufacture and maintain a sense of ongoing, open-ended, indefinite responsibility.

So debts and contracts, individual and social, are key to the formation of the modern human, the human with a sense of individual responsibility. But for Nietzsche this does not happen either through the magical mechanism of the invisible hand, as was the case for Adam Smith, or through the smooth evolutionary workings of deep social structures, as was the case for Durkheim and evolutionary social thought generally. Liberalism and sociologism are in some ways opposed to one another, but one thing they have in common is a belief that "things just happen," that nature — and hence social nature — takes its course. Without pausing to critique the accepted views of social evolution, Nietzsche goes directly to his own view, a view that is shocking even today and was certainly more than shocking in his own time — the view that violence, and even extreme violence, is required to make the will's memory effective in the long run and in the population as a whole. People would rather forget their debts, just as children would rather forget their bedtime and their homework. Thus,

> When man decided he had to make a memory for himself, it never happened without blood, torments and sacrifices: the most horrifying sacrifices and forfeits (the sacrifice of the first born belongs here), the most disgusting mutilations … pain was the most powerful aid to mnemonics.[22]

Note here that Nietzsche does not state that the Romans who threw people to the wild animals at the circus were consciously intending to use this spectacle for the purpose of creating a conscience in the Roman populace. It is as fruitless to speculate about the intent of the punishers as to imagine one can discern and judge the true intent of the offender. The "origin and purpose of punishment" are "separate, or ought to be: unfortunately people usually throw them together."[23] Thus, the violence of punishment was not consciously and rationally chosen to provide a general deterrent.

More generally, practices that have a certain effect are rarely chosen with foresight. For Nietzsche, beginnings are always contingent, they are ad hoc responses to specific problems, and thus by no means explainable by reference to whatever purpose is later served by that practice. Governance is always a practice of bricolage. Once a certain practice is disseminated (throwing people to the lions, say), it is relatively easy to appropriate and resignify it. Humans do not set out to consciously create new governing technologies from scratch. They look around, grab what they feel could be useful, and experiment. Seeing "purpose" in human practices, as sociologists love to do, is usually an exercise in the teleological fallacy. This general skepticism about human planning underlies Nietzsche's devastating

critique of the pretensions of criminal law professors to have theorized "the purposes of punishment." As Robin Small puts it,

> Nietzsche notes that punishment may serve to enhance respect for the authority that determines and imposes the penalty. Or it may impress itself on the memory, ensuring that the law is never forgotten. Sometimes punishment is addressed to the advantages formerly enjoyed by the offender, and is designed as a repayment for them. It may be a the payment of a fee by the wrongdoer for protection for further revenge from the offended party. It may be a practical compromise it may be a war against rebellion against the order of society, or a celebration of victory over the enemy. This list, Nietzsche remarks, is 'certainly not complete'.[24]

The Shylock situation of the debt to be repaid with a pound of one's flesh, therefore, is not a social-control explanation — and, more importantly, it is not a functionalist explanation at all, social control oriented or otherwise. Punishment is not one thing with one general social "purpose" (as in Durkheim's well-known theory). Punishment only exists as a unified entity with a single name — rather than as a set of heterogeneous events: someone being hanged, a child being locked in her room — as "it" comes to have certain effects, particularly effects on the formation of human responsibility. Practices involving physical pain, cruelty, debts, mercy, and so on are in themselves heterogeneous and concrete. They are only grouped together under the banner of "punishment" after the fact, as state institutions develop that appropriate these ad hoc inventions and justify the whole lot — institutions plus practices of punishment — by inventing "the criminal law."

Nietzsche's argument is thus methodologically radical in eschewing the nineteenth-century German obsession with origins, focusing instead on "minor practices" and their effects — particularly their bodily effects. Paralleling Kafka's gruesome description (in the short story "The Penal Colony") of a torture machine that literally writes one's crime on one's back with a bloodied needle, for no apparent reason, Nietzsche states:

> With the aid of such images and procedures, man was eventually able to retain five or six 'I don't want to's' in his memory, in connection with which a promise had been made, in order to enjoy the advantages of society — and there you are! With the aid of this sort of memory, people finally came to 'reason'! — Ah, reason, solemnity, mastering of emotions, this really dismal thing called reflection, all these privileges and splendours man has:

> what a price had to be paid for them! How much blood and horror lies at the basis of all 'good things'.[25]

Guilty or Not Guilty? That Is Not the Question

Even if one grants that physical punishment, or, more commonly, the spectacle of other people's physical punishment, is the mechanism that constitutes the capacity to remember one's promises, it could be objected that this may explain conformity — people would not want to risk their bodies and so would make an effort to remember certain promises and debts — but would never explain the feeling of guilt, the feeling that if we break a promise or break the law this is somehow a bad, immoral thing.

As I said earlier, the transition from objective to subjective, internalized guilt is easier for Nietzsche, since in German owing someone something is, linguistically, the same as being guilty. In English common law as in the English language, a civil court might force you to pay back your creditors, but losing a case does not make you guilty — you are only guilty of crimes, that is, of offenses against the state, and even then being found guilty only requires intent; remorse is largely irrelevant until the sentencing phase. Nevertheless, the general argument made not only in the *Genealogy* but throughout Nietzsche's work, to the effect that resentful subordinates, forced into obedience by their noble rulers, end up making a virtue out of necessity by regarding obedience to an abstract ascetic rule as a positive virtue, can help to fill in the steps separating the primal memory of owing inscribed on the body (the "five or six I won'ts") from what Christianity would regard as the higher, more spiritual machinery of feeling guilty. And the key intervening step, the most important link connecting the embodied memory of pain to the wholly spiritual feeling of having done something that is absolutely wrong, is the free will, that key artifact that law and liberal political theory share.

The notion of free will is inherently ridiculous, Nietzsche tells us in *Human, All Too Human*. Man is the only animal who self-servingly imagines that he is somehow above natural necessity, above the flux of what happens. The much-misunderstood idea of "the eternal recurrence of the same"[26] is a (perhaps misleadingly worded) call to stop seeing the world as a set of opportunities for showing off human ingenuity and freedom. It is a call to take a more modest perspective that refrains from placing "man" above "nature," and hence refrains from inquiries into autonomous inner intent. Man is simply being ridiculous when he tells melodramatic tales of human virtue and human vice that perpetuate the illusion that "man is the free being in a world of unfreedom, the eternal miracle worker, whether he does good or ill, the astonishing exception."[27]

In keeping with this, what Nietzsche objects to about criminal justice is that a particular state of affairs — the historical development of debts, obligations, contracts — is turned from a fact or a practical need into a duty, an inward moral obligation. That we do often owe people is not at issue here. He does not object to contracts; he objects to romanticizing the contract and turning an obligation that needs to be fulfilled for pragmatic reasons having to do with social cohesion and our own ultimate interests into some kind of moral virtue.

Neither does Nietzsche object, as a matter of principle, to generosity or altruism. Indeed, he spends some time praising the virtues of unconditional mercy, and deriding the desire for vengeance shown by the weak and powerless.[28] And, most importantly, contrary to the standard view of his work, he certainly does not object to responsibility. Defining humanity by reference to the capacity to make promises surely suggests that he takes promises, and thus objective responsibility, seriously. Nietzsche chooses his words carefully, and words that occur at the beginning of one of the few essays actually published in his lifetime are particularly well chosen. So if he says that the ability to make promises is key to being human, he should be taken at his word. But the point is that, for him as for Foucault, responsibility has little or nothing to do with top-down moral codes. Responsibility is a question of ethics, of one's effort to conduct oneself in such a way as to further both one's own feeling of life and strength and the world's ultimately ungraspable dynamic creativity. This kind of responsibility does not evoke subjective guilt.

As Derrida reminded us, it is possible, Nietzsche's work tells us, to have and to take responsibility, to act upon the self, both to keep promises and to go beyond promises, without feeling guilty — insofar as responsibility is what moves us to go beyond the logic of exchange (and its eventual historical product, guilt/remorse) into the logic of justice.[29]

> It is not impossible to imagine society so conscious of its power that it could allow itself the noblest luxury available to it — that of letting its malefactors go unpunished. 'What do I care about my parasites, it could say, 'let them live and flourish: I am strong enough for all that!' … Justice, which began by saying 'Everything can be paid off, everything must be paid off' ends by turning a blind eye and letting off those unable to pay — it ends, like every good thing on earth, by sublimating itself [*Selbstaufhebung*]. The self-sublimation of justice: we know what a nice name it gives itself — mercy [or grace]; it remains, of course, the prerogative of the most powerful man, better still, his way of being beyond the law.[30]

Responsibility and generosity are both possible in a postliberal and post-Christian world, therefore, a world that does not quite exist yet but which is located beyond the fiction of individual autonomous free will — the world that half-exists, "beyond the law." To put it differently, responsibility and justice are both possible without the liberal subject. Indeed, healthy, life-affirming generosity beyond the logic of exchange and beyond the negative dynamic of *ressentiment* is only possible in a nonliberal and nonmoralistic world. The liberal subject and his logic of exchange are perhaps necessary steps toward justice: but nevertheless they need to be rejected (*aufegehoben*) on the way to justice.

To go "beyond the law," then, one needs to go beyond the subject of law, which is also the subject of morality, which is also the subject of grammar. As is well known, Nietzsche argues throughout his work on language that our grammar deceives us when it forces us to posit a subject for every action, a doer for every deed. Things happen; lightning flashes (*Genealogy*, II), and there is no need, other than a grammatical need, to posit a subject that "does" lightning. One should not try to separate or distinguish the dancer from the dance.[31] The free spirit who enjoys the dance without needing to posit a preexisting subject is the type of spirit who will be able to listen to Zarathustra and go beyond the law.

What could this mean for mechanisms of law and justice? First, the demotion of the responsible, autonomous, liberal individual to the status of product of lowly sociolegal practices suggests that Nietzsche would sideline all inquiries into criminal "intent," or *mens rea*, because one thing he and Freud would agree on is that people never really know what they are doing. Just as (as the introduction to this book argued) the tablets of the law are always half-written — because neither the positive law nor the anarchist myth of lawless world are sustainable — so too, human purpose is always half-formed, half-baked, and half-conscious. Inquiries into intent presuppose that the criminal is a fully rational subject who knows his own mind and who can unambiguously turn his attention to a specific goal and deliberately choose certain means to that end. And if intent is rather a fiction, the even more slippery entity that is subjective guilt or remorse is clearly fantastical.

What is documentable is the debt or the loan. The development of socioeconomic practices of indebtedness did not need to give rise to the elaborate philosophical edifice of the criminal law, of intent, remorse, deterrence, and so forth. Thus, criminal law is demoted to the level of civil law — something anticipated at the very beginning of the essay, since Nietzsche chooses to start with the ability to make promises, an issue key to private law, rather than with the kind of moral-social order imperative that is found in criminal law.

But this move is not uniquely Nietzschean: utilitarian and pragmatic approaches to law share his interest in moving away from intents and motives, and the free will in general, in favor of focusing on "harm to others" and on the practical effects of actions.

What is distinctive about Nietzsche's approach, in my view, is not that if we applied it to the criminal law we would abolish the distinction between crimes and lawsuits. What is more revolutionary than proposing a new set of principles for the criminal law along the lines of the nineteenth-century utilitarians is precisely the fact that he avoids the temptation to follow his discussion of debt and contract with a proposal for reframing the criminal law. The criminal law is not reframed so much as completely demoted. We do not get a critique of coercive state law; we get a marginalization of the whole apparatus of law, in favor of a lengthy, often fanciful but nevertheless highly empirical, or at least colorful, description of the sorts of practices that came, retrospectively, to be labeled "punishment." It may not be an oversimplification of Nietzsche's views on the criminal law to conclude that Nietzsche would not simply want to give criminal law students a different introductory lecture: he would appear in the classroom only long enough to lead them on a tour of the closest prison. And if law schools in my own city are any indication, this profound Nietzschean lesson — which could equally well be taught by American pragmatists, though with much more superficial effects — has yet to be even discussed, much less accepted.

Utilitarianism and pragmatism are alternative philosophies of law, rejecting inquiries into subjective intentions and motives in favor of objectivist inquiries into effects. Nietzsche shares this interest: but he is not a utilitarian, not because he has different, opposing views, but because he is both more than and less than a philosopher. For him, what is real, what is worth talking about, are human practices — practices of settling accounts, for example. Human — and natural — events and practices do not exist to exemplify theories. And the best we can do, as thinking beings, beings who live in social relations that are not those of the ruminating herd, beings condemned to live in temporality rather than "tethered to the stake of the moment," is to acknowledge and accept life as humans have to live it, namely, as a necessarily failing effort to seize, to manage, or to accept the constant flow of time and events.

Assuming an ethical stance that accepts the flux and the struggles of life, rather than trying to find a place somewhere above the flux from which one can judge is to take responsibility; assuming responsibility for being human — for being an animal with desires and appetites, but a temporal animal rather than a herd animal — is of course what Nietzsche attempted

to actually do, not merely to advocate. And it is this ethical work on his own self — the effort to use philosophy's own tools not only to deconstruct philosophy, but to actually put it aside and begin to think differently — that constitutes, I would suggest, his critique not so much of the criminal law but of the underlying project of free will that liberal legalism and liberal political theory shares with Christianity.

Nietzsche's debunking of the liberal subject and his self-imposed burden of guilt has sometimes been read as a boyish call to be irresponsible, to just enjoy ourselves and forget about the needs and suffering of others. (Noted humanist scholar Martha Nussbaum is a case in point here,[32] and of course the Habermasians as well.) But this is to ignore Nietzsche's sustained argument against the nihilists, the postmoderns of his day. Nietzsche's project is not to say, down with responsibility! Instead, he shows that responsibility, an important tool of social cohesion in all societies but particularly in liberal legality, is merely that — a tool, which could take other forms, but which in our own society was put together in an ad hoc manner out of existing materials, namely, practices of punishment and the mentality of *ressentiment*. And because responsibility, in our societies, is freighted with *ressentiment* and fear, rather than being inspired by life-affirming "will to power," it takes the contingent, and to Nietzsche questionable, forms that we see around us, including in criminal law.

We cannot do without responsibility, or without promises. We are animals, but not herd animals. But we can stop believing that there is some essential eternal moral law that eternally and naturally generates a feeling of unfulfillable responsibility, a constant guilt, within us. We could begin to imagine different forms of ethical responsibility once we have understood the particular genealogy of the currently available, *ressentiment*-based forms that pass for ethics. And so we can see responsibility for what it is — a highly flexible technique of social and political governance, as useful to Reformation Calvinists as it is today for neoliberal propagandists — and learn that all practices of responsibility need not rely on inner psychological guilt.

And if responsibility is not necessarily guilt-ridden, so too, freedom is not necessarily liberal. Going somewhat beyond Nietzsche's own concerns and into our own present, we can see that having debunked the liberal autonomous subject does not mean that we have to go from the frying pan of the liberal free will into the fire of sociological determinism. Social science undergraduates typically begin university believing the usual myths about the autonomous subject making him/herself and his/her world, but, upon learning something about social institutions and about hegemonic discourses, they often react by becoming vulgar social and cultural deter-

minists. They seldom stay in university long enough to get to the less simplistic perspectives that lie beyond the binary opposition of liberal individualism and sociological determinism. Nietzsche gives us some insights that may help to move to that uncrowded space, by arguing (along similar lines as the pragmatist philosophers) that autonomous subjectivity is not an illusion — it certainly exists, but as an effect, as the product of certain practices. Nietzsche is asking us to ask ourselves the following question: Are we mature enough to realize that the basic tools of our legal and social order are not eternal principles or transcendental essences but rather mere ad hoc practical inventions, assemblages?

For Nietzsche, it is pointless to argue about whether subjects really do exist, or about whether freedom and autonomy do or don't exist. For him that is the same as arguing about whether angels exist. As William James might put it, angels were real when certain practices in the everyday world relied on them and made them real. And the same goes for the liberal subject and its free will.

Thus, Nietzsche enjoins us not so much to take up a new philosophy of law or a new philosophy of ethics, but to decenter timeless philosophies of all sorts in favor of genealogies. In genealogical work, one asks not "What is x?" or "Does x exist?" but rather:

> What happens when people act as if x exists?
> What are the real world effects of x? (God, the subject, the free will, etc.)
> Which practices came together to constitute the assemblage we call "x"?
> How is governance accomplished through x (liberal guilt, for example)?

These may seem like untheoretical, empirical questions. But to me, they are the only useful theoretical questions, since they hold some promise to take us beyond the futile debates of the late twentieth century about whether "the subject," the humanist liberal subject, does or does not exist. Sociologists are fond of saying that concept x is "undertheorized." But there are just as many risks involved in overtheorizing a concept — that is, turning it into a static concept occupying a fixed place in a general model of society. The freedom of the liberal subject — the freedom that the criminal law firmly attaches to each one of us through the doctrine of mens rea, among other techniques — a freedom that Nietzsche tells us is the product of many centuries of illiberal rule through pain and force, is perhaps a concept that could benefit from a little less theorizing than it has received in the work of people like John Rawls and Ronald Dworkin. "What is freedom?" or "How much freedom should individuals be afforded through law?" are not useful questions, at least if one wants to understand how we are actually governed rather than simply engage in speculation and fan-

tasy. And yet these are regarded as the most theoretical questions one can ask. Drawing on Nietzsche — and reading Nietzsche through a somewhat Foucaultian lens — we can challenge the assumptions about what is theory that are embodied in the academic practices that lead people to pose unanswerable questions, developing instead more modest and more grounded questions. For example, we might ask how a collective belief in individual freedom — a belief that leads to neglecting the weight of history — has resulted in certain specific political practices. Or we can ask what work is accomplished, socially and culturally, by the legalistic construction of "intent." Or we can ask questions about the dichotomy between legal practices that proceed without inquiries into subjectivity (strict liability, for instance) and practices that hinge precisely on subjectivity. Such questions can lead to research that has a chance of generating some new analysis of our present.

That legal mechanisms are fruitful sites upon which to study the genealogy of contemporary mechanisms of social, ethical, and political governance, neoliberal and otherwise, is something that some sociolegal scholars, including many of the authors represented in this anthology, have been arguing for years. Substantively our analyses will of course diverge. But while continuing to disagree, we can collectively draw comfort from the fact that as we go on studying how law works we can all cite as an "authority" one of the greatest breakers of law tablets, one of the greatest antitechnical, anti-institutional, and antiprofessional intellectuals of all time.

Notes

1. On liberal governance and free will, *see inter alia* N. Rose, *Powers of Freedom* (Cambridge, Cambridge University Press, 1999) and M. Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (Cambridge, Cambridge University Press, 1998).
2. Psychoanalytic work on law has a tendency to avoid discussing any specific legal mechanisms or systems. The word 'law' usually has a very generalized, timeless meaning, with norms, parental rules, and state law usually being conflated, even when Lacan's concept of the law of the Father is not directly invoked. In my view this does not mean that such work is inferior or useless, but simply that the peculiar, ahistorical use of the term 'law' needs to be kept firmly in view to avoid making unjustifiable claims about the reach of one's conclusions.
3. Kunal Parker recently pointed out "astonishing" parallels between Nietzsche's genealogy and Oliver Wendell Holmes' pragmatist debunking of the systemic and rationalistic pretensions of European legal theory. Like Nietzsche, Holmes argued, against the metaphysical approach to legal theory, that legal doctrines are in many cases nothing but *ex post facto* justifications for rather trivial historical contingencies, themselves often rooted in nothing but artifacts of language. One of Parker's Holmes' quotes is particularly Nietzschean: "All that can be said is, that the metaphors and similes employed naturally led to the rule which has prevailed, and that, as this rule was just as good as any other, or at least was unobjectionable, it was drawn from the figures of speech without attracting attention, and before anyone had seen that they were only figures, which proved nothing and justified no

conclusion" (K. Parker, "The History of Experience: On the Historical Imagination of Oliver Wendell Holmes" *PoLAR* Vol. 26 no. 2, Nov. 2003, 71).

4. I largely follow Deleuze's interpretation of 'the will to power,' especially his explanation of the difference between 'active' and 'reactive' forces (Gilles Deleuze, *Nietzsche and Philosophy*, London, Athlone, 1983). What makes Christianity unhealthy is for Nietzsche not that it advocates for the weak, but the fact that life forces have been turned inward, in the form of 'bad conscience'; it is the mode of action, not the quantity of power, that makes certain movements and mentalities unhealthy.
5. Wendy Brown is probably the best-known feminist theorist using Nietzsche's work, in her case to demonstrate the limitations of identity politics, which she analyzes as a politics of ressentiment (*States of Injury*, Princeton, Princeton University Press, 1995; *Politics Out of History,* Princeton, Princeton University Press, 2001). While granting that her analysis, though overly polemical and single-minded, has much merit, I think it would be just as useful to use Nietzschean tools to understand not the demands of the oppressed, but rather the guilt feelings — and the actions or inactions that result from them — of those who are members of privileged groups.
6. R. Posner, "Past-dependency, pragmatism, and critique of history in adjudication and legal scholarship," *University of Chicago Law Review,* Vol. 67, no. 3 (2000), 573–606.
7. Friedrich Nietzsche, *Genealogy of Morals* (Oxford: O.U.P., 1996) II, 1.
8. Nietzsche, *Untimely Meditations* (Cambridge: C.U.P., 1997) 1, 87.
9. On the binaries of modern knowlege projects, see Bruno Latour, *We Have Never Been Modern* (Cambridge, MA, Harvard University Press, 1993). As far as I know, Latour's well-known deconstruction of the things/people, nature/culture binary is not directly influenced by Nietzsche, but Nietzsche would certainly have appreciated Latour's insistence on treating important human legal subjects (the Conseillers d'Etat) as if they were ontologically on the same plane as pieces of paper and even paper clips (see Bruno Latour, *La fabrique du droit*, Paris, La Decouverte, 2004). Indeed, Latour's title for his ethnography of the *Conseil d'Etat* is pure Nietzsche.
10. "Everything human deserves to be viewed ironically so far as its origin is concerned: that is why irony is so superfluous in the world" (*Human, All too Human*, #253). For a discussion of Nietzsche's ironic ethics and their potential use today, see M. Valverde, "Justice as irony: A queer ethical experiment" *Law and Literature*, Vol. 14, no. 1 (2002), 85–102.
11. I thank David Owen for a very enlightening conversation on which I draw here.
12. Nietzsche, *Genealogy*, II, 1.
13. Nietzsche, "On the Uses and Abuses of History," in Nietzsche, *Untimely Meditations*, supra, n. 8.
14. It may be trivial — or not — to point out that we often feel somewhere in our bodies that we are supposed to fulfil some obligation before we actually remember, intellectually, what that obligation is.
15. David Owen, *Nietzsche, Politics and Modernity* (London, Sage, 1995), 58.
16. See Pat O'Malley, *Risk, Uncertainty, and Freedom* (London, Cavendish, 2004).
17. Nietzsche's account in this essay of the *Genealogy* is typically not explicit about whether the links traced are necessary or contingent, philosophical or historical. My own interpretation always stresses historicity, but I think it is equally valid to read Nietzsche's often fanciful genealogies as philosophical explanations, as Gilles Deleuze, for instance, does.
18. Nietzsche, *Genealogy*, II, 2.
19. Ibid. II, 2.
20. Ibid. II, 9, 10, 19.
21. "The living generation always recognizes a **juridical** [emphasis added] obligation towards the earlier generation, and particularly towards the earliest generation. … : a debt is recognized, which gnaws incessantly by virtue of the fact that these forefathers, in their continued existence as powerful spirits, never cease to grant the race new advantages" (*Genealogy*, II, 19). The necessary failure of every individual and every generation to repay this ancestral debt is of course the subject of Walter Benjamin's reflections on justice and history (see his "Theses on the Philosophy of History").
22. Nietzsche, *Genealogy*, II, 3.
23. Ibid. II, 12.

24. Robin Small, *Nietzsche in Context* (London, Ashgate, 2001), 185. Small explains very lucidly how punishment is distinguished from revenge, with revenge being associated with ressentiment while punishment is associated with the active forces of life. This could be an important point if one wanted to develop a Nietzschean substantive theory of the criminal law, but here I set this aside in favour of a reading that focusses on Nietzsche's method more than on the normative preferences he expresses.
25. Ibid. II, 3.
26. I have found Deleuze's interpretation of 'eternal recurrence' particularly helpful (see Gilles Deleuze, *Nietzsche and Philosophy* (London, Athlone, 1983)
27. Nietzsche, "The Wanderer and His Shadow," in *Human, All Too Human* (1986), 12.
28. "One should beware of assessing the value of a man according to a single deed … If men like us have no crime, e.g. murder, on our conscience — why is it? Because a few opportune circumstances were lacking. And if we did it, what would that indicate about our value?" "One should reduce the concept 'punishment' to the concept of suppression of a revolt, security measures. … But one should not express contempt through punishment" (Will to Power, #740).
29. For many decades Nietzsche's writings on 'noble' vs 'slave' moralities were read as an endorsation of regressive political projects, but in recent years, thinkers such as William Connelly and Wendy Brown have provided readings that use Nietzsche's critique of liberalism for post-liberal rather than pre-liberal purposes. See *inter alia* the essays in K. Oliver and M. Pearsall, eds., *Feminist Interpretations of Nietzsche* (Pennsylvannia State University Press, 1998).
30. Nietzsche, *Genealogy*, II, 10.
31. "Psychological history of the concept 'subject'. The body, the thing, the whole construed by the eye, awaken the distinction between a deed and a doer; the doer, the cause of the deed, conceived every more subtly, finally left behind 'the subject'" (Will to Power, #547).
32. M. Nussbaum, "Is Nietzsche a Political Thinker?" *International Journal of Philosophical Studies*, Vol. 5, no. 1, 1–13. Nussbaum's article is a remarkably intolerant argument to the effect that anyone who does not share her preference for liberal tolerance as a substantive value is not only nasty but also not a political thinker.

CHAPTER 4

Law's Ignoble Compassion

MARINOS DIAMANTIDES

Most of us who grew up in cultures that value charity are familiar with the urban story whereby a young newcomer to a big city starts off by occasionally giving loose change to street beggars and ends up, not much later, turning a blind eye, often acquiring a sick stomach in the process and having to tolerate insults from the disappointed beggar. The commonly held belief that, in maturing, compassionate persons simply grow indifferent out of sheer repetition of the sight of beggars is not credible unless we can remove our suspicion that the same person ends up paying the same or a higher price in terms of bad conscience. It is, however, likely that the person in our example stops giving as a result of a categorical mistake ("I shall no longer give to this one because I cannot give to all who are like him") and/or the hope that more happiness will be generated if one's money is spent through an organized effort. Indeed, in western cultures it is common knowledge that as compassionate persons grow older they tend to contribute less on an ad hoc basis and more through fiscal and political support for scientifically guided state welfare initiatives, policing, and military expeditions aiming to decrease or eliminate the "causes of suffering," namely to reduce or eliminate risks to productive and enjoyable everyday life. Domestic and international "antisuffering" programs range from vaccinations to prevention of crime to humanitarian military interventions overseas that aim to impose the rule of law, better governance, and/or respect for human rights, and have a way of ending up engaging

the intervener in protracted engagement with the complex miseries of distant others.

The person of our example is also likely to be contributing to organized nongovernmental charities that work hard to "manage" suffering by offering relief and so to mediate the spectacle of such suffering as cannot yet be eliminated, for example removing unsightly beggars from the streets. Of course, misery is never eliminated and has a tendency to show its ugly head in infinite ways, spoiling the view and undoing appearances. Moreover, we empirically know that the feeling of safety of persons living in welfare states can coexist with increased nonspecific anxiety. Arguably, this inexhaustible anxiety of the suffering-averse person in turn helps continue the significant popular support, beyond the call of "civic" duty, for state-coordinated charitable programs (e.g., blood donations) and various civil society initiatives. From a Nietzschean perspective this anxiety over the persistence of suffering also displays the nihilist's wish to deny that "waste, decay and elimination" are necessary consequences of the growth of life.

Generally, Nietzsche pointed out the dangerous naïveté of waging moral, and even scientific, wars on sickliness-sickness, which is "absolutely necessary" and belongs to every age and people. His fury was particularly directed against "moral remedies" against sickliness, the employment of which he described as nothing but consolation, anesthesia, and intoxication, which hasten exhaustion and hinder progress.[1]

Incidentally, it could of course be argued, though this is not the purpose of this chapter, that Nietzsche's wish to see "real progress" unhindered by morality was as impossible a dream as is the desire to separate scientific research from the moralities of the free market, social engineering, and the law. Here, however, my concern is with the apparently disproportionate increase in moral generosity in the form of collective efforts compared with direct, interpersonal compassion. Arguably, that modern economic man continues to give generously in this impersonal way goes to show that, in the aftermath of the death of the God of morality, *hoi polloi* are not free from the illusion of the God of metaphysics, namely, the belief in a leading conscience of the universe and operator of universal finalism. Today, this usually takes the form of a belief in the power of economic and biomedical sciences to "manage" all kinds of suffering efficiently and comprehensively if not eliminate them. What must be noted is that the compassionate urbanite of our example, who no longer gives to beggars but contributes to charities, deprives himself or herself of the opportunity to immediately discharge spare energy in order to affirm the distance between himself or herself, as the one who is strong, and the unsightly weak beggar. He or she exchanges the power to maintain distance from the suffering witnessed for a

hope in the systemic elimination or management of suffering, which is bound to prove deceptive and thus further induce anxiety.

Nietzsche's philosophy offers a useful perspective on the question at hand. After all, he is of course famous for affirming the indissoluble link between life and suffering against a long list of attempts to create a false sense of comfort, including Christian theodicy, the secular morality of utilitarianism, modern medicine, and the welfare state. Indeed Nietzsche discounted suffering as a philosophical problem only in so far as this meant a problem posited by and for the senses, that is, the problem of pain and pleasure in naïve and sensationalist discourses. That said, the philosopher of joy, dance, and gay knowledge shared — even with Schopenhauer — the recognition of suffering as constitutive of the human condition. Throughout his work it is said time and again that all becoming and growing postulates pain and that to seek to eliminate suffering is to hate life. Nietzschean affirmation, of course, is distinguished precisely by its resistance to Schopenhauer's conclusion that the ultimate human response to the implication of suffering in all human life is the denial of life itself. Slave morality begins with the question "Why suffer pain?" which represents "natural" weakness as a consequence of injustice and gives rise to resentment and, later, nihilism. From a genealogical perspective even to ask "Why suffer?" already expresses the exhausted and sickly nihilist who hopes for "stillness and calm seas," or a life without suffering. The religious "ascetic ideal" was a successful attempt to offer a meaningful answer to that question. By contrast, like the nobles at the beginning of his *Genealogy*, Nietzsche appears throughout his work to continue to want to want and will, to continue to desire and so, by implication, to suffer. Crucially, Nietzsche wrote of the will to affirm life's sufferings within a *meaningless* universe, as something that has historically eluded both pagan and Christian:

> What really arouses indignation against suffering is not suffering as such but the senselessness of suffering: but neither for the Christian, who has interpreted a whole mysterious machinery of salvation into suffering, nor for the naïve man of more ancient times, who understood all suffering in relation to the spectator of it or the causer of it, was there any such thing as senseless suffering. So as to … deny it, one was in the past virtually compelled to invent gods. … Nowadays it might require other auxiliary inventions (for example life as a riddle, life as an epistemological problem).[2]

In sum, where the Schopenhauerian saint finds in human suffering the reason and the power to deny life, Nietzsche does not see gratuitous suffering as a problem to be overcome or a condition to be transcended. It is his

embrace of all suffering as always being absurd and in excess of cause, effect and representation, beyond causality and responsibility, as well as theatre where actors are interchangeable, in a spirit of individuating *amor fati* and acceptance of *eternal recurrence,* that clearly separates the thought of Nietzsche from that of pessimists; and indeed that of optimists whose "grounds" for believing that either science or social consensus or moral autonomy can overcome, transform, or transcend individual suffering are as stable and everlasting as the Earth itself.

In relation to jurisprudence Nietzsche's attack on moral pity casts a different light on debates over the apparent clash between the deontological morality of rights and utilitarianism. For obvious reasons a prime candidate among legal fields that can be subjected to this critique is so-called medical law and ethics. Medical law is marked by a tension between theory and practice or, better said, by *techniques* that mix liberal principles of individual autonomy — understood not as real capacity of self-mastery but as ideal freedom that defends itself against external constraints — and the Christian morality of sanctity of life with scientific and economic considerations of necessity that are seen as pragmatic. Thus, indicatively, whilst consent is generally seen as pivotal to the legality of medical intervention, the construction of valid consent turns around questions of patient competence and therapeutic interests, both of which are formulated as questions of fact. To illustrate how such techniques may be called debilitating or will-depleting in a Nietzschean sense, consider how the law may honor the decision of a schizophrenic not to accept lifesaving treatment on irrational grounds, when that patient is shown to have accepted the therapeutic value of the proposed treatment, but declares incompetent a sane person who refuses to acknowledge the value of the medical diagnosis using subjective criteria.[3] Thus thrives the "immortal" legal subject at the expense of mortals' will to power. Moreover, whilst the law does not cease to declare all life sacred, the value of particular lives — from cryo-preserved embryos and abortable fetuses to children born with severe disabilities and permanently comatose adults — is estimated in terms of a proxy pain-pleasure calculus for the being in question within the confines of public interest estimated in money, whereas, of course, the only pain or pleasure that counts is for those caring for such beings. Death, too, has been redefined, ostensibly on scientific grounds by a committee of medical experts, whereas in fact the only consideration was how to minimize the number of insensate people surviving by virtue of resuscitation and life-support systems whilst maximizing the number of potential fresh cadavers as sources of organs for transplantation.[4]

In connection with such inhuman legal depictions of how humans decide to care for one another or not — using values the source of which is external to the decision maker — Nietzsche's views can be used to criticize both liberal moralism and utilitarian metaphysics. Starting with rights, the *injunction* to recognize every man's equal value irrespective of weakness and dependency is clearly antilife. Submitting to a moral law that calls for treating an insensate, vegetating patient as an end in himself implies a desire to recognize the law as being larger than life, insofar as life implies decay including loss of consciousness, or a desire to be moral *because* we see in our morality an essential condition for the transcendence of weakness and suffering. It is a tactical move designed to deny the evident connection between human, animal, and plant life and in this respect Kantian morality is functionally identical with preceding moralities, which aimed at the abolition of suffering. A Nietzschean will be interested in medico-legal cases that extend traditional criminal and tort doctrines by applying notions of responsibility for man-inflicted harm to disputes over the meaning and value attributed to suffering an illness, such as suffering that no one has caused and, often, that no one can reverse. Much of this type of litigation is resolved through judgments that deserve the attribute "decadent" in the Nietzschean sense that they ultimately attempt to "pass judgment on suffering" and share in the belief that it is desirable and indeed possible to banish suffering. One should also call such decadent judgments "sickening" given that Nietzsche viewed sickliness-sickness as one more *consequence* of decadence, not its cause; other consequences including addiction to vice, prostitution, crime-criminality, celibacy-sterility, hysteria, weakness of the will, alcoholism, pessimism, anarchism, and libertinism. Further consequences may even include "[o]verwork, curiosity and sympathy — our *modern vices*."[5] To these, we may add the *legalism* that caters to

> every sufferer [who] instinctively seeks a cause for his suffering; more exactly, an agent … upon which he can, on some pretext or other, vent his affects … the venting of his affects represents the greatest attempt on the part of the suffering to win relief, *anesthesia* — the narcotic he cannot help desiring to deaden pain of any kind. This alone … constitutes the actual physiological cause of *ressentiment*, vengefulness and the like: a desire to *deaden pain by means of affects*.

Thus, anger at doctors becomes a substitute for resentment of sickness. This is equally the case both in the so-called patient-centered jurisdictions and in those that embrace medical paternalism. The former, which employ

expanded principles of medical negligence, the North-American version of "informed consent" that requires the doctor to disclose *every* aspect to the proposed treatment that the particular patient would have needed to know before deciding, the law is practically inviting patients to retrospectively accuse their doctor for responding to their need. I wonder, for example, how long it will be before the same Prozak nation that used to brag about how easily their doctors obliged in handing out prescriptions will turn against their founding fathers. As for jurisdictions that embrace medical paternalism, like English law, the result is that frustrated patient-litigants come to suffer their treatment at the hands of doctors and judges in addition to their own plight. In both cases different legal tactics are used to the same anesthetic effect: take the patient's mind off the suffering that cannot, by any stretch of the imagination, be attributed to human agency. It may be proved one day that Prozac or frustrated litigation kills, but so does depression and indeed life. Moreover, in cases of incurable and painful conditions, unnecessary exceptions to the legal rules are made where the legal construction of medical responsibility can be explained only as a form of mandatory empathic reaction to the need of the patient to have his or her suffering somehow publicly justified or condemned. This is the case, for instance, in jurisdictions that allow or habitually excuse mercy killing in cases where the patient's suffering is judged to be "excessive." Consider, for example, the so-called doctrine of double-effect in English law. In general English law constructs doctor's duty of care by focusing exclusively on the agency of the physician as scientist and technician — certainly not as executioner. Yet a doctor may lawfully administer what he or she knows to be a lethal dose of painkillers to a patient because his or her primary intention is said to be to provide relief, with death being incidental. The law's rationality here truly suffers *with* the patient as it artificially dissociates pity from its lethal potential.

Even in cases where it is totally counterintuitive to measure the value of carers' pity according to the pain felt by the recipient — for example in the case of unconscious or indeed insensate beings — the law employs the usual technique that links life-or-death decisions to the patient's autonomy or/and best interests. In Nietzsche's terms, therefore, medical law binds its subjects to the "slave moralities" of deontology and consequentialism — the moralities that glorify, respectively, suffering and pleasure — and to the inhumane humanist tendency to posit consciousness as the source of all value. Consider, for example, the absurd English laws that prevent a doctor from switching off the life-support machine of an insensate, permanently comatose patient except where it can be established that death is in the patient's own "best interests." For (an American) example,

the infamous judgment in *Superintendent of Belchertown State School v. Saikewitcz*,[6] will never lose its illustrative value. This widely derided decision (that was intent on upholding the autonomy of a comatose patient by requiring the legal ward to effect a "substituted judgment" — namely, to discover and articulate what the patient would have wanted to happen to him had he been conscious — even though the patient was legally incompetent prior to falling into a coma) simply takes to its logical extreme the desire to be moral as a means of "transcending" suffering! Regarding the attribution of such value to the moral autonomy of the insensate and mentally ill, Nietzsche warns: "If the degenerate and sick ("the Christian") is to be accorded the same value as the healthy ("the pagan"), or even more value, as in Pascal's judgment concerning illness and health, then unnaturalness becomes law."[7]

Similarly, Nietzsche's ideas on the impossibility of modern man's affirming suffering and its cruel effects offer an exit from the legal impasse created in countries such as Britain, which pioneered universal health-care systems but now sponsor resentment for the very sacrifices they sanction, most notably by covering up as "medically futile" what essentially are very expensive treatments. Hence the debilitating task of reconciling the Judeo-Christian principle of "sanctity of life" with the absence of a "human right" to medical treatment and with lawful practices ranging from standing nonresuscitation orders, to decisions to let viable Down's Syndrome children die, to diverting resources from elderly Alzheimer's patients, to harvesting organs from a healthy minor in order to implant them in his or her sick sibling — the list is long. Finally, the idea that modernity suffers from decadence in terms of poetic freedom helps highlight the stalemate in developing appropriate juridical answers to novel questions posed by the sciences of life. For example, in relation to frozen embryos, fetuses, and even less complex human tissue, the law continues to assign significance only to the born whole human, whilst, at the same time, it shies away from applying the laws of property and, instead, focuses on the issue of the autonomy and consent of the legal subject. More traditional problems, too, continue to receive legal answers that are open to suspicion, such as sanctioning forced sterilization of the mentally incompetent continues to be based exclusively, if incredibly, on the malleable "best interests" of the incompetent. Again, Nietzsche's philosophy may be used to critique the absence of will to power in these instances.

In order to illustrate further how law constrains the staging of suffering and of the subjectivity it commands by refusing to give appropriate names to the kind of patients that fall short of autonomy and indeed defy a neat placement in ontological schemes — cryo-preserved embryos, the anencephaly

infant, the vegetating — it is instructive to recall the ethic of the theater of the absurd. In plays like *Waiting for Godot*, the characters are *deliberately* excessively formal to prevent empathic identification by the audience. By contrast, it appears that both the positive law and many of its critics seem intent on sponsoring only tragic or melodramatic stagings of subjectivity that only accentuate bad conscience.[8] For example, the English debate over fetal rights is polarized between, on the one hand, the current position that only the born infant — namely the speaking subject — may enjoy rights and, on the other hand, the suggestion that legal protection of fetuses should follow only if it can be proven that they are capable of feeling pain during abortion. This latter view, of course, invites its qualification by Peter Singer–type discourses — a mere addition to the long tradition of naturalistic fallacy — whereby the value of a being's suffering is derived from the degree of its consciousness and sensory capacity. Singer is, of course, right that if what we care about is the patient's capacity to experience pain, we must care more for the suffering of a pig than that of a newly born human given the former being's superiority in actual neural complexity.

Nevertheless, the strange metaphysical power of the concreteness and skill of theatrical performance that Nietzsche speaks of in the *Birth of Tragedy,* and which the theater of the absurd recaptured, is lacking in the modern law's productions of autonomy and duty of care where, instead, there is fetishization of the language of autonomy and, to a lesser extent, of empathic identification — with the result that *the absurdity of suffering, rather than being staged, becomes incorporated in the legal judgment*. In sum, the law either hides or condemns the absurdity of the human condition by its inane insistence on downplaying the subjective power of the healthy to intervene in situations of natural suffering without first answering ontological questions, such as: To what extent can the patient experience pain? What are his best interests? and so forth. Law's inability to depict the lawful cruelty of its agents vis-à-vis the subject of a wretched existence contrasts with theatrical works by someone like Fernardo Arrabal who, having turned his back on the practice of law, wrote plays where absurdity is derived from characters who are intent on seeing the human condition with uncomprehending eyes of childlike simplicity. The characters treat each other as toys — now the object of affection and now that of cruelty. Whilst Arrabal's plays, particularly *Fando et Lis*, successfully alert the audience to the inevitable consequences of the failure to invoke the existence of an invisible moral law that orients our response to witnessing meaninglessness, the subjects of positive law are prevented from producing moral truth and come themselves to suffer the world as a meaningless

affliction. Thus, we act *contra sensu* in taking the permanently comatose being to "suffer" subjectively where no subjectivity remains. Yet, despite the law, thinking people understand that to the extent that such absurd suffering remains a phenomenon, it is the intentional focus of the conscious witness that matters, not some hidden essential meaning. Hence one of my medical law students, avoiding all temptation to subjectivize and sensationalize the "suffering" of insensate beings, proposed in class that we use a much more abstract definition whereby the existence of "suffering" results from the observation that a more or less complex entity (including an artificially intelligent machine) cannot perform those functions for which it was adapted or designed. This definition was meant to stand irrespective of whether the entity in question feels anything or even manages to group disparate sensations into a unified "subjective" experience.

* * *

It is — uninspiringly — true that Nietzsche's critique of moral theses on suffering partly rested on his own quasi-utilitarian calculation according to which the morbid state of pity "in fact" helps no one and, indeed, increases suffering by bringing about the debilitation of the will through shame and guilt. Indeed, it is guilt and shame that remain with us when we resolve cases by satisfying ourselves that *this* but not *that* suffering is unbearable. In this regard, apart from his suggestion that pity accentuates bad conscience, Nietzsche simply echoed the spirit of his contemporary scientific medicine by seeing in pity an impediment to therapeutic "progress." Thus he equated Christian morality and quackery.[9] Indeed, under what came to be known in the history of medical science as the doctrine of "scientific nihilism," eminent professors of medicine of the time "knew that the curing part of medicine rested upon the discipline's scientific basis, and that the physician's compulsion to heal [*Drang zum heilen*] had to be reined in."[10] It is more interesting, however, to read Nietzsche's prophesies about the manifestations of nihilism — some of which I evinced above in the area of health care — in the light of his *unembellished humanity*. Indeed Nietzsche has to be the philosopher of compassion par excellence. In a negative sense, Nietzsche simply has to be the philosopher of pity given how sorry he was that modern man is incapable of deriving pleasure from the sight of suffering in all but pathological ways. In a positive sense, Nietzsche remains the philosopher of *affirmative compassion* in word and in deed. After all, Nietzsche summed up his oeuvre as an attempt to cure man of bad conscience:

> To restore a good conscience to the evil man—has this been my unconscious endeavor? I mean, to the evil man in so far as he is the *strong* man?[11]

In this regard, it is important to remember that, according to Nietzsche, a qualified idea of nonmoral compassion *is* an integral part of human flowering and the innocence of becoming. This idea of "affirmative" or "life-enhancing" compassion has not received as much attention as has his correlated gesture of dismissing the preoccupation with suffering as characteristic of self-tortured metaphysicians and religious people. The origins of the Nietzschean theory on noble compassion can be traced in the *Birth of Tragedy* and the claim that modern man has lost the ability to derive pleasure from inflicting and/or seeing suffering. This is followed, in *Genealogy*, with the claim that the options for modern man are either to react to instances of others' suffering with "morbid" — moral or empathic — pity denying, in the process, the meaninglessness of suffering; or with productive, "life-affirming" compassion qua will to power without attempting to derive the compassionate action's value from any external source. In *Will to Power*, *Daybreak,* and other works, the idea of compassion as a life-affirming response to another being's suffering is explained negatively and is distinguished from morbid pity, which underlies moral duty. In short, the master may act kindly upon a weaker other out of a *surplus of energy* — not from a submission to moral duty, utilitarian calculus or, more immediately, out of empathic identification, fear of pain, and need for pleasure.[12] The master, like a member of the audience in the theater of the absurd, chooses to care for a suffering hero despite not knowing — and indeed without asking "who is" the hero and "why they suffer."

> A man who says, "I like this, I take this for my own, want to protect it, and defend it against anybody"; a man who is able to manage something, to carry out a resolution, to remain faithful to a thought, to hold a woman, to punish and prostrate one who presumed too much; a man who has his wrath and his sword and to whom the weak, the suffering, the hard pressed, and the animals, too, like to come and belong by nature, in short a man who is by nature a *master* — when such a man has pity, well, *this pity* has value. But what good is the pity of those who suffer. Or those who, worse, *preach* pity. [13]

Elsewhere in Nietzsche's work, noble compassion is distinguished from morbid pity in terms of self-care, specifically in acting out one's compassion while keeping on guard against being physically or emotionally

contaminated. It is noble, Nietzsche wrote, to "[c]are for the most external things, in so far as this care forms a boundary, keeps distant, guards against confusion."[14] The implication of this is a radical freedom to will to care for another's suffering while keeping it at bay. By contrast, we find the ignobility of "the pity of those who suffer" in the context of legal judgments involving insensate vegetating patients. In basing the decision to disconnect life support on a dubious extension of the principles of ideal autonomy and objective best interests, judges show their inability to affirm the value or disvalue of another's bare life and to not share in its meaninglessness. Nietzsche helps us understand that this is not an instance of cruelty or neglect but rather the result of the nihilist's tendency to mirror in the ugly meaninglessness of the other who does not as much "contain" suffering as is crushed by it. After all, the nihilist hold on humanity follows the murder of the God of morality, who died, in supreme tragic irony, out of man's hatred and resentment. Indeed, God's death came at the hands of the "ugliest of men" ("he looked like a man but had almost no human shape, an un-nameable being"), whose self-hatred and resentment were exacerbated by a God who "saw me at all times." God's murderer exemplifies modern man's tirelessly active bad conscience that, just as the moral God — the hypostasis of bad conscience — exemplifies an unflagging capacity for pity. In sum, the God of morality is a voyeur imagined by the moral being, who cannot but associate suffering with guilt and pity. Similarly, in the abortion debate some want the law to take into account the ability of fetuses to experience pain. This call for more guilt contrasts with Nietzsche's call for the anarchical freedom to will to love and care without empathy, be it for a conscious human, a permanently comatose human, an embryo, a dog, a machine, or a structurally flawed building.

Moreover, the noble man's compassion is not restricted by false necessity, be it categorical or pragmatic. When the noble man wills to donate the value of this act depends on the fact of abundance whereby giving does not endanger the donor's enjoyment. The value derived neither from its character as duty obedience under a rational moral law nor calculated on the basis of its predicted likely beneficial consequences. In other words the nobility of compassion depends on freedom from both the illusion of morality and the belief in science's capacity to discover the laws of universal finalism. By contrast, in medical law, examples abound of how the belief in economics and medical science qua the new "God of metaphysics" robs individuals of their freedom to will to care. In the English case *Regina v Cambridge District Health Authority, ex p B*,[15] which I choose because it acts as authority for a number of subsequent similar cases, a ten-year-old National Health System patient, suffering from lymphoma since the age of

five, had received all standard treatments to no avail before her doctors determined that no further treatment could usefully be given. They estimated her life expectancy as between six and eight weeks. Her parents, having obtained a second opinion from doctors in the United States, requested an additional, expensive, new treatment. This was denied, partly on the ground that the new method's success rate was "too low" to render the distress associated with the treatment in the "best interests" of the child; and partly on the ground that the local health authority should be free to consider whether the expenditure of £75,000 on one patient's treatment, the success rate of which was disputed between 2.25% and 18%, was an effective use of resources, bearing in mind the present and future needs of other patients. From a Nietzschean perspective, even though the man himself was categorically against the assumption that life is intrinsically "sacred," it is hard to accept the first ground as evincing anything but resentment and nihilism; for how could death be in the best interests of the child as opposed to painful but possibly therapeutic treatment? This utility test underlies the English moral obsession with avoidance of pain and pleasure maximization, as translated into a monetary value by Bentham. This case was referred for judicial review through which the High Court eventually ordered the Health Authority to reconsider their decision. Justice Laws opined that while doctors can rightly assess the chances of therapeutic success of the proposed treatment and its objective disadvantages in terms of risk and suffering, the assessment of the child's best interests entails a valuation that is not a medical question but one for those — in this case the father — who assume the child's overall care. As for the argument stemming from limited resources, the administrative court considered that, when the question is whether someone's life might be saved, a health authority can and should do more than "toll the bell of tight resources." I cannot say whether the High Court's judges here were "nobly" and anarchically opening the taxpayers' coffers or unquestionably accepting the Judeo-Christian valorization of all kinds of biological life as "sacred" no matter how unhealthy they are. We are unsure as to whether the motivating factor was a will to assert moral freedom in the face of an absurd situation or, alternatively, bad conscience. We can, however, praise the risk the judges took by not relying on the new metaphysics of universal ends in nature, the world, or history in relation to which a life's worth and a charitable action's usefulness can be *measured* and *compared*. As in the example with the passerby and the beggar, with which I opened this essay, while one can rely on economic thinking to count how much money one can afford to spend on a beggar, a child, a dog, or an idea, this calculus cannot provide an objective, universal answer as to whether one *finds* oneself obsessing

over the beggar, child, or dog and, further, whether one can will to will this fate. Depressingly, if predictably, the Court of Appeal reversed this order holding, inter alia that:

> In a perfect world any treatment which a patient … sought would be provided if doctors were willing to give it, no matter how much it cost. … It would, however, … be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world.[16]

It is hard not to get angry at the inhumanity of a decision that values compassion only in so far it can be democratically partaken by *all* — from the miser to the patrician — and, of course, at the decision's nihilistic cynicism in consigning said compassion to Platonic ideality. What contemporary medical law exemplifies is that if the moral man of old, like the biblical Job's neighbors, saw a link between natural suffering and sin, the modern moral man is still unable to embrace the absurdity of suffering with a suitable sense of *gratuitous* yet life-affirming "responsibility" qua desire to care. Instead man sees in suffering either the end of some preventable cause (faith in science) or the victory of meaninglessness over subjectivity (resignation). In either case, natural suffering continues to be subject to the same evaluative principle of self-accusation and to give raise to bad conscience. Compassion, in turn, is still assigned to the imaginary, inhuman world of absolute goodness and truth as opposed to the world of effects.

Consequently, "noble compassion" remains meaningful only at the level of individual eccentricity and largesse where it is hard to distinguish from morally bound philanthropy. For it to become of universal significance we shall first need to totally overcome the guilt and shame that flow from the resentment of natural suffering; moreover, we shall need to replace the moral principle of self-accusation by an "innocence of becoming," whereby "becoming must appear justified at every moment,"[17] so that it is impossible to devalue it, as prophesized in *Zarathustra*. It is important, however, to stress the messianic character of Zarathustra's prophecy because the conditions for human flowering cannot simply follow the will to rid oneself of the God of morality, a path pursued by Nietzsche. The innocence of becoming, and the will to noble anarchic compassion therein, require the absolute affirmation of the world as a world of affects and, therefore, our disengagement from metaphysics. In this connection, I argue, while rage and despair suffice to energize being to rid itself of morality, being still cannot summon the patience to watch the painfully slow disappearance of the God of metaphysics *and* expend one's power in the form of noble compassion. In connection to the issues raised earlier, the challenge for

modern noble men is to face up to the absurdity of suffering — which ridicules not only the idea of morality and God's pity but also, crucially, the belief in a world as system or governed organization within which suffering can be adequately measured, compared and, ultimately, eradicated — and still to will to care.

I have argued that the so-called moral dilemmas with which lawyers wrestle in relation to medico-legal techniques — which can be summarized by the sanctification of biological life (*zoe*) and the calculus of the quality assessment of conscious, political life (*bios*) according to the pain and pleasure scheme — illustrate advanced nihilism and partial denial of Zarathustra's message on the death of God. There are also pedagogical issues at stake because teaching nihilistic law is not fun. For example, the efforts expended by medical lawyers to formulate the problems in terms of metaphysical grounds (sanctity, autonomy, etc.) that have long lost their credibility would be laughable were it not for the incredible sense of boredom generated among students and practitioners of law and the stifling of creative interpretation that follows.[18] In short, the part of law that deals with such marvelous entities as frozen embryos and comatose patients tragically comes to represent an extreme case of morbid refusal to affirm *Abgrund* or, more poetically, the "beautiful chaos of existence," which forever prevents consciousness from throwing an anchor. While most educated lawyers would readily subscribe to the Nietzschean rebellion against bad conscience and proclaim themselves free from the moral compulsion of pity, few are prepared to fully embrace the great metaphysical horror, to look behind the veil or mask of the phenomenal world in order to make their own the truth that there is nothing there that would stop or limit their interpretative creativity, and to affirm that being is composed chaotically. It is, arguably, due to this psychological reason that even the noblest of medical lawyers tolerate *by default* the instrumental economic rationality that governs actual medico-legal practices. Otherwise, those with half a brain would find it easy to expose the limitless limitedness of human freedom, to throw teleology out the window, and proclaim man capable of forcefully interpreting the value or disvalue of being-without-essence in a world lacking structure, *telos,* or meaning. In this connection I suggested earlier that, even in the aftermath of the death of the God of morality, modern man still must learn the value of patience, as he sits and watches the inevitably *slow* disappearance of another God, that of metaphysics, whose historical function has been to hypostasize the belief in universal finalism and the denial of chaos. By killing the God of morality man has rebelled against God's pity but such an act does not by itself free man to confront the abyss and to realize the meaninglessness of his sufferings.

Man, thus, still dwells in the post-Platonic denial of the world of effects and of belief in the supposedly immutable world of, decreasingly, absolute goodness and, increasingly, absolute truth as offered by science and economics.

Notes

1. Friedrich Nietzsche, *The Will to Power, 1967* (Walter Kaufmann ed., R.J. Hollingsdale trans.).
2. Nietzsche, *The Genealogy of Morals,* in *Basic Writings on Nietzsche* (Walter Kaufmann, ed. and trans., 2000) [hereinafter Nietzsche, *Genealogy of Morals*].
3. Respectively in, *Re Maida Yetter* (1973) 96 D & C 2d 619 (CP Northampton County, PA) and *State of Tennessee v. Northern* (1978) 563 SW 2d 197 (Tenn. CT App.). For a full comparative discussion of these two cases see M. Diamantides, "The Violence of Irresponsibility — Enigmas of Medical Law" *New Formations*, special issue "The Ethics of Violence," Renata Salecl and Slavoj Zizek, eds., (London: Lawrence and Wishart, 1999) 145–158.
4. See "How Death was Re-Defined" in P. Singer, *Rethinking Life and Death — The Collapse of Our Traditional Ethics* (Oxford: Oxford University Press, 1995).
5. Nietzsche, *The Will to Power,* para. 42, 2, 73, 48.
6. 370 N.E. 2d 417 (Massachusetts, 1977).
7. Nietzsche, *The Will to Power,* para. 246, 142.
8. In his writings on Greek tragedy, Nietzsche asserted — and a psychoanalyst would tend to agree — that Aristotle was wrong that in attending tragedy one is "purged" of the affects of pity and terror through their arousal. See Friedrich Nietzsche, *The Birth of Tragedy*, 133–34 (Frances Golffing trans., 1956). Experiencing pity and terror cannot be therapeutic. The art of the terrifying combined with happy endings is esteemed only by the weak. The strong, by contrast, relate to tragic suffering with pleasure, affirming the large-scale economy of things which justifies it and creating its beauty. It is thus that the modern western individual may manifest *amor fati*, escape the herd mentality that attaches to the collective instinct against selection, and dismiss the illusion of man-made equality. Ibid.
9. Nietzsche, *The Will to Power,* para. 248, 143.
10. R. Porter (ed.), *Cambridge History of Medicine* (1996), at 142.
11. Nietzsche, *The Will to Power,* para. 788, 417.
12. See Nietzsche, *The Will To Power*, para. 943, 496–98. Addressing hedonists and utilitarians alike, Nietzsche wrote elsewhere: "*Our* pity is a higher and more farsighted pity: we see how *man* makes himself smaller, how *you* make him smaller—and there are moments when we behold *your* very pity with indescribable anxiety, when we resist this pity. …" Friedrich Nietzsche, *Beyond Good and Evil*, para. 225, 153 (Walter Kaufmann trans., 1966). His pity comes from a feeling of "overflow" not from lack:
    > the noble human being, too, helps the unfortunate, but not, or almost not, from pity, but prompted more by an urge begotten by excess of power. … Noble and courageous human beings who think that way are furthest removed from that morality which finds the distinction of morality precisely in pity, or in acting for others, or in *désinteressement*. (Ibid., para. 260, 205)
13. Nietzsche, *Genealogy of Morals,* para. 293, 230.
14. Nietzsche, *The Will To Power*, II, para. 943, 496 (emphasis added).
15. [1995] 25 BMLR 5; *rev'd sub nom*. R v Cambridge Health Authority, ex p B, [1995] 2 All E.R. 129.
16. Ibid., 137.
17. Nietzsche, *The Will to Power*, para. 708, 377.
18. To those of Hegelian persuasion I give that it may indeed be that one has to simply learn to live with boredom, compensated, perhaps, by the historical concretion of dialectical thinking. This is the domain of pure conceptuality, uninterested in incarnate being. This paper, however, relies on Nietzsche and so assumes the ultimate groundlessness of Hegelian consciousness.

CHAPTER 5

Aphorisms, Objects, Culture

TATIANA FLESSAS

> A thing would be defined once all creatures had asked "what is that" and had answered their question.[1]
>
> — Friedrich Nietzsche, *The Will to Power*

The question addressed by this chapter is how to distinguish a piece of "cultural property" from other sorts of valuable historical or artistic material. As law understands the value of cultural property, it does not lie in the age, antiquity, or beauty of a particular object or set of objects. Rather, the law defines and protects objects as cultural property when they incorporate a particular kind of knowledge-relation, that which demonstrates a particular kind of attachment between the "knower" and the object. The attempt to define the object within (and for) the operation of law requires, thus, understanding this essential attachment. This chapter proposes that a Nietzschean analysis of how cultural property is defined by law allows us to predict what will be considered cultural property in the future, and also helps us to understand some of what is at stake in disputes regarding the ownership of cultural property.

This chapter's analysis begins by looking at the definitions of cultural property in law and interrogating the values that are expressed in these definitions. The first step of asking "What is that?" is to examine the values implicit in the cross-definitions of culture and life, which extend throughout

the legislative instruments defining cultural property. As will be shown, the key to what constitutes cultural property is whether the object leads to *self-knowledge*, as this is the value that underlies both culture and life. How then to determine the value of this value (self-knowledge)? The interpretation required is an interrogation of the attachment between knower and self-knowledge, and is constitutive of the link between the knowing self and the desired object.[2] The claim made in this chapter is that the best way to interpret and understand the law defining cultural property is to think of both a piece of cultural property (as object), and the definition of cultural property (as text), as Nietzschean aphorisms.[3] The concept of the aphorism pulls definition and object both within its ambit, as to define cultural property and to interpret one of Nietzsche's aphorisms is the same task, requiring the same tools, and being mindful of the same landscape.

Definitions

Cultural property cannot be defined purely by description. The first problem is that an object that is cultural property and one that is not may be exactly alike in all particulars of workmanship, materials, and provenance. The second is that in the past fifty years, conventions and treaties have radically expanded the definition of cultural property, both as a result of the increased interest in heritage of all kinds, and as an attempt to address this problem.[4] Within both national and international legislative frameworks, the definitions of cultural property have become increasingly specific, and as a result longer and more complicated.[5] Cultural property definitions have moved from the "objects — buildings for objects — concentrations of buildings for objects" scheme used in 1954,[6] to lists of sources of information regarding human knowledge and culture very broadly.[7] For example, "traces of human existence" that are not human remains (including DNA, etc.) or artifacts — in short, that are not necessarily tangible — must now be represented within cultural property law. The fluidity and (increasing) intangibility of these objects not only exposes the breadth of the law's — and the culture's — power to define, but also exploits the lacunae and interstices within any/all of the already existing definitions and makes the project of defining cultural property more difficult.

Legislators struggle to come up with a definition for cultural property that can both root the object solidly within a legal framework for what is valuable, and also remain flexible enough to make room for ever-novel classes of things. However, looking at what is common to definitions of cultural property, it is clear that *each definition retains a space for the value that makes one object cultural property and another merely a beautiful or*

historically significant artifact or piece of art. This must be taken seriously. It cannot be mere oversight that retains a silence among all the words; rather, it is this *gap* that the following analysis attempts to show ineluctably defines an object as cultural property rather than mere "art object" or "archeological artifact." In any description of cultural property there is necessarily a missing component, and the definition of cultural property is necessarily bound up with the space of this missing piece. Also common to these definitions is that the value of the property is a result of the *knowledge* that these kinds of objects may provide. Human knowledge and the objects are somehow equated with each other. The legislation protects objects that have the cultural value of assisting (or in some cases, guaranteeing) knowledge. In general, in cultural property,

> [i]f "culture" consists "of learned modes of behaviour and its material manifestations, socially transmitted from one generation to the next and from one society or individual to another…," then the cultural heritage consists of as much of those activities and the objects which give us evidence of them as we can perceive.[8]

This of course opens a great many questions. The two most important are the questions of what the object of this knowledge is and the relationship between culture and knowledge.

Life

To address the first question, the knowledge that the Conventions protect is knowledge about *life*: the definitions represent each and every aspect of life, familiar and unfamiliar. Life is *what* is important, in all its aspects: signs of life, early life, modern life, political life, human life, animal life — any indicia, elements, cast-offs, or environments in or through which life is available for study. This lack of discrimination, or possibly, this *impossibility* of discrimination, between the various forms, functions, and meanings of life, displays a central problem of modernity.[9] How to assess the value or the meaning of (the objects in) these definitions?

Giorgio Agamben writes that the "idea of life"[10] is ungoverned in modernity. The lack of discrimination in definitions of cultural property may show these definitions to be one of the dimensions in which

> there will be little sense in distinguishing between organic life and animal life or even between biological life and contemplative life and between bare life and the life of the mind.[11]

The problem with contemplating "bare life," or life qua life, unmediated by knowledge of anything other than itself, is that thought requires an external correlate in order to avoid freeing "itself of all cognition and intentionality."[12] For Agamben, the task then is to think the necessary correlate. There must be a system of thought that stands outside of life and yet does not fall into the trap of metaphysics. Without such a conceptual or philosophical system, knowledge — about life or anything else — is meaningless.

In cultural property analysis, the reference for the study of life is culture, while culture requires the evidence and artifacts of life. The danger is that this system leads to a meaningless proliferation of artifacts. If culture cannot stand outside life, then Agamben's concern also applies to cultural property generally: Why bother to collect this sort of knowledge, as "[w]hat is the nature of a knowledge that has as its correlate no longer the opening to a world and to truth, but only life and its errancy?"[13] In order to consider whether the knowledge being sought has an external correlate, the analysis turns to the second question asked above: What is the relationship between culture and knowledge?

Culture/Knowledge

The emphasis on knowledge is intimately connected with the definition of "culture" in modernity. Culture has many meanings, particularly in attempts to define cultural property.[14] However, a very common definition of culture is the intended transmission and reception of knowledge. As such, culture is fundamentally a relational concept. It inhabits (and defines) interstitial space. In this realm, culture is the medium for the transmission of knowledge between people, between institutions, between people and institutions, between objects and viewers, and between knowledge itself and its interpreters. For the purposes of this chapter, the last pairing is the most important. The (space of) culture can be understood (at least in part) as the (space defined by the) relationship between knowledge and the self as knower. The significance of these cross-definitions is to suggest that the space opened by the notion of cultural property — the nexus of culture and property[15]— is a space mediated through the self and self-knowledge.

At the center of the complex of the will to self/knowledge that informs cultural property analysis is the problem that Friedrich Nietzsche places at the beginning of *On the Genealogy of Morality*:

> We are unknown to ourselves, we knowers, we ourselves, to ourselves, and there is a good reason for this. … [*O*]*ur* treasure is where the hives of our knowledge are. As born winged-insects and

> intellectual honey-gatherers we are constantly making for them, concerned at heart with only one thing — to "bring something home." As far as the rest of life is concerned, the so-called "experiences," — who of us ever has enough seriousness for them? or enough time? … We remain strange to ourselves out of necessity, we do not understand ourselves, we *must* confusedly mistake who we are, the motto "everyone is furthest from himself" applies to us for ever, — we are not "knowers" when it comes to ourselves.[16]

Nietzsche argues that modern human nature is to set out to know everything, and in particular ourselves. However, the ground(s), the very endeavor, of our knowing is flawed. Instead of deriving self-knowledge through experiencing our own, individual lives, the space of knowledge is extra-life. This does not mean that this space (which is culture, in the present argument) can function as a true resource for meaningful knowledge about life. The "hive" consists of and contains the ascetic disciplines, as well as the objects of those disciplines. Although the products of asceticism are what we (erroneously) look to when we seek to know ourselves, the hive is where both the inside and the outside world are transformed, via knowledge, into "honey" for what is inevitably our *not-self-knowing*. Nietzsche's point mirrors Agamben's: the rationalistic pursuit of knowledge will not lead to understanding life any more than the pursuit of life can be depended on to generate knowledge.

The question is then "Why not?" Discussing Nietzsche's link between human experiences and the transmission of culture, Pierre Klossowski writes that

> Culture (the sum total of knowledge) — that is, the intention to teach and learn — is the obverse of the soul's tonality, its intensity, which can be neither taught nor learnt. The more culture accumulates, however, the more it becomes enslaved to itself — and the more its obverse, the *mute intensity* of the tonality of the soul, grows.[17]

Culture and "the soul's tonality" are experientially opposed to each other in human life. Entering into the culture/knowledge system has the effect of silencing the expression of "the so-called 'experiences'", which in fact define each human life. In this space, the knowledge that is created and privileged by culture — by transmission and intentionality — is negatively linked to what gives it meaning. Both the transmissive, acquisitive act of culture, and the accumulation that results, are part of a vicious circle of sorts, through which the work of culture and the intensity of the soul become increasingly separate.

In this construction, embedded in this notion of culture is a conflict with the knowing self. What begins as an act of expression (or engagement with the world) becomes an experience of muteness (or distance). The intentionality that permeates culture results, however unintentionally, in silence. There is resistance to the *experience* of thought,[18] as there is a separation between thought and (true) experience. The knowledge that arises, therefore, is specious or damaging. Culture is the transmission of this kind of damaging knowledge. The human (or life) experience that does not find expression in the culture/knowledge system is silenced, even as it gives rise to the intention to transmit knowledge (and thus to the activities and "goods" that define this system.) Culture implicates knowledge and the self in conflicting sources and degrees of intensity.

This problematic link between culture/knowledge and self/knowledge, and the inversion of the direction of intentionality in this field (from looking outward to looking inward) sheds light on the field of cultural property. When thinking about how cultural property is defined, or even when thinking about the objects themselves, the same complex is visible. Cultural property consists of objects and practices or traditions that seem to guarantee or underwrite some profound knowledge of (human) history and experience. In cultural property disputes, the relationship with the pieces of cultural property is invested with the intensity that Klossowski finds in (the Nietzschean definition of) culture. The experience of this intensity, or what Klossowski would call the "tonality" or "mood" of the parties, generates perceptions of reality that often exceed rational understandings of time and selfhood.[19] Similarly, the claims made for/about ownership of the ancient object at issue telescope ideas of eternal identity and vast spans of time into present, human existence.[20] The result is that culture is read through property — things or nonthings — to derive an (often or necessarily) irrational knowledge of the self.

The objects or practices themselves embody this conflict. As expressions of the struggle for self-knowledge in an environment that is (paradoxically) hostile to expression, they can be defined by looking to the fault lines they embody. Cultural property analysis depends upon preserving knowledge itself, via preserving things (tangible or intangible) that are only valuable insofar as they provide foundations for knowing the roots of the (cultural) self. From this perspective, cultural property is a term that can include almost any sort of thing, including things not-yet-known or not-yet-recognized as culturally valuable, and most commentators agree that legislation protecting cultural property recognizes this essential fluidity.[21]

However, the knowledge is derived via the route of acquiring or studying cultural property will never be enough to satisfy its seekers. Fundamentally,

it cannot meet the intensity or "truth" of the experience that is generated by, or packed into, the object or practice. No object can serve as the external point of truth that must exist in order to anchor the culture/knowledge complex, as no object can entirely stand outside of this complex and thus guarantee its accuracy. Simultaneously, there is an error in the methodology, the ascetic "'bring[ing] something home'" that Nietzsche discusses. The object/practice at issue cannot contain the knowledge sought; it is the space and the direction of the (desired) knowing that the cultural property opens up and represents that must be liberated in order to understand cultural property disputes.[22] The para-rational investment in the object must be reconciled, within the language of the definition of cultural property, with the imperative of modern culture.[23]

If one looks at the problematics at the core of cultural property (definitions and objects) in this manner, it becomes clear that the essential element of anything that may be defined as cultural property is that it must act as some sort of truth-claim or guarantee regarding the origin, existence, or meaning of the knowledge that underlies culture. The core of all cultural property (definitions and objects) is the valorization and fulfillment of this particular function. Therefore, the interpretation that is used to equate object and function is also at the core of all cultural property analysis. What sort of interpretation is required?

Aphorisms and Interpretations

The link between self and knowledge, or the central figure in the construct of self/knowledge, is the piece of cultural property. As such, it *must* function as an aphorism, and furthermore, given the value of culture embedded within the concept of cultural property, it must function as a *Nietzschean* aphorism. The object of cultural property, the definitions of cultural property, and the Nietzschean aphorism merge here. As aphorism, the cultural property functions as a puzzle, creating as well as accessing a/the place of *interpretation*, which is an interpretation in itself. The interpretive requirements for correctly "decoding" a piece of cultural property and a Nietzschean aphorism are the same, and implicate the same themes: the externality (asceticism) of truth and the aggression of wisdom.

Aphorisms

At first impression, aphorisms may appear as wholly irrelevant to cultural property. Each definition of cultural property is so riddled with gaps, and with allusions to past and future, that both the field and the objects within it cannot be defined once and for all. In contrast, "… an aphorism … is, an

expression or saying which absolutely closes its borders to everything inessential and admits only what is essential."[24] Unlike definitions of cultural property, aphorisms are essentially concise:

> 1. A "definition" or concise statement of a principle in any science. … 2. Any principle or precept expressed in few words; a short pithy sentence containing a truth of general import; a maxim.[25]

Given the situation of inherent indeterminacy and flux in definitions of cultural property, it may seem [confusing] to suggest that the form of interpretation required by Nietzschean aphorisms is the same as that embodied in definitions of cultural property. Looking more closely, however, *aphorism* comes from the ancient Greek, *aphorismos*, where it meant, primarily, to mark off by boundaries rather than to categorically define.[26] Aphorisms operate to demarcate space. In this sense, aphorisms are (very like) cultural property. As already discussed, a piece of cultural property is marked off from other things of equal age or origin; it is also a relationship, narrative, or practice marked off from other relationships, narratives, or practices. In the didactic realms (teaching, memory, rhetoric), aphorisms represent locations of information. This dual nature (both boundaries and spaces) means that they both create and serve as access to the realm(s) that they demarcate. Again, cultural property also serves these functions.

There are two "psychologies" for aphorisms that have relevance to cultural property analysis. First, as metaphors, they embody a particular rhetorical space, in which the subject and the object of knowledge merge.

> The psychology of the metaphorical address …is that the audience will itself supply the connection withheld by the metaphor, so that the rhetorician opens a kind of gap with intention that the logical energies of his audience will arc it, with the consequence that having participated in the progression of the argument, that audience convinces itself.[27]

The entry into the realm of the object is one of the desired effects of cultural property discourse, and thus one of the reasons that cultural property legislation exists.[28] The gap at the center of definitions of cultural property may well serve as a locus for the willful appropriation of objects and the knowledge that underwrites their value.

Second, both object(s) and definition(s) delimit the realm of knowledge to do with information about humanity that might otherwise be lost.

Therefore, cultural property seeks to ensure *memory*, another function of the Nietzschean aphorism:

> There is another but comparable psychology for the aphorism, namely that once heard it is unlikely to pass from recollection, so its pointed terseness is a means to ensoul the message it carries, and to counteract the predictable deteriorations of memory.[29]

The constitution of the definition may thus serve as both the constitution of the self-knowledge that it seeks to appropriate, and the guarantee of this knowledge. Entering into the world of the object and appropriating that world as an act of memory are both perfectly possible (indeed unavoidable) within the aphoristic form.

Therefore, upon further reflection, the gaps and allusions discussed above, the pitted surface of the definition (and often of the object), may themselves be the essential demarcation of boundaries. If that which marks an object or practice as a piece of cultural property is a space, an inadequacy in rational description, then the inadequacy of the definition may be "proof" of the relevance of the aphoristic form. Moreover, if within the space of cultural property one finds the topography of the will to self/knowledge, then the similarity or usefulness of the Nietzschean aphorism becomes even more striking. The meaning of any aphorism requires interpretation, and central to the interpretation is a relationship of radical discontinuity between outside and inside, culture and self, knowledge and its transmission.[30] This form of interpretation requires unearthing and/or contributing the long narrative sentences that underlie the brief fragments of definitions and objects both. The surface of the piece is a lure rather than an answer to the question that it sets. The object presents putative or assumed linkages between origin, truth, and wisdom, which are then decoded or interpreted by the vast army of commentators, lawyers, and scholars who address it.

Interpretations and Battles: "Truth" and "Wisdom"

Objects that are cultural property must serve as guarantees for culture, and the relationship with culture/knowledge, that the legislative documents encode. As such, they must stand outside the life/culture/knowledge complex if they are to succeed. Can these objects be made to function as a source of nonrelativistic "truth"?

> *What then is truth? … A mobile army of metaphors, metonymies, anthropomorphisms, a sum, in short, of human relationships which, rhetorically and poetically intensified, ornamented and transfigured,*

> *come to be thought of, after long usage by a people, as fixed, binding, and canonical.*[31]

The truth-claims made in a Nietzschean aphorism — and in this aphorism in particular — are similar to the truth-claims made by/in a piece of cultural property. Truth is "… traditionally associated with the adequation of a proposition and a thing."[32] Although lawyers or legislators are not philosophers, the substance of cultural property definitions requires them to make assessments of truth-claims in this essentially conflictual realm.[33] To base legal categorization of a thing on claims made about the truth that it embodies[34] is to contemplate the possible correspondences between (the value of) knowledge and (the value of) things. The value of the object is that it guarantees connection and correspondence with a world outside bare life or mere proliferation; thus, it provides *true* knowledge of what we (human beings or a specific people) are. In this sense, the object itself opens — or embodies — the space of this truth.

This space is fundamentally contested. To engage with the law regarding cultural property means entering modernity, a realm of forces and strategies that center on the acquisition and deployment of the power to know. In order to address the issues that arise, the following analysis relies on Alasdair MacIntyre's discussion of the aphorism above.[35] MacIntyre assesses the truth claims made in this aphorism, qua "truth," from a methodological perspective. As such, his analysis is very important to the question of interpretation raised here. Can aphorisms (and their cognates in this essay: objects of cultural property and the definitions in cultural property instruments) be interpreted so as to guarantee the truth that they are being used to represent? MacIntyre's analysis of the claims made by Nietzsche in this aphorism is both an exposition of the techniques by which aphorisms can be interpreted, and a substantive examination of the "battlefield" on which the "army" fights. The battlefield, says MacIntyre, is that of reason. Is there an object to be known, or does the act of speaking knowledge constitute the object and the knower both in a field of (ongoing) conflict?

The question appears, on the surface, to be one of authority, complicated by the modern confusion as to genre.[36] Can Nietzsche speak about the truth from a valid position of authority?[37] Nietzsche scholars have extensively theorized the problem of interpretation as regards Nietzsche's truth-claims and the link between the will to power and knowledge.[38] Certainly, in the contemporary university, neither the dissemination nor the reception of knowledge can guarantee truth. Indeed, culture in modernity (as defined above) must be understood as conflict:

> [I]n our situation of radical disagreements a lecture can only be an episode in a narrative of conflicts; sometimes it may be a moment of truce or negotiation between contending parties, or even a report from the sidelines by a necessarily less than innocent bystander, but nonetheless it is always a moment of engagement in conflict.[39]

Given this landscape, can there be any guarantee or evidence of truth that can serve as the foundation for culture/knowledge?

The importance of this aphorism depends upon the cross-definition or reliance of its truth and of its aphoristic nature. If untrue, it fails as an aphorism and vice versa. Does this aphorism merely serve as a shifting of the ground for the transmission of knowledge, or does it succeed in giving a solid definition of truth? The statement that Nietzsche makes about the truth — that there is no truth "as such," thus that all truth is perspectival — is a statement that seems to make a universal, nonperspectival claim.[40] The claim is that there is no truth as such because there is no one world to which the truth as such could attach. The corollary of this argument, which is also another objection to Nietzsche's framing of the truth, is that the very denial that there is "… one world, 'the world,' beyond and sustaining all perspectives, may itself perhaps seem to have an ontological, nonperspectival import and status."[41] Is his aphorism substantively false, therefore? More importantly, does the aphoristic technique rely on the acceptance of a particular metaphysical or ontological set of assumptions, which themselves stand outside of the knowledge (and thus the culture) industry? The question is relevant to the issue in this essay, as cultural property serves as guarantees for this industry. Do the objects themselves encode transcendent principles, or do they open up the contested, embattled space that Nietzsche and MacIntyre describe?

This problem is exacerbated by Nietzsche's statements regarding interpretation. The relation that any interpreter has to any text is ultimately individual, therefore,

> it is not just that all interpretation is creative, but also that all commentary is interpretation; Nietzsche held of utterances what he held of things: "That things possess a constitution in themselves quite apart from interpretation and subjectively is a quite idle hypothesis."[42]

Metaphor rules the endeavor of interpretation, and thus of the constitution of things.[43] MacIntyre argues that to attempt to shift metaphors into other conceptual modes, especially that of ontology, is to make a (possibly

deliberate) mistake.[44] If this attempted shift is deliberate, then it is a strategy, "some more-or-less successful attempt to preempt the possibility of rival interpretations."[45] These statements have consequences for the endeavor of this chapter — as well as putting Nietzsche himself in a problematic position (a professorial or professional position) opposite his own utterances. Genres in which truth is found within metaphors lend themselves only reluctantly to genres in which authoritative statements are made. In addition, Nietzsche's definition of truth, and the subsequent critiques of this definition,[46] also results in the problematizing of any other commentator's truth-claims, whether these claims are lodged in a text or are about an object, or both.

The solution is to take the aphoristic form seriously, and to look at the operation of interpretation in the Nietzschean aphorism. If the academic form of utterance is negative, repressed, and repressive,

> By contrast the Nietzschean aphorism is active, a place and a play of contrary forces, the medium through which a current of energy passes. "An aphorism," Deleuze has said, "is an amalgam of forces that are always held apart from each other." It is in uttering and responding to aphorisms that we outwit the reactive, academic mode.[47]

The marking-off or boundary function(s) of the aphorism are visible in this definition. An aphorism keeps things separate as a *means* of defining them, rather than *because* they are *necessarily* different. Thus for MacIntyre, aphorisms are the medium for speaking anticonsequentialist truth. The relationship between the knower and what is known is of prime importance.[48] The scholar or commentator who relies on nonaphoristic, objective, or nonspecific perspectives when thinking about thinking becomes trapped in dialectical reasoning, which is in turn a short step from *ressentiment*.[49] Reasoning must be an activity in the arena of other activities, and not a retreat into the safety of a predetermined authority.

The aphorism invites the writer and reader into a world of engagement, in which truth can erupt or be agreed upon, not into a world of truth per se. The object of cultural property, as aphorism, as a set of boundaries, does the same. It cannot guarantee the truth that its definition as "cultural" property is seeking. The drive to know the truth about an object, according to Nietzsche, is "evidence of a culture in which lack of self-knowledge has been systematically institutionalized." This comports with the foregoing analysis of the value of life in cultural property instruments. Basing law on the truth of an object, as cultural property instruments do, is a business that requires infinite flexibility if it is not to lead to cumulative and genuinely harmful ignorance. Any *one* conception of truth, or concep-

tion of the rationality that leads to the truth, will land the commentator in the position of the nineteenth-century lecturer whom MacIntyre discusses, a position that is both personally and professionally compromised.[50] In nineteenth-century academic scholarship, the truth of bad morality would have appeared "both incredible and offensive."[51] In twentieth- and twenty-first-century academic scholarship, when Nietzschean analyses and the rise of the genealogist are commonplaces, the truth underlying an object, a conflict, an investment, or an understanding may still appear "incredible and offensive." Certainly, this analysis leaves the commentator who might want to think in or through the cultural property complex with difficult questions. If the object does not guarantee truth, then why protect it?

The Necropolis

The purpose of each and every convention or treaty regulating cultural property is two-fold: definition and preservation. We have discussed the problems of definition, but they are matched by the problems raised by preservation. How can or do we understand the increasing interest in or need for protection of each element or strand of culture? What is meant or made by the privileging of preservation over other means of assigning value to the object? As the work of the law in this area is to formulate objects to which notions of cultural property can attach, the fundamental conceptual structure on which this work relies is that which can sustain the reflexive, cyclical privileging of preservation per se. The movement of the legislative definitions of cultural property is from objects to life, and from knowledge to preservation, reification, and security. We can understand this in two ways. First, the attempt to define cultural property requires addressing the concept of "preservation." To question the meaning of preservation within this schema is to consider what the law protects *against*. It attempts to protect — paradoxically, as this is a hallmark of life — *permeability*. Second, preservation is the hallmark of the kind of culture that reifies life. It is the opposite of the aphoristic endeavor, and the opposite of the values that cultural property are meant to ensure.

The attempt to define cultural property, and to address the values that inhere within cultural property issues, requires thinking in terms of *life-preservation-loss*. The struggle to define cultural property and to determine appropriate protection for it in the twentieth century has arisen from and is entwined with looting and theft of (primarily art) objects during war.[52] The value-laden approach to defining cultural property is thus not surprising. The space in which things are/can be valuable after the Second World War still begs definition. The extremes are the ineffable and the

acquirable; the return to ("indigenous"?) notions of spiritual origin and the acceptance of a dollar-driven status identity. Legislation protecting cultural property continues to respond to the potential dangers to objects that arise during armed conflict. The most solid of objects are porous and permeable, in the view of this kind of legislation. The dangers are forces that can corrode or erase these objects as solid things: natural disasters, war, vandalism, and looting. Recent attempts to expand the definition of cultural property are attempts to extend the legal protections already in place for tangible objects in wartime to tangible and intangible objects threatened in other contexts and other types of conflict. Losses due to natural disaster or to theft during archeological excavations, disappearance into the collections of private individuals, bad conservation, or misidentification of provenance are all forms of erasure. The object is permeable to commerce and to forgetfulness regardless of whether it is a totem or a myth of origin, a sacred scroll or a language. Commentators disagree regarding which ending results in the most permanent loss — sale into a private collection, sale at all,[53] or decay. In the attempt to allot or determine "ownership" in this field, commentators fall back on the core self-justifying belief or principle in Western thought that the *true* owners of a culture are the people who *preserve* it.[54] In a landscape of assured loss, loss easily inverted into willing destruction, the highest expression of ownership rights now requires that the true owner desire the culture's (or object's) preservation above all.

Yet, this essay has attempted to argue that if we had a true understanding of cultural property, we would not hold the preservers up for admiration. The objects meant by definitions of cultural property are usually both things and attachments, both objects and the stories told about them. Nothing is discarded in this process of increasingly complex definitions; rather the field becomes ever more cluttered. The value of these objects should be diluted by the constant expansion of the field, yet it is the value of the values expressed in the definition of cultural property that becomes faint or vague against the backdrop of a plethora of things. In a world of more and more preserved and valuable things, it is not clear any more *why* they are valuable. The value-generating and value-laden *preservation* of things and not-things becomes problematic. Preservers not only choose the ascetic path for themselves, they also remove any other choices from others. The result is that there is only one way to value culture; there is only one correct posture for experiencing life.

Conclusions: The Value of These Values

This approach to the problem of definitions raises other related questions that must be addressed in the chapter conclusion. Is a general definition of cultural property either possible or necessary? The search for any definition, much less a definition that could include all kinds of claims regarding cultural property, may be mistaken. Definitions announce and also distinguish between what may enter the category, place, or ground being identified, and what may not. Yet, lodged in each definition of cultural property is the notion (or myth) that it announces itself, presenting itself as a threshold and opening ground within itself that demands definitions from others hoping to enter into the realm proposed by the object. This leads to a second question: To what does the indeterminacy and flux within the notion of cultural property attach?

One of the hallmarks of cultural property disputes is the idea that the things at issue are *always* valuable and *have always been* valuable. Some element(s) of the definition/object must be responsive to this argument. As these determinations cannot be made once and for all, or in advance, the ground opened by cultural property — definitions, objects, and law — is one of discontinuities in surface. The seemingly exhaustive legal definitions are the location of gaps, paradoxes, inconsistent values, sudden switches of focus. In effect, the definitions discussed above do not determine the meaning of cultural property. Rather, they place the protected object in the position of a ladder or trellis, allowing the people claiming it to claim the ground from which it springs, and allowing that ground to support the claimants.[55] As a conceptual structure, *cultural property* (either the term or the specific object) is the combination of the law and the object. It inhabits a middle realm between ground and claimants, a realm in which the law and the thing(s) interweave. In this vision, cultural property is the structure that allows attachment to something other than the object itself.[56]

Therefore, when one looks at the debates that arise out of the claim of ownership of a piece of cultural property, it is obvious that an object that is cultural property differs from other objects in its *function*, not in its age or source. The question regarding the function of cultural property goes to the question of "essence" or "value," as do the preceding indicia. Some preliminary suggestions as to the function of cultural property would include: a mirror, a hammer, a scalpel, a means of differentiating past and future from present, a theft (from rightful owners and from thieves both), and a porous shell. Like any object, an object defined as cultural property can be redefined, misdefined, or forgotten. The definition attaches great value to the object, at least for the particular moment when a culture claims the

object as its property. Simultaneously, the language of this definition is predicated on the argument (if not belief) that the moment of the object is universal rather than particular. The momentariness of the definition is balanced by the eternality of the adjectives chosen. This is a realm of inversions and ironies, therefore, a place where utter certainties of description and substance (stone, bone, clay, etc.) expose uncertainties and conflicts. In this area, interpretation is also "discovery" or "creation."

The making of the object through interpretation, however, is always, painfully, the second making. The origin eludes, as does the piece of cultural property itself.[57] No matter how permeable, these artifacts remain impervious to our eyes. In this case, however, it is not knowledge but *ownership* that debunks most cherished myths of origin (even as it creates other myths). A myth of origin rarely survives the conflation of "then" and "now" that is represented by defining an object as cultural property. As then is not now, nor are "we" "them." Our origin — as owners — is entirely different than the origin that the object was supposed to guarantee. Sooner or later, therefore, either the object demands its own "truth," or it succumbs to a truth that may or may not suit the role mapped out for it by its owner. At that moment, the owner/commentator is free of a particular kind of illness. When one accepts defeat in the search for the "true essence" of the object, then one ceases to be deformed — one takes up a different position opposite

> whatever drive it is whose inhibition and distortion have led to an unacknowledged complicity in a system of suppressions and repressions expressed in a fixation whose signs and symptoms are the treatment of highly abstract moral and epistemic notions as fetishes. That drive turns out to be … the will to power.[58]

One may still choose to excavate, if that is where pleasure lies, but the necropolis loses its authority to mediate wisdom, meaning, or life.

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Notes

1. Friedrich Nietzsche, *The Will to Power*, para 556 at 301 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., 1967).

2. An argument that the attachments at stake are those between the self and knowledge of the self raises questions of the "cultural self," or of "possessive nationalism," in which the links between theories of ownership and theories of human nature are understood as constitutive of legal definitions of cultural property. See, e.g., Rosemary Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination," in Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (1997).
3. Friedrich Nietzsche, *On the Genealogy of Morality* (Keith Ansell-Pearson ed., Carol Diethe trans., 1994).
4. "Cultural property" includes new classes of things almost daily and new legislation, new museums, and new disputes arise constantly. Against this background, any definition of cultural property would have to include "heritage," "intellectual property," and intellectual history components. The progression toward an increasingly complicated set of definitions is particularly visible within the area of international (UNESCO and European Union) legislation, although the problem spans all attempts to define what constitutes cultural property. Lyndell V. Prott and P. J. O'Keefe, *Law and the Cultural Heritage* (1984). "It would be useful if there were a generally accepted definition of … 'cultural property'. … Unfortunately this is not the case: … each Convention or Recommendation has a definition drafted for the purposes of that instrument alone; it may not … be possible to achieve a general definition suitable for use in a variety of contexts." Chapter 1, "The Need for Protection," 8.
5. For example, the definitions of what is covered by the UNESCO Convention for the Protection of the World Cultural and Natural Heritage; the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects; The Protection of Moveable Cultural Property; the European Union Directive on the Return of Cultural Objects; the European Union Regulation on the Export of Cultural Goods (Council Regulation No. 3911/92); the European Convention on Offenses Relating to Cultural Property (23 June 1985); Recommendation Concerning the International Exchange of Cultural Property. There are initiatives in Russia, Asia, India, Australia, and throughout North and South America as well.
6. In the foundational twentieth-century pieces of cultural property legislation, the 1954 Convention for the Protection of Cultural Property (The Hague Convention); The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property.
7. This is not only true of the European Convention on Offences Relating to Cultural Property (1985), although it can be seen very clearly in this particular Convention: "… (q) all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavations or discoveries are the main source or one of the main sources of scientific information; … (s) archeological and historic or scientific sites of importance, structures or other features of important historic, scientific, artistic or architectural value, whether religious or secular, including groups of traditional structures, historic quarters in urban or rural built-up areas and the ethnological structures of previous cultures still existent in valid form."
8. Prott and O'Keefe, *Law and the Cultural Heritage*, 7.
9. "Almost twenty years before *The History of Sexuality*, Hannah Arendt had already analyzed the process that brings *homo laborans* — and, with it, biological life as such — gradually to occupy the very center of the political scene of modernity." Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998) 3. Agamben's work cannot be addressed here on its own terms, as it is too vast for the argument made in this essay. However, the correspondence between "bare life" and the (possibly uncritical) valorization of the "life" protected by cultural property legislation is remarkable and serves to confirm that the issues raised in cultural property theory (legal and otherwise) are firmly rooted in the problematics of knowledge and reason in modernity more generally.
10. Giorgio Agamben, *Potentialities* (1999) 220. (Chapter 14, "Absolute Immanence").
11. Ibid., 239.
12. Ibid.
13. Ibid., 221.
14. See, e.g., Lyndell V. Prott and Patrick J. O'Keefe, "'Cultural Heritage' or 'Cultural Property,'" *Int'l J. Cultural Prop.* 2, 1 (1992):307.
15. The topography of the space of culture/knowledge in cultural property discourse includes an essentially propertized or commodified notion of knowledge as a transmissible good

within it. Although this is not the main thrust of this essay, it is worth emphasizing that "knowledge" is "property" within culture. "Knowledge" is also "culture" within property.

16. Nietzsche, *On the Genealogy of Morality*, 3.
17. Pierre Klossowski, *Nietzsche and the Vicious Circle* (1997), xix.
18. In Klossowski's description of Nietzsche's analysis of knowledge/culture, he is clear that Nietzsche's thought is partially an experience of delirium. This must be acknowledged as informing not only his life but, substantively, his work. The concept of this "resistance" to thought exists against this background.
19. c.f. Klossowski generally, chapter 3, :The Experience of the Eternal Return," in *Nietzsche and the Vicious Circle*.
20. For example, the claims of a modern people to an ancient artifact require establishing continuities of identity with the original owners/makers of that artifact.
21. See, e.g., Prott and O'Keefe, supra note 15.
22. Certainly, knowledge about "the past" or "history" cannot ever be guaranteed accurate. The idea of conflating artifact and meaning, or object and knowledge, erases, in this context, the necessary act of interpretation, and instead attempts to give the impression that the object is somehow enough on its own.
23. This imperative is to generalize thought, to create abstract (and selfless) teaching and learning about knowledge. as the cultural imperative follows Nietzsche's ascetic ideal, the discussion of the split between culture/knowledge/self is best understood with reference to the 3rd essay in *On the Genealogy of Morality*.
24. Martin Heidegger, *Nietzsche (*1981), Vol. 1, 11.
25. *The Oxford English Dictionary*.
26. Aphorism is the combination of the prefix "*ap-*" (softened into "*aph-*" through its placement) and the root "*orizo*," the same root as in "*orizontas*," or horizon. Thus "*aphorizo*" means to mark off by boundaries, and "*ousia aphorismeni*" means property marked off by boundary pillars. In this sense, *aphorizo* means either to mark off for oneself or to border on. The second and third meanings are to determine or define, as in "*chronos aphorismenos*," a determinate time; or to separate, distinguish, or exclude, as in "*episteme aphorismeni*." It also means to bring to an end or to finish, to grant as a special gift. Finally, it means to banish. Liddell and Scott, *Greek-English Lexicon* (new edition, 1940?). In modern Greek (*Greek-English Dictionary*, Kyriakides, 1909), *aphorismos*, *-ou*, means excommunication primarily, but also an aphorism or maxim. The use of aphorisms originated with Hippocrates, who used them as mnemonic devices to transmit medical information to his students.
27. Arthur C. Danto, *Some Remarks on* The Genealogy of Morals, in *Nietzsche, Geneaology, Morality: Essays on Nietzsche's Genealogy of Morals* 35, 37–38 (Richard Schact ed., 1994).
28. Within the context of cultural property law and disputes, this nexus of life and knowledge provides an explanation for the root of the disagreement, encoded within different pieces of legislation, about whether cultural nationalism or cultural internationalism should be the guiding approach to the allotment of cultural property. Knowledge of "life" continues to be the "object" of cultural property instruments, but it is knowledge *already possessed* rather than knowledge that is *missing or lost* that is at issue. In cultural nationalism, the underlying relationship to (the value of) knowledge is one of having rather than needing. All that is needed is the object that *expresses* the knowledge. In cultural internationalism, the object underwrites knowledge that might otherwise be "lost" or withheld, knowledge that is directly relevant to the past/future of "all mankind" or to human beings in an evolutionary sense. For example, the Hague Convention takes the position that cultural property belongs to "all mankind," whereas the 1970 UNESCO Convention instead validates specific national claims to cultural property. The conflict between general and specific owners has been extensively addressed in the commentaries on ownership in this realm. See, e.g., John Henry Merryman, "The Public Interest in Cultural Property," *Cal. L. Rev.* 77 (1989):339.
29. Danto, supra note 27, 38.
30. "[The] high Nietzschean tonalities found their immediate expression in the aphoristic form: even there, the recourse to the code of everyday signs is presented as an exercise in continually maintaining oneself is a discontinuity with respect to everyday continuity." Klossowski, "The Experience of the Eternal Return" in *Nietzsche and the Vicious Circle*, 65.

31. Alasdair MacIntyre, "Genealogies and Subversions," in *Nietzsche, Genealogy, Morality: Essays on Nietzsche's Genealogy Of Morals*, 284, 286–87 (quoting Friedrich Nietzsche, *Uber Wahrheit und Luge im Aussermoralischen Sinn*, I).
32. Marc Shell, *Money, Language, and Thought* (1993), chapter 6 "What Is Truth? Lessing's Numismatics and Heidegger's Alchemy," 156 (paraphrasing Heidegger).
33. Cultural property instruments arose out of experiences of conflict. War, loss, and theft gave rise to the imperative to preserve certain kinds of things. Yet, as the classes of things to be preserved have multiplied, the protective imperative has become generalized to a point where the question arises regarding the nature of the danger. At stake seems to be not just physical damage and appropriation, but intellectual/cultural damage and appropriation as well.
34. One could say that the truth that a piece of cultural property presents is that of its origin or of its history, but in cultural property law, the emphasis on life means that the claims center on the truth of its being *as* truth.
35. See supra note 31 and accompanying text. MacIntyre is not primarily a Nietzsche scholar, but in this essay, he considers the claims made by the genealogical approach to knowledge, which Michel Foucault and others devolve from the philosophy of Friedrich Nietzsche.
36. Tracing the genre of the lecture from the Middle Ages, MacIntyre points out that the medieval lecture took the *texts* as authoritative, rather than the speaker. Truth and rationality were independent of each other, and could be cross-referenced for validity. In the late nineteenth century, truth and rationality — lecture and lecturer — folded into each other. The authority was vested in both, acting as one. The lecturer vouched for the truth of the lecture. It is this structure that Nietzsche's aphorism was meant to address. The question remains regarding whether Nietzsche escapes the position of authority that he sought to discredit. Although Nietzsche's aphorism is both a harbinger and a definition of the genealogy of knowledge in modernity, the question that Nietzsche scholars ask is whether Nietzsche necessarily took on the authority of the nineteenth-century lecturer to make this statement, and if so, what effect that position would (or does) have on the substantive claim being made. This question cannot be addressed in this chapter, but it is important to note that Nietzsche's position (both inside and outside the culture/knowledge system) is an expression of a relationship to the culture/knowledge complex that many "experts" must necessarily share.
37. See MacIntyre, supra note 31, 287–9 for MacIntyre's summary of the ongoing debate regarding the philosophical validity of Nietzsche's truth-claims.
38. In whole, this is an enormous field, and is too big a topic to be included per se in this chapter. See Werner Hamacher, "The Promise of Interpretation: Reflections on the Hermeneutical Imperative in Kant and Nietzsche" in Laurence A. Rickels, ed., *Looking after Nietzsche* (1990). See also the collection, *Nietzsche, Genealogy, Morality: Essays on Nietzsche's* On the Genealogy of Morals (Richard Schacht, ed., 1994); Maudemarie Clark, *Nietzsche on Truth and Philosophy* (1990).
39. See MacIntyre, supra note 31, 285.
40. In this sense, it is vulnerable to the same sorts of questions and critiques as the question of "authority" briefly addressed above. For example, if Nietzsche excepts himself from the position of a contestant for the truth, and instead takes the position of truth-giver, then not only does he challenge his position as an "outsider" to the academy of his time, but he also challenges the statement he is making about the genealogy of truth, and the definition he gives of his philosophical endeavour more generally. As MacIntyre writes, "If this is so, Nietzsche thus understood will have been restored to conventional academic philosophy, an apparent radical at one level but not at all so at another." MacIntyre, supra note 31, 288.
41. Ibid., 288.
42. Ibid., 288, quoting *The Will to Power*, 560.
43. "For metaphors are the currency of interpretation just as they are of the texts interpreted." Ibid., 288.
44. Aphorisms are metaphors, but if Nietzsche's aphorisms are authoritarian statements of noncontingent metaphysical or ontological "reality," then they are shifted into "other conceptual modes." At this point, the aphorism would be merely a standard didactic technique, and not a way of transmitting a genuinely new perspective on/as knowledge.
45. MacIntyre, supra note 31, 289.

46. From within the philosophical academy, mostly. Cite the articles in *The Philosophical Forum* 30, 4 (Dec. 1999) and *The Continental Philosophy Review* 32, 4 (Oct. 1999).
47. MacIntyre, supra note 31, 290.
48. MacIntyre argues that Nietzsche's aim was to combat the deformation that modern morality caused, which made the specific task of the genealogist to trace the development and workings of *ressentiment*. Like Danto (below).
49. "For Nietzsche all theorizing, all making of claims occurs in the context of activity. … So it is not by reasoning that at a fundamental level anyone moves from one point of view to another. To believe that reasoning can be thus effective is to express allegiance to that dialectic of which Socrates was the initiator and in so doing to reaffirm one's inability to escape from the inhibiting and repressing reactive formation which the repressive and reactive habits of activity exhibited in dialectical reasoning bind its adherents." MacIntyre, 292.
50. Bad morality "assumes many different forms, among them those of nineteenth-century academic scholarship." (MacIntyre, 291) Furthermore, if one is a member of the professoriate, then one is by definition a person deformed by the will to power through the process of cultural/knowledge transmission. It is particularly through taking on the authority to speak/know that one runs the risk of institutionalizing ignorance, and doing harm thereby. MacIntyre points out that Nietzsche removed himself from this position, commenting that it is not possible to live for truth in the university. (MacIntyre, 287).
51. Ibid., 292.
52. cf. Generally, Chapter 1, "Plunder, Reparations and Destruction" in John Henry Merryman and Albert E. Elsen, eds., *Law, Ethics and the Visual Arts*, 3rd ed. (1998).
53. Even to a museum, as "sale" means "loss" to the rituals/living meanings of the culture from which the object came.
54. It may be worth noting that ownership may begin in "blood" or "history," but arguably it ends in appropriation. Indeed, one of the largest and most covert arguments in cultural property analysis is between passive and active ownership, that is, between ownership earned by identity and ownership earning identity. See Michel de Certeau, *The Practice of Everyday Life* (2001) on strategies and tactics is interesting here.
55. The Christian imagery is inescapable here. Exploring this imagery fully is beyond the scope of this paper, although obviously any discussion of the "self" against the background of "the law" must take on the question of Christianity. This is particularly true when working with the concept of the Nietzschean self, which is irradiated by the problem of selfhood in the context of Christianity. For an authoritative discussion of the relation between the notion of the Christian "self" and the legal ground from which that springs (and vice versa), see Tim Murphy, "Law and Society: The Penetrative Scheme and the Juridical Soul," in *The Oldest Social Science? Configurations of Law and Modernity* (1997).
56. The argument that the "ground" may be only, or even primarily, the concept of "land" that accompanies theories of nationhood or the self-determination of peoples is not addressed in this paper. Certainly, cultural property disputes serve political functions and seek to anchor territorial claims. The strain of cultural property analysis that seeks to explain the desire for the object as a desire for the legitimation of, and entitlement to, a given political identity is extremely valuable.
57. This is a necessary side effect of any attempt to "fix" knowledge in modernity. For example, Nietzsche's repudiation of classical philology as practiced in Germany in the nineteenth century is a result, in part, of the reified and inaccurate relationship that classical scholars at that time had established between ancient Greece and [their] modernity. "Were the classical philologists in fact to understand classical realities, he [Nietzsche] was to remark, they would recoil horrified. And they would do so in part at least because they would have to acknowledge that their own academic purposes had alienated them from their object of study and concealed it from them" (MacIntyre, 286). What was true of those scholars is equally true today of any "purposive" scholarship.
58. MacIntyre, 287.

CHAPTER 6

Nietzsche between Jews and Jurists

ANTON SCHÜTZ

Nietzsche as a Legal Theorist …

Of the treatises that have earned Nietzsche his place in the philosophical pantheon — man and overman, transvaluation of all values, will to power, eternal return of the same — none offers relevant comments as to the philosopher's stance toward legality. Even if one leaves those highlighted core regions and moves into the all-inclusive thicket of Colli's and Montinari's meticulous restitution of the philosopher's writing, the search for a philosophical theory of law in Nietzsche remains inconclusive. Perhaps this result should not come as a surprise — or, if so, this should perhaps be deciphered as a hint that the philosopher should be read anew, at least by lawyers. For the limited number of passages in Nietzsche that have been suspected of containing a theory of law reveal at closer looks a concern, not with legal claims but, explicitly, with a "more-than-law," that is to say, with the "*privilege* of the most powerful man," his "Jenseits *des Rechts*" or, indeed, his "*Vor*recht" (i.e., pointedly, not his "*Recht*").[1]

Nietzsche's notions of the self-preservation of the powerful, his concepts of will and nobility, and his praise of the Aryan elite are all well expressed in his comments of the "Code of Manu,"[2] where they are coupled with the historiographically naïve persuasion that this colorful document

provides both a faithful rendering of a once really existing state of society, and a once really valid prescription addressing legal subjects. This naïveté jars with the author's more sophisticated earlier discussions of the reception and positioning of the past within the present. One has to gauge what "Manu" stands for — its *Sitz-im-Leben* in the philosopher's life and arguments. Nietzsche's soteriological addiction to "Manu" is elucidated by the fact that he is looking for a reference capable to establish an unbridgeable gap between his outlook on power and that of Western legal culture. Provided this good is delivered, he is prepared to pay almost any price, and especially to forget about the philological *Redlichkeit*, the philological honesty he had so highly valued at the time of the *Untimely Meditations*. It is in relation to that strategic aim, to his ferocious will to set himself apart, that the "Code of Manu" comes for Nietzsche as a serendipity that allows his antilegal radicalism to mock parade as an internal construct of law in its own right, and to be interpreted, by later critical lawyers, as a token of that "constructive criticism" by means of which the philosopher, much like themselves, takes part in the legal-theoretical discussion of his times. Two issues should be followed up.

On the one hand, Nietzsche plays, although no doubt ironically, the trump card of "speaking in the name of a code," that is, of doing precisely what lawyers do habitually and professionally. This opens the question as to whether the "Code of Manu" is correctly described as a set of valid legal rules. To what extent, one is tempted to ask, has the choice of the term "code," a term densely inhabited with positivistic meaning since the beginning of the century, to translate the legendary legislator's creation given rise, necessarily, to premature identifications.[3]

The other question concerns Nietzsche's move towards legal theory as such, no matter his references, codificational or otherwise. For, undoubtedly, Nietzsche's putting on a lawyerly mask creates a major temptation, for the legal theorist, of perceiving the philosopher as a fellow legal theorist — part, perhaps, of the larger and more general temptation to which legal theory succumbs with joyous helplessness, of claiming the Western (or: "continental") philosophical canon *in extenso* as its archive, heirloom, or Old Testament.

. . . Or a Law-Haunted Legal Subject?

Pending inquiry on the two issues, it appears as premature to decide on the integration of Nietzsche's thinking into the body of Western jurisprudence. And yet, it must be admitted that the most dawning point in connexion with the question of Nietzsche's lawyerly involvement has so far not even been touched upon. Granted Nietzsche's lack of ambition to

participate in any enterprise that could be associated, however remotely, with legal theory as we know it, granted even that his overriding and ultimate project consists in distancing himself from any cultural compound in which law and lawyers, as the West knows them, play a constitutive role, what still remains to be checked is the possibility of a Nietzsche who passionately tries to free himself from the filiational bonds that link him to the West and, more specifically, to the Western-Christian legal heritage and proves notwithstanding all efforts incapable of doing so. After all, one's resolution to dissociate oneself from the Western legal tradition and its ordering of power and morality is one thing, and the carrying out of such an ambitious project is another, incomparably more precarious and improbable thing, especially if the facts of one's biography and socialization provide that any accessible "against" is so deeply affected and subverted by what it opposes that any move is condemned to rely on that which it sets out to reject. What one needs to understand is that this is, precisely, the situation in which Nietzsche finds himself ("Manu" provides, of course, the main exception here, an exceptionality which explains "Manu"'s grotesque and much-discussed overrating by the philosopher). At the price of suspending, for a moment, a denial that is fundamental to Nietzschean faith, it might be worthwhile, in other words, to consider the possibility that the spectacular gesticulations the philosopher uses in order to distance himself from the Western moral-legal background — his own — turn out to be so many manoeuvers destined to outshine precisely those aspects of his thinking that are most likely to disclose unwelcome proximities to the tradition he claims to have definitively and completely annihilated or, at least, expelled from his own thought: the Christian tradition.

On Cursing

Nietzsche's definitive "blow" against this tradition announces itself by its title: "The Antichrist: Curse against Christianity." Perhaps it has been a matter of primitive or magic legalism, if not indeed, ironically, the unfolding of a deep-seated implication of Christian moral teaching, that the reception of Nietzsche's last works generally, and of the *Antichrist* in particular, has been largely grounded on the deceptive assumption that forswearing Christianity is a thing that succeeds automatically — an unwitting application, perhaps, of the distributive pattern, peculiar to the Christian pastoral, according to which the straight path is narrow and exposed to danger, and the subject choosing it in a state of permanent dependence on external aid in order not to falter - whereas sin, on the contrary, is self-fulfilling, and the sinner always perfectly and easily capable of reaching his or her sinful

ends by their own sinful means. What needs consideration is that "cursing" is not quite a transgression like others. On the contrary, it is rather a subtle compound of two separate functions. Like other forms of verbal negativity, cursing reveals itself as an action that endlessly resuscitates the enemy that it endlessly sets out to annihilate. The feature, however, that moves the curse into a separate category is its hyperbolical resoluteness. The possibility we have to face is that of an unwitting ruse. To curse Christianity was for Nietzsche the most ambitious, consequent, and uncompromising way of asserting his absolute adhesion to Christianity. And it is thanks to the sheer intensity of cursing that the philosopher is put at a safe distance from finding out about his operation and its paradoxical efficiency. By dint of its inclusiveness, which it shares with rites of exorcism generally, the fact of cursing rules out the possibility of becoming aware of one's own involvement with the object cursed. The whole difference between curse and, say, "analysis," lies here. If I curse x, the declarative intent or performative value of my curse is expressed in the warning: "Do not ever talk to me about x again!" a warning not even addressed to x but to everyone else. By my curse I declare my retirement from every scene or context where I am in danger of being reminded of the person, or object, I curse. Now, as already intimated, Nietzsche's "The Antichrist: Curse on Christianity," Nietzsche's curse is replete with tokens of his utmost dependence on the object cursed, indeed it stages the most personal declaration of love to the person of Jesus, and appears in this respect as a self-contradictory, self-defeating, and ineffectual curse. Notwithstanding this, the use of the genre "curse" allows Nietzsche to ignore the contradiction that paralyzes the curse and perverts its effects. The curse was vain; not so, its author's arrangements, for the letter that would let him know of it, never to reach its addressee.

Nietzsche and the Christian History of "Outsourcing Law"

A curse that reproduces in itself the features targeted by its own polemical intention does reach its addressees even so; it only eliminates its author from the return path. The fact that Nietzsche's thinking entertains close relationships to legal or law-related (law-critical) traditions of the sort he considers deeply illegitimate, can be gathered by the closer reading of a large body of apparently law-unrelated passages and chapters of his work. The texts at issue can be circumscribed thematically and with precision. They relate to *the Jews* — a frequent subject in Nietzsche's writing throughout,[4] in spite, indeed in virtue of, the fact that Nietzsche himself does not fathom how closely related this topic is to the issue of law. Of course, many readers of Nietzsche join their author in overlooking

the connection. They, too, have subscribed, as a matter of unshakeable self-evidence, to the assumption that the author of "The Antichrist: Curse on Christianity" has crossed the Christian Rubicon, leaving behind all Christian remembrances.

I would like to argue, on the contrary, that his view of what doubtlessly is the crucial *sedis materiae* of the Western approach to law and legality — the Christian-Jewish divorce in matters of interpretation — contains a number of indications that Nietzsche is linked by strong genealogical bonds to the Christian position. Understanding Nietzsche means understanding him as a son of Christianity, and this, once again, both in spite and in virtue of his uncompromising unwillingness to be recognized as such. Furthermore, it is Nietzsche's filial piety with regard to the Christian value scheme that precludes him from building up a tenable and consistent account of matters legal, rather than the archipelago of dispersed and ambiguous observations on law that can be harvested from the passages he dedicates to *the Jews*. For Nietzsche misses the point of the equation of "Jewish" and "legal," a point that has been established through centuries and millennia of Christian history. He misses the point of the resulting concomitancy between antilegalism and anti-Judaism. He misses the point of the indelible mark these processes of identification and emblematization have left, at once, on the existence of the Jews and on the social staging of law.[5]

Most decisively of all, Nietzsche misses the point that the history of Christianity, since Paul's Epistles, is that of a campaign of critique, or "antirrhetics," against the law, doubled by a campaign of putting the Jews into the position of a site of permanent disposal of matters legal. Why does Nietzsche have to miss these points? The reason is not a secret. He is caught between two bonds and two duties: as a fighter against the Jewish-Christian continuity of *ressentiment*, he participates in, indeed leads, the great Western crusade against the law; however, the German bourgeois Protestants, anti-Semites, socialists who are his readers and contemporaneous fellow fighters in this crusade, embody *ressentiment* more perfectly. Nietzsche despises them and exposes them. Does this stop him from participating in the great Western crusade against the law? To do otherwise would have required Nietzsche to withdraw from Christian–post-Christian antinomianism. He has, of course, never ever thought to become interested in rabbinic Judaism. He has not succeeded in asking the law question afresh (this he had tried, but only to fall prey to the adventurously racist ideas of the first popularizers of "Manu" and other "aryan" texts). This is why the treatises "Nietzsche and the Law" and "Nietzsche and the Jews" should be understood as connected. The single historically fundamental

move of Christianity — which provides it with an iron grip on its subjects such that no "curse" can be thought of even scratching its surface, and which works on undisturbed in modern and secular conditions — is no other than its program of marginalizing the reference to law. This move resides, in other words, in its trans-legal intention and critical-legal onslaught. While remaining largely outside of Nietzsche's scope, this move and the history of its effects on the Christian politics with the Jews, circumscribe the scene of his discussions.

Traveling into Nietzsche's Hell

The difficulty of approaching or understanding law "directly," without "taking sides," that is, has been experienced by many other authors apart from the self-proclaimed anti-Christian Nietzsche, in the long history of Christian and Jewish interpretation, their long divorce and never closed controversy. Historically, the matter embraces the entire flourishing of Western culture. This, of course, tends to make it into one of those facts about a culture that are noticed only to be forgotten in the next instant — "too big to be kept in mind," and especially, "too complex to be transformed in a matter of repeatable routine."

Among the semantics of the Christian canon that Nietzsche makes part of his own project — a project directed against Christianity, as he never doubts, rather than performed in pursuance of Christianity's ends — we find the notion of the "happy message," or *evangel*. If Nietzsche must take particular steps to establish that the Gospel's claim to be "Good News" — "glad tidings" — is spurious, this is because that evangelic basic tonality is genuinely indistinguishable from the philosopher's own, to such a point indeed that the reader of the Christological central chapters of *The Antichrist* feels a certain temptation to perceive it as an unwittingly delivered blueprint for an autobiography. The "Good News" of the evangelical announcement of the Christian freedom from the law informs nothing less fundamental to Nietzsche's art of writing than his ways of summoning his readership — as *we liberated spirits* (*wir freigewordenen Geister*).[6] On the other hand, the evangelic theme also marks out the site and object of what the philosopher perceives as Christianity's core failure — the failure that *The Antichrist* chooses as the target of his unfettered attack. Assumed in order to epitomize Christ's exemplary life (and, Nietzsche adds, his Buddhist perfection), the "Good News" is a reference betrayed, deserted, and discarded by the Church, and by Christianity from the outset. "The fate of the evangel was determined by death — it hung on the Cross,"[7] and the Gospel is a reaction to Jesus' death, a death which his disciples, of lesser perfection than their master, have never forgiven.[8] "[T]he most

unevangelic of feelings, revengefulness, again came uppermost. The affair could not possibly be at an end with this death: one required 'retribution,' 'judgement' . . ."[9] Unsurprisingly, given the reactive conditions prevailing at its appearance, the pretended "evangel" fails to bring "glad tidings" and turns out to be a "dysangel,"[10] turns out to be bad, indeed evil news (*schlimme Botschaft*).[11]

What "Christianity" means to Nietzsche and what is at stake in *The Antichrist* take their origins at the moment at which Jesus' life, that truly unique accomplishment in self-exposure, with its Buddhist overtones, disappears behind his death on the cross. Christianity as we know it has been "dysangelic" from the outset, that is to say: not since Jesus' life, words, and deeds, but since the Church. The Church established itself right away as a warehouse of claims to validity, arts of governance, techniques of legitimacy, and other campaigns for accumulating power and wealth that have played in history as its regrettable and decisive roles. All of this has been diagnosed much earlier, for instance, three and a half centuries before Nietzsche's own, by Martin Luther's critique of Papal Rome. Nietzsche's Antichrist offers a narrative of decadence that is in essential agreement with all other versions, old and new, of Protestant Church history. It is just less compromising, more faithful to the common Protestant model.[12] For Nietzsche, the substitution of the genuine Christic element, with its institutionalization/legalization, takes place earlier than even the staunchest of admittedly theologically motivated Protestant histories. It starts not with the Popes, but with Paul and the Gospels, with the retroactive misreading and reactive misrepresentation of Christ as "founder," with Christ's death, a death the "unforgivable" character of which is thus confirmed with fresh arguments by Nietzsche himself.

Down and Out with Paul and the Apostles

What might be noted at this juncture is the fact that, notwithstanding the apparently unambiguous wording of its title, *The Antichrist*'s target is not Christ, it is the Christian. The German language offers no watertight distinction between these referents. Whereas *der Antichrist*, that ancient and medieval apocalyptic personality, had opposed Jesus Christ in person, the specific spin of Nietzsche's title is built on the linguistic indistinction between the person of Jesus Christ and that of the individual Christian subject, between "*der* Christ" and "*ein* Christ." The philosopher's mock-medieval linguistic maneuver consists in passing off as a first millennium–style eschatological heresy what turns out to be, to some large extent, a provocative charge against the Christian–post-Christian culture of the Second German Empire. "Lost in translation" is that imperceptible

double-entendre that allows Nietzsche to use theological wording in order to launch an attack against a sociologically determined target. Along with that indistinction, the English version loses further degrees of intelligibility of some of the *opusculum*'s features, which for being less conspicuous, are only the more relevant, such as the fact that it consistently avoids taking issue with the historical person of Jesus,[13] or also the fact that he seems to speak of Christ with a certain discreetly withdrawn piety — behind which the reader, impressed by the title, hesitates to discern a common Christian-Nietzschean sense of solidarity and sympathy, self-exposure, loving intelligence, and tender emulation. It might be thought, for certain passages at least, that this proximity of author and dedicatee seems to turn the work into an untimely and uncanny specimen of the medieval genre of "Imitatio Christi." The failure of Christianity is the failure of the false evangelists, that, especially, of the posthumous apostle of Christ, the most "dysangelic" Paul. With Paul

> came the worst of all. … In Paul was embodied the antithetical type to the "bringer of glad tidings," the genius … of the inexorable logic of hatred. What did this dysangelist not sacrifice to his hatred! The redeemer above all: he nailed him to his Cross.[14]

The Christian failure is not a failure to realize the "glad tidings" that they announce: it is the failure to actually announce them. Accordingly, what is at stake are not conflicting contents of dogma, it is something infinitely more practical, truthful, and drastic: a conflict of gestures, of lives, of "self-dedications." To be a Christian is to be in a state of constant performative self-contradiction.[15] That which Nietzsche rejects in the Gospel's moral teaching — greeting it with a: "How evangelic!" replete with bitter irony and uambiguously reactive moralistic disgust —[16] is not the teaching in itself but, much rather, the behavior (*Verhalten*)[17] that it reveals, and the open contradiction — far worse: the unaccounted-for nonrelationship — between behaviors, that it engenders. Christ's "behavior" consisted in his living and dying, not in order to "'redeem mankind,' but to demonstrate how one ought to live," and especially in order "not to resist even the evil man [but] — to love him. …"[18] Christ's behavior thus has no common point with Christian behavior, with its hidden agendas, overdetermined actions, unavowable submissions, and other "urges to annihilate." Christ is, for Nietzsche, as he says explicitly, an "idiot";[19] yet, he is also the man "who has flown highest yet and gone astray most beautifully."[20]

The self-portrayal entrusted on these lines is concealed by a heavy layer of German bourgeois–style opinionating. Yet, both strata of the palimpsest

coincide on one point. How does Jesus achieve his "high flight," his "beauty"? By getting rid of something — of something Jewish. Jesus (not Paul!) is the man who has "abolished . . . the Judaism of the concepts 'sin,' 'forgiveness of sin,' 'faith,' 'redemption by faith' — the whole of Jewish ecclesiastical teaching was denied in the 'glad tidings.'"[21] To be just to Nietzsche, the German verb that Hollingdale here translates with the unduly dramatizing "abolished" is no other than the much more patient and easygoing "to dismiss," (*abtun*), close to Paul's *katargein* as to Hegel's *aufheben*.[22] Jesus had, thus: "laid down," at most: "done away with," the concept of guilt. "[H]e had denied any chasm between God and man, he lived this unity of God and man as his 'glad tidings.'"[23] And now "this unexpected shameful death." Jesus' death necessarily provokes "[t]he [disciples'] feeling of being shaken and disappointed to their depths, the suspicion that such a death might be the refutation of their cause."[24] The disciples react to the challenge of Christ's death by taking revenge for it, Nietzsche tells us. Paul, specifically, reacts with "the lie of Christ risen from the dead."[25] The tension between Paul and Christ is recognized as part of the most intimate trade secrets of that "pathetic little star called Earth,"[26] into which the philosopher pledges to delve. He casts an understanding yet distant gaze on that "most noble"[27] but otherwise inoffensive man who, after having been put to death, is instrumentalized as the resurrected Savior by his pupils, the bigoted and prolific wheeler-dealers who constitute Christianity's initial personnel, and on whom and whose values the philosopher-theologian levels his unlimited reserves of moral penetration. What does escape his clearsightedness, to an equally radical extent, are the values and drives that animate the nascent Nietzschean population. Nietzsche's blind spot regards the appraisal and evaluation of those individuals who constitute the circle of his own readership, his own pupils, apostles — he likes to imagine them as so many *freigewordene Geister*, ambitious spirits, who are motivated by no lesser task than their personal liberation, whom he believes to rise over the average. Whether any of them has received the message Nietzsche has cast in his vision of Jesus as the "only solitary figure one is bound to respect in the whole New Testament," is a question that deserves asking.

An Aryan Intermezzo, Followed by News on the History of the Western *Sonderweg*

Other strata of Nietzsche's writing are no doubt more accessible to Nietzsche's Nietzschean "followers" than his interpretation of the Jew Jesus. The story of Pilate, for instance, the man who could not persuade himself "[t]o take a Jewish affair seriously," because his "noble scorn of a Roman"

stopped him from doing so.[28] It is true that Nietzsche, genealogically deprived — as he was, as a German, in his own eyes — of the noble Roman art of protecting one's superiority, succeeds only halfway in adopting the Pilatian gesture. The task of breeding stronger and better human races, of domesticating and improving mankind by means of enforcing racial laws, is a more popular issue.[29] When the philosopher is dealing with the thorny question of the breeding of humans, of leaving behind what he calls the "un-bred, the mish-mash human," his referential horizon is no longer the same type of past whose cast involves Jews, Christians, and occasionally a Roman dignitary, a past that stages narratives in which life and action are significantly entrusted upon individuals. It is by virtue of its preference for collective categories of human life that the Aryan horizon, as portrayed in the "Code of Manu" (as read by Nietzsche), is so irresistible to the philosopher.[30] Clearly, on these premises, there is no point in losing one's time indulging in the patient art of the historical psychology that Nietzsche, notwithstanding his fundamental commitment, applies to the individual persons of Jesus, the evangelists, Paul, Pilate. If the perspective is on a humanity that organizes itself on a basis of racial selection, then, it must be admitted, the bulk of *The Antichrist*'s argument is entirely irrelevant. Yet, Nietzsche's pages of positive or confessing Aryanism reveal a distinctively flat encephalography. The philosopher's peculiar crush on orientalism (which definitely foreshadows the nazi passion for the "Aryan" Orient) is indisputably of little interest, in the light of the core Nietzschean topics of meaning and knowledge, power, law, interpretation, and their Western archeology. These themes are, on the contrary, intimately entangled with the legal/Jewish issue, an issue that Nietzsche, if unwittingly and, of course, unwillingly, is proficient at, thanks, precisely, to his negative Christianism.

A voluminous archive relates the life and adventures of the Jewish-Christian divorce in the Western *longue durée*. Doubtless, the event's core peripety turns precisely around a divide in matters of interpretations, irreconcilably divergent voices on what is right and what is wrong with dealing with one identical text. Christian voices animated by the promise of gaining access to the single correct understanding of the Scripture and speaking in the name of faith, spiritual meaning, bottom-line unambiguousness, and the imperative of efficient government. Jewish voices, with no claim to an interpretive method that vouches for the correctness of its outcomes, with no claim to the accessibility (or indeed, the existence) of a single best judgement, but concerned, exclusively, with each interpreter's responsibility towards the letter and, perhaps even more, towards each other. Most decisively, we find, on the Christian side, faith, or more specifically, a *belief in faith*. The difference this belief in faith

makes, not only for the practice of reception and interpretation, but for the relationship of law and truth and, thus, radically affects the social standing of law. No equivalent of such a faith or other mediation exists, quite obviously, on the Jewish side — all arguments must be traceable to the Scripture. The most intricate question concerns the *reentry* of the Jews within the Christian horizon. This reentry has its condition. The status to which the Jews are appointed Jews within the Christian horizon, is that of residual depositaries or hostages of law and matters legal — or, as they are often called, "merely legal." What the Christian scenario teaches about the Jews is that, for them, the "law" is still not abrogated. Thus predestined, the Jews have been traditionally given some form of an exclusivity, as the Christian embodiment of "the law." The Jewish name thus enters into a close relationship with the law, with the effect that the Christian legal problem and indeed aporia is not cured, to be sure, but made manageable through its externalization/concentration on *the Jews*. Throughout two otherwise turbulently innovative millennia, this scenography remains unchanged in its basic parameters. The lesson the relevant archive provides for the study of Nietzsche lies in the possibility, which it opens up and helps to let appear as plausible, that his occasional encounters with questions of law — a fortiori, his comments on duty, debt, and contract in the Second Essay of the *Genealogy of Morality* — are related to referential backgrounds that are undoubtedly deeper than those generally on offer: the background of the then nascent science of criminology or the contemporary German legal academy.[31] Nietzsche's view on law has no claim to exceptionality within the parameters of Christian rule, being itself a Christian view in the sense that it draws its source from the multifaced law-related *problématique* of *the Jews*.

The Morals of Genealogy

Having recourse to the sharply periodizing — thus eminently historicist — distinction of, on the one hand, Christianity's genuinely evangelic prehistory, which has its site in the life of Christ and ends on the Cross, and on the other hand, its calamitous and "dysangelic" history, an imitation in worse of the *ressentiment*-exploiting priesthood that rules the Second Temple, Nietzsche comes much closer than he would have admitted to the traditional self-accounting of the West, both Christian and secularized that is considered post-Christian. The question relates to *genealogy* — in a different, earlier, more literal sense of the term than his own (as in the *Genealogy of Morality*). The Christian canon, predicating, in Hebrews 7:3, its portrayal of the Savior on His being "without genealogy" (*agenealogetos*), has recourse to a negative genealogy — as it does, in Paul, with a negative

doctrine of law. To the absence of genealogy the unidentified writer of Hebrews adds the further requirement of a lack of a father and mother (*apator, ametor*). The negative doctrine of law, on the other hand, the suggested neutralization of law (its abolition, suspension, "taking out of store," "privation of effect," transformation into a higher or meta-legal state, *Aufhebung*, etc.) forms in multiple ways the core message of Paul's writings. Within this horizon, the name "the Jews" at once names the genealogical inscription that legally guarantees the well-foundedness of the Gospel (i.e., the divinity of Jesus), and provides the positively law-related and positively genealogy-related contrast value for the negative Christian take on genealogy. Rejected genealogy and rejected law are equally associated with the signifier "Jewish."

Which is, incidentally, the topic ultimately concerned in the interpretational divide here under review? Can it be identified under "religion"? The word would create more indeterminacy than it remedies. The reason is that the Jewish/Christian divide extends its organizing and sense-making effects inside and outside the borderline usually referred to as religion. Moreover, the step from Christ and the Christic movement to the age of the Christian religion properly speaking has also been a step towards a Western civilization whose "Christianness," no longer limited to its confession or "religion," encompasses its civilizational horizon at large. The scope of Christian innovations includes both religion and the non-religious. It is true that, by putting the Christic episode in the mild light of a European side-species of Buddhism[32] — in sharp contrast to a Christian age identified as the advent of the "*ultima ratio* of deceit"[33] — Nietzsche's interpretation of the step distinguishes itself by its prevailing theme, decadentism.[34] Not any more than with religion, the point has to do with values, or even the value of being indifferent to values. It concerns anyone's living relationship to law, and it unfolds its relevance each time one asks the question of the status of Christianity in Western society.

Who takes the legal sin upon him or herself? Such is, then, the question that *the Jews* are the answer to, if cast in the competent theological and Pauline terms. They are *chargés de mission* of a very special mission indeed. Modern anti-Semitism — the species present in Nietzsche's world — remains undecipherable as long as the substantial legacy it has received from that older Christian dispositive is not taken into account. While modern anti-Semitism, at the moment Nietzsche encounters it and, creating his personal brand of "anti-anti-Semitism," modifies its target, affects key periods of the history of modern Germany, Christian anti-Judaism pertains to the whole Christian *longue durée*. At no moment in their Western history prior to the twentieth century, have the Jews been candidates for

systematic liquidation. They have never figured on a list of heretics to be extirpated.[35] While ruling out an imaginary continuity from Christian anti-Judaism to Auschwitz, this, however, rules in the structuring role of *the Jews*, the special mission they have been assigned within the common history here referred to as the history of the Christian-Jewish divorce.

There is no shortage of texts able to throw light on this intricate and unequal relationship of coexistence and divorce. I have chosen two. They complete each other and together provide a striking scan of the "classical" anti-Judaic message and the extent of its effects. *Novella 146* is an imperial directive, part of a large and famous collection in the Roman Law codification compiled and edited by a sovereignly appointed commission of legal scholars in sixth century Byzantium. Emperor Justinian's directive deals with the Jews, with the Jewish reading of the Scripture. It vituperates against what he calls the "madness" of Jewish literalism and legalism in interpreting the Bible ("*insensatis semetipsos interpretationibus tradentes*").[36] My second text, more than a millennium younger, stages the harassment inflicted on a Jewish businessman in Venice by the local Christian youth. The harassment is justified by an argument against literalism and legalism in all points consonant with Justinian's charge against Jewish Biblical hermeneutics.[37] Shakespeare's words: "the jew will have his bond" summarize the annihilating but unending reproach aimed at *the Jews* by the institutions of Western Christendom. The aversion against the Jewish name has merged with the resistance against the legal "bond" whose Roman law ancestors *nexum* and *vinculum* it had pushed into the background.[38] The protest against the rule of "mere" positive law is irreversibly entangled with anti-Judaism, and the identificatory package composed of "bond" and "Jew" will remain a leitmotiv of Western and European culture far beyond the age in which *religion* was consecrated as societal agency of sovereign value positing. This is why the disproportion between the infrequency of texts in Nietzsche that deal with law, and the overwhelming number of pages where he devotes himself to *the Jews*, is less remarkable than his failure to fathom the connectedness of both.

The common point linking the historical contexts at issue in both texts has escaped the attention of many a recent legal or literary observer (not, though, Shakespeare's and probably even less Justinian's). It lies in the fact that, for the whole length of this controversy — which, to recall it once again, is in a precise sense coextensive with the life span of what we call "the West" — the Jewish side, far from rejecting the accusations of legalism and literalism, is at best nonplussed by the idea that these are matters one can be "accused" of.[39] But, incomparably more decisive than these direct effects is the retroeffect these anti-Jewish accusations or attributions — of

sticking to the Scripture, the law, the bond, to its mere letter, its mere body — have exerted on Christianism itself. The dream of "doing without" law has given rise not only to the wide specter of Christian antilegalist traditions, but to a plethora of supposedly post-Christian campaigns in favour of meta-legal justice, infra-legal rules, arts of alternative legality, methods of reasoned consensus, grammars of responsive intimacy or responsible love, or, finally — Nietzsche's version — of the honesty (*Redlichkeit*) of the powerful as a sufficient grounding for their mutual obligations.[40] These campaigns face, each in its way, the same type of difficulties of which the entire history of the Christian-Jewish divorce can show such an impressive list of examples. Moving out of the circle of law, one irremediably produces the necessity of establishing a novel, specific relationship, often exceedingly fragile, unstable, self-defeating, to all those who hesitate to do the antinomian step (and to *their* law), and fatally witnesses the growth of a new legality, undistinguishable from the old except that it does not own up to its legal character.

Doctor Jekyll and Mister Hyde

Nietzsche is both a predecessor of any critical legal movement today and a precious missing link between a legal critique as part of an outspokenly and dominantly religious Christian civilization and legal critiques as part of an avowedly Christian structure known as secularism. Contrary to hopes — nourished, mostly, by Nietzsche's fury and disgust about the current leaders of the anti-Semitic movement — his position as to the structurally decisive legal and interpretive stakes of the Christian-Jewish controversy largely matches with Christian antilegalism. The Christian–post-Christian fugue of legal oblivion includes Nietzsche's voice in its polyphony. As so many of his cultivated contemporaries as well as compatriots, the philosopher stands in an indissoluble genealogical relationship to a religious and trans-religious tradition that achieves itself and its identity through a capital "otherwise than by law," disowning legality and entrusting subjective integrity, not to law, but to self-subtraction from law.

If the discrepancy between Christian anti-Judaism and secular anti-Semitism is well established, the resistance against admitting the dependence of the latter on the former does not go without saying. This resistance evinces the remarkable feature of holding its firm place within the Western self-assessment until today even if it originates in the high tide of anti-Semitism. In the German-speaking Europe of Nietzsche's lifetime and throughout a period that spans from the mid-nineteenth to the mid-twentieth centuries, it is the anti-Semites who, eager to argue their doctrine's scientifically sound, "objective" character, reject any commonality

with merely traditional and — especially disreputable in their eyes — "religious" sources. Nietzsche is a clear case in point. He deals with the Jewish reference through two alternating narratives. Wherever he praises the Jews, he speaks as an observer of their enemies. Here, the Jewish reference is empty; it is but the other side of Christian self-thematisation. When Nietzsche argues the proto-racist doctrines of superior and inferior races, and looks at the "Semitic" continuity, the Jews belong, on the contrary, to the same side as the Christians, the other side being reserved for the "Aryans." Most telling about the racist component of his thinking is Nietzsche's attitude toward any non-Semitic non-Aryans: they are not worth mentioning. Also, in his second narrative, he identifies the Jews as radical Christians. It happens, too, that he calls the Christians "superlative Jews," thereby representing them as the ultimate culprits of each and every indictment contained in *The Antichrist* (which in that particular not-so-particular sense turns out to be, in spite of all, an anti-Semitic pamphlet).

It is thus the Jewish-Christian difference on the level of conflicting dogmatic contents rather than of a supposed heterogeneity between "innate" dispositions, it is the "religious" viewpoint that allows Nietzsche to speak in favor of the Jews. Nietzsche is philo-Semitic in connection with the traditional Christian condemnation of the "Jewish perfidy," philo-Semitic against Paul, against the church,[41] against the anti-Semites and, indeed, against his own deeply ingrained grievance to the "Semites" as the agents of *ressentiment*. There is a problem of fusing or merging the two horizons into which "the whole problem of the Jews," as he once called it,[42] distributes itself, namely the Judeo-Christian distinction on the one hand, and the racial divergence on the other. The *Horizontverschmelzung* fails, the two horizons refuse to merge. The Judeo-Christian controversy is, as we have seen, the theater of Nietzsche's antitraditional, free-thinking, "humanist"-minded standard arguments. It is however the question of racial dispositions that comes closest to Nietzsche's ambitious themes: overman, transvaluation, domestication. When they reappear in this context, *the Jews* find themselves in the role of the "most fateful" ("most disastrous" would in certain respects be at least as correct a rendering of Nietzsche's *verhängnisvollste*) "nation in world history."[43] The Jews, "the Semites" to be exact, are the soil of Judeo-Christian priesthood, "the only soil on which this plant could possibly have grown."[44] No algorithm, no procedure of translation is offered to mediate between the two theaters. Nietzsche's "whole problem of the Jews" remains unsolved, and in retrospect it is clear how, by demolishing any remaining obstacles to the identification of Christianity as a Jewish invention, Nietzsche's work has,

under the cover of his anti–anti-Semitic protestations, substantially enriched the potential of anti-Semitism.

Giving all its due importance to the once much-celebrated one-page-long aphorism in which he touches upon the antithesis between spiritual and literal interpretation,[45] it is fair to say that the author of *Daybreak* avoids most of the decisive themes of the Judeo-Christian conflict of interpretation, and especially the antagonisms of faith versus law, grace versus law, morals versus law, and *epieikia/aequitas* versus law. Nietzsche's Jewish science oscillates between two disparate, if equally consequential *topoi*, each of which contributes to the effect of diverting his attention away from the radical and undeconstructible tensions that preside over the Christian-Jewish divorce. These topics are, on the one hand, Nietzsche's understanding of the Jewish-Christian relationship as a relationship unfolding, not primarily in terms of incompatible interpretations and diverging modes of relating to the text, but in terms of continuity, takeover, and succession within one encompassing — and deeply regrettable — historical campaign.[46] For Nietzsche, the only decisive contrast is between the united age of Judaism-plus-Christianism — Nietzsche's personal version of "Judeo-Christianism"— on the one hand, and the Aryan *fundamentum inconcussum* of his projected construction of future European humankind, on the other hand. The distinction Nietzsche draws, with no claim to any specific originality on that point, between a "Jewish-Christian" *age* that succeeds an Indian, pre-"Jewish-Christian" (Indo-German, Aryan) *age*, invariably defines Nietzsche's position in his final decade.

True, the philosopher presents himself, indeed exposes himself, especially throughout his last years as a writer, as the author of a neverending series of detailed protestations, violent objections, and insuperably poignant judgments against the anti-Semites. Repeatedly, Nietzsche goes as far as expressing his plain preference for Jewish over Christian values and arguing their superiority. As these statements are diametrically opposed to the general climate within the German intellectual elite, they have played an important part in the history of the philosopher's fame. In reality, both Nietzsche's argument against Wagnerian and other anti-Semitic pamphleteers in the context of the evolution of "cultivated" German public opinion, and his anti-Christian argument, have distracted many from a genuine appreciation of Nietzsche's complex self-positioning within the Judeo-Christian antagonism. The irresistible appetite for such sources and founding structures of European culture as could provide Europeans with an access to another ascendency than that of Judaism — a disposition that Nietzsche shares with numerous members of the contemporary European elite, for whom the "Indo-German" was a matter of

dramatic interest throughout — combines in Nietzsche with his personal anti-anti-Semitism. Understood by many interpreters as declarative of a position in favor of the Jews, it has even been interpreted as a token of an intact political correctness, and repeatedly named as a token of the suitability of Nietzsche's thought for a twentieth-century readership.

Nietzsche, according to this sympathizing vulgate, ceaselessly confronts and challenges modern anti-Semitism, which is steadily gaining in power, in his times, in the cultivated society of Europe and above all, Germany. This understanding claims that Nietzsche's polemics are directed against Christianity, holds that the anti-Semitic position has never harvested a more unambiguously negative comment than Nietzsche's, and emphasizes that Nietzsche has many "positive" things to say about the Jews, especially of his own times. This is true to the extent that Nietzsche unmasks anti-Semitism as an imposture and as the current *palingenesis* of everything tasteless and disreputable, of all spurious values. Yet, these spurious values start, in Nietzsche's view, with the Judeo-Christian slave morality. In fact, Nietzsche's anti-anti-Semitism epitomizes the tragedy of an anti-Semitism despairing in the confrontation with its own untenability, an anti-Semitism that occupies, all the same, the center of Nietzsche's sympathy and existential attention. Nietzsche's interpretation of Christianity as a Judaism raised to an exponential power is a maneuver launched in order to save anti-Semitism by providing it, *loco judaico*, in place of the Jews, with an appropriately aggrandized adversary, *un ennemi à sa taille*. "Save" anti-Semitism? From what? From becoming worse than even the Jews, is Nietzsche's reply. This is why Nietzsche argues that the "Antis" are misled by their target and should pounce on Christianity rather than the Jews.[47] Nietzsche is prepared to expose and denounce anti-Semitism — as long as it is from the viewpoint of another, different, but equally anti-Jewish mindset. For Nietzsche, anti-Semitism is part of a tradition that, if it is not irreproachable in itself, deserves to be defended against its embezzlement by flawed nationalists and Wagnerians. His scourging remarks "against" the anti-Semites are thought "for" an integrally anti-Semitic public.

Post-Christianity?

Just how deep is the cut between "Christian" and "post-Christian" times? The two ideas that constitute the structural content of post-Christianity: the idea of an adaptive reorientation of traditional parameters and the idea of the advent of a time "after law" are both borrowed from Christianity, and more exactly from Christianity in its key moments.[48] The upshot is that post-Christianity is not only the most devoutedly Christian discursive configuration currently available, but that it is the only form in which the

continuation of Christianity can currently be thought. Post-Christianity is a renewal, a fresh start, a "second round" of Christianity. The key crusade of modernity — the one directed against institutionalized religion — repeats Christianity's performative content and foundational gesture: the step toward a new, emancipated condition of human existence, redeemed from its subjection under the law. The step toward post-Christianism, or "secularisation" is, of course, no longer directed against the Jews and their law, *adversus iudaeos*, to quote the common *incipit* of medieval treatises so numerous that they actually form a whole literary genre, but against Christianity's institutional embodiment, whether enclosed in its singular and Catholic appearance or dispersed among the multiplicity of Protestant denominations. A major difference between the two promises of an "after law," the first — Christian *simpliciter* — and the second — Christian *sub specie* "post" — lies in the "addressee" of the law-emancipating gesture. In the second occurrence, the identity of the structural content makes it difficult to distinguish between old and new, between substituted and substitutor. Throughout its "secularizing," Christianity liberates itself from its own legal or institutional appearance. There is no one else left to be "secularized."

That problem was unknown at the time of the first occurrence. For the Apostle to the Heathen, the new community had no other possible meaning than that of a secularization of Judaism. The Christian self-emancipation from law, or *katargesis tou nomou*, had been predicated on its core orientation "against" something — a something that had a name as well as an existence. In other words, Christianity has acquired its profile as the enterprise of announcing a post-Jewish age. As internal outcasts the Jews are essentially included in the Christian economy of salvation. The gain in evolutionary potential that is provided by the presence of such an identifiable "backdrop," cannot be overrated. It is proportional only to the increase of the risk that the situation thus created imposes on those placed, precisely, in that position. In the moment Nietzsche is writing this model is old, it has accompanied Western history throughout, it is heading toward its discontinuation. This discontinuation — supposing such a discontinuation can be implemented on a permanent base — might well constitute the one feature of post-Christianity worth considering a novelty. A Christian and thus antinomian civilization, the Western entity had been predicated, throughout the ages, on its capacity to externalize its legality by assigning it to a non-Christian depositary — to a representative of law who operated as the outside guarantee of law's internal efficiency (thereby enabling Christian civilisation to be simultaneously "Christian" and "a civilization"). The transition to post-Christianity heralds the advent of an age of Western culture that, without in the least revoking its meta-legal constitution and legitimacy

inaugurated by Paul, indeed steadily increasing Paul's radical *Aufhebung des Gesetzes*,[49] lets the position of the depositary, assigned — traditionally, genealogically — to the Jews, become vacant. The Jews are discharged from their unequal duty as compulsory internal outside. Nietzsche's take on the Jews — whenever he is writing in his lighter, more rationalist vein — is perfectly representative of this tendency. If he fails to realize the significance of the outsourcing procedure, Nietzsche sides increasingly with the Jews, to the extent, at least, that he is confronted with current anti-Semitism. The question is that of the conditions of that vacancy. Which structures have been successfully displaced, and how?

Western Christian culture has negotiated its own dilemma of law and genealogy by externalization. It has in other words designated outside representatives upon whom to foist these rejected references. Is the maintaining of an externalized legality, while simultaneously cancelling the site of its externalization, a viable project? Can it "work"? From time immemorial, the projective imagery of an exaggerated, undomesticated, *uncivilized* concern for law and the "merely legal" has been the *ne varietur* form of Christian anti-Judaism. On this point as on others, a certain *Ancien Régime* has been part of the current Western institution for two centuries now, although more modest estimations are at least equally arguable. Whether this suffices to definitively sever the law question and its traditional Jewish/Christian identification must be left to the wise. It remains part, in any case, of the database of Western culture in the making.

The Good News of the New Testament enters the scene, the scene of the political at least, as law's other. The subtle artifact situated in the Pauline ordering that underlies Western Christianism is constituted as a polarity between fulfillment and neutralisation of law. Both converge in the same promise, or project, of legal *kenosis* — the possibility of emptying oneself of law, of constituting oneself as a subject, with respect to something more consistent, more valuable, less arbitrary than law. Christianity, outsourcing law to its other side, claiming to be more-than-law, and redrawing the genealogical map accordingly, constitutes itself as a surplus religion. That this relationship will give rise to pathologies, legal "phantom limb pains," comes as no surprise. Christian anti-Judaism remains undecipherable as long as one fails to re-contextualise it within the realm of these idiosyncratic ailments. For a very long time, for centuries of Reform and Enlightenment, European minds — and the ideas of the founding fathers of the United States show little difference, in this respect, from the enlightened European mindset — represented the Western drive to self-liberation from law as a move against the dark Empire of a perverted Christianity. Nietzsche, especially the Nietzsche of his last decade, shares both the

bi-millenial genealogy and its modernist re-ordering, whose implications he unfolds more radically than any other author, and in an incomparably confident and flamboyant fashion. But the overall picture they rely on is gravely, if not rather comically, mistaken. The successive antinomianisms of the reformers and of the Enlightenment, of modernity and postmodernity, are all modest remakes of the incomparably more relevant Christian antinomianism that precedes them by fifteen centuries and has never stopped, to this day, to structure the Western attitude toward things legal. The Western cultural tradition has ever been defined, first by its antilegal values, and only second by its law. It has been, in a word, a critical legal movement.

Notes

1. Friedrich Nietzsche, *On the Genealogy of Morality*, 2nd essay, para. 10, in *Basic Writings of Nietzsche* (Walter Kaufmann ed. and trans., 1992), 509 (emphasis added); Friedrich Nietzsche, *Zur Genealogie der Moral* [*On the Genealogy of Morality*] (1887), 2, reprinted in *Werke in drei Bänden* (Karl Schlechta, ed., 1966), 814.
2. An anonymous Brahmanic collection of teachings/rules, which, uniting much older material under the reference of the legendary law-giver Manu / "the wise one," is now usually dated in the first centuries A.D. The "Code of Manu" was first translated into English in 1794. On Nietzsche's encounter with the text , see *infra* note 90 and accompanying text.
3. On Nietzsche's dependence on Manu's translator Jacolliot, and on Jacolliot specifically, see Annemarie Etter, "Nietzsche und das Gesetzbuch des Manu," *Nietzsche-Studien* 16 (1987):340; see also Andreas Urs Sommer, "Friedrich Nietzsche's 'Der Anti-Christ," *Ein Philosophisch-historischer Kommentar* (2000):561–85.
4. In *Dark Riddle: Hegel, Nietzsche, and the Jews* (1998), 152–84 Yirmiyahu Yovel suggests three separate topics that Nietzsche is thinking of when he refers to Jews and Judaism. There are three stages. First, the conquering Judaism of the *landnahme* narratives contained in the Old Testament — Nietzsche likes it for its force, naturalness, self-assertion; second, the time of the institution of Jewish priesthood — which he dislikes (and describes in the *Genealogy of Morality*) and, third, the new Jews: Nietzsche's contemporaries and colleagues of Jewish origin — once again sympathetic, as they are objects both of anti-Semitism — itself object of Nietzsche's anti-anti-Semitism — and of a peculiar and problematic virginity with respect to Christianity and its flaws — specimens, as it were, of a paradoxical domestic side-species of the "good savage." These contemporary Jews, being Europeans by civilization, are different from the mainstream descendants of Europe and the *Christenheit*, and among them especially from the German nationalists, exempt of *ressentiment* (*ressentiment*, of course, is in itself Jewish in its origin, as it represents the discovery by the Jewish priests of stage 2 and their legacy to Christianity). Yovel's classification is helpful, and help is needed, as Nietzsche uses the name "Jew" and "Jewish" in the way his contemporaries do, i.e., as references to a transhistoric essence. What is striking enough — even if it, too, just reproduces an implicit and consensual verdict of contemporary opinion — is, on the other hand, the distribution of Nietzsche's Jewish references. Certain ages, it would seem, have more justified claims to Nietzsche's attention than others. True, there are two aphorisms that compare the respective contributions to progress, especially scientific progress, of Christians and Jews, and which, being critical of the Christian and favorable to the Jewish side, have elicited much praise from progressive Nietzscheans, those, especially, who were eager to defend Nietzsche against the accusation of anti-Semitism (cf. below, note 45, which reproduces one of these passages). But apart from these, Nietzsche, who in general is so extraordinarily eloquent on the topic, observes silence — a silence that extends to the barely less than two millennia that separate the period of the Second Temple from the second half of the nineteenth century. In Jewish history as Nietzsche knows, or imagines, it, the entire

period of rabbinic Judaism is in the role of the outcast. The selective silence is reported in Yovel, who, however, fails to see in it anything surprising or worth pointing out. But the question whether Nietzsche's avoidance is not, rather, of the most decisive relevance for the understanding of the philosopher's view of the Jews, is an open question. Nietzsche's lack of concern for rabbinic Judaism is, if widely shared, deeply unsettling, a fact worth investigation. So much so, indeed, that the lack of concern for this lack of concern — the scholarly oblivion of Nietzsche's own oblivion of the most decisive portion of Jewish history — stands itself in need of explanation.

5. cf. *Genealogy of Morality*, 2nd essay, para. 10, 508, referring to *mercy* (*Gnade*), Nietzsche here takes a step toward recognizing the tension between law and its meta-legal *hinterland*, following up the divide between mercy and strict or literal law, by relating *mercy* to a process of *décadence*: the justice which began with, "everything is dischargeable, everything must be discharged," ends by winking and letting those incapable of discharging their debt go free: it ends, as does every good thing on earth, *by overcoming itself* ["sie endet wie jedes gute Ding auf Erden, *sich selbst aufhebend*"]. This self-overcoming of justice: one knows the beautiful name it has given itself — *mercy*; it goes without saying that this mercy remains the privilege of the most powerful.
6. My translation. cf. Friedrich Nietzsche, *Der Antichrist* [*The Antichrist*] (1895), reprinted in *Werke in drei Bänden*, 1197. Hollingdale's rendering "we *emancipated* spirits," in Friedrich Nietzsche, "The Anti-Christ," in *Twilight of the Idols and The Anti-Christ*, para. 36, 160 (1990) conceals the tracks of this evangelical genealogy.
7. *The Anti-Christ*, *supra* note 5, para. 40, 164.
8. Ibid., para. 40, 165.
9. Ibid.
10. Ibid., para. 39, 163.
11. See, e.g., ibid., para. 45, 171.
12. cf. Jonathan Z. Smith, *Drudgery Divine: On the Comparison of Early Christianities and the Religions of Late Antiquity* (1991).
13. Nietzsche, *The Anti-Christ*, para. 29–35, 152–160 (criticizing Ernest Renan's sublime misrepresentations of Christ as a powerful law-giver — an "*impérieux*" "*grand maître*," both "*génie*," and "*héro*"); Nietzsche, *Der Antichrist*, 1193–97.
14. Nietzsche, *The Anti-Christ*, para. 42, at 166.
15. "Paulus has re-established, in grand style, just that which Christ, through his life, had annihilated," says a posthumous note from the eighties. *Werke in drei Bänden*, 655. Nietzsche portrays Christ as deprived or incapable of *ressentiment*, or in other words as gifted with a "profound instinct for how one would have to live in order to feel oneself 'in Heaven' and 'eternal'." The Christ of pure inwardness, the one Nietzsche *believes in*, is essentially a *lebensphilosophical* Christ, the site of a life-long victory of life over order, of gesture and behavior over power, teaching, or knowledge. Christ's life is idealized as the site of a permanent speech-act, a never-ending self-exposure; at the same time, Christ succeeds in preventing any exteriorization or institutionalization of that which is said, thus avoiding any *performativity* (the "dysevangelic" Christian era starts with *the breakdown of this prevention*). The notion of "behavior," which is among the most advanced points in Nietzsche's vocabulary, marks out the uniqueness of the issue in his eyes. He here transgresses the borders of his customary conceptual realm, which is demarcated by concepts like "psyche," "typus," and "instinct."
16. See Nietzsche, *The Anti-Christ*, para. 45, 171–72.
17. See ibid., para. 35, 159–60 (translation modified by the author).
18. Ibid.
19. Ibid., para. 29, 153.
20. Friedrich Nietzsche, *Beyond Good and Evil*, in *Basic Writings of Nietzsche*, para. 60, 262.
21. Nietzsche, *The Anti-Christ*, para. 33, 158. It is true that "*katargein*" has its own history of unduly dramatizing translations. Giorgio Agamben, *Il Tempo che Resta: Un Commento alla Lettera ai Romani* (Bollati Boringhieri ed., 2000), 91–92. For Nietzsche's statements on the "*Vernichtung*" (annihilation) of the law, and its role in Paul's conversion, see Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality* (R. J. Hollingdale trans., 1982), para. 68, 39–42.
22. Agamben, *supra* note 20, 95.

23. Nietzsche, *The Anti-Christ*, para. 41, 166.
24. Ibid., para. 40, 164.
25. Ibid., para. 42, 167 (translation altered).
26. Ibid., para. 39, 164.
27. See Friedrich Nietzsche, *Menschliches, Allzumenschliches* [*Human, All Too Human*] (1878), reprinted in *Werke in drei Bänden*, para. 475, 686 (translation by the author).
28. Nietzsche, *The Anti-Christ*, para. 46, 174. The genuinely gentile "noble scorn" which the philosopher finds so admirable, is further illustrated by a question that Nietzsche understandingly locates in Pilate's manly unsentimental mind, namely: "One Jew more or less — what does it matter?"
29. See the chapter, "The 'Improvers' of Mankind, in Twilight of the Idols," in Nietzsche, *Twilight of the Idols and The Anti-Christ*, 66.
30. Ibid., para. 3–5, 67–70.
31. See Nietzsche, *Genealogy of Morality*, 493.
32. Nietzsche, *The Anti-Christ*, para. 20–23, at 141–45.
33. Ibid., para. 44, 169 (translation altered).
34. See Yirmiyahu Yovel, "Nietzsche and the Jews: The Structure of an Ambivalence," in *Nietzsche and Jewish Culture* (Jacob Golomb ed., 1997), 114.
35. Yosef Hayim Yerushalmi, *Diener von Königen und nicht Diener von Dienern: einige Aspekte der politischen Gesichichte der Juden* (1995), 37. (There was in the middle ages no mass-murder [by Christians against Jews].)
36. *Corpus Iuris Civilis, Auth., Nov. const. CXLVI*, Praefatio. Quoted after the edition Lyon (Jean Pillehotte) 1612, vol. 5, col. 621. On the passage, see Pierre Legendre, "Les juifs se livrent à des interprétations insensées: Expertise d'un texte," in *La psychanalyse est-elle une histoire juive?* (Jean Pierre Rassial ed., 1981), 93–114.
37. William Shakespeare, *The Merchant of Venice*.
38. Roman law is, however, remembered *precisely* in connection with the theme of torture inflicted on the body of the insolvent debtor, in Nietzsche, *Genealogy of Morality*, 2nd essay, para. 5, 500; see also Nietzsche, *Zur Genealogie Der Moral*, 806.
39. For a particularly telling text see the "Dispute between a Jew and a Christian" by Gilbert Crispin and his anonymous continuator (eleventh century), especially its polemics against the antiliteralist ways of the Christian interpretation of the Bible. The following argument is put into the mouth of the Jewish — and the ears of the Christian — disputant: "You put figures and allegories wherever you want. Wherever the letter refuses to say that which you would like it to say, you tell us that it comes all dressed up in allegories and figures, which you then move on to explain with whatever comments you see fit. You thus succeed in accommodating the Scripture to whatever you wish — not surprisingly, as instead of subjecting your understanding to the Scripture, you subject the Scripture to your understanding. . . ." cf. Bernard Blumenkranz, ed., *Gisleberti Crispini Disputatio Judei et Christiani* (1956), 72 (translation by the author). For further texts and literature on the topic, see Gilbert Dahan, *Les Intellectuels Chretiens et les Juifs au Moyen Âge (*1999).
40. On the link between power and right, see Nietzsche, *Genealogy of Morality*, 494–96; Nietzsche, *Menschliches*, para. 26, 889; Nietzsche, *Zur Genealogie Der Moral*, 800–01. On *Redlichkeit* as the legality of thought, see Nietzsche, *Daybreak*, para. 370; Friedrich Nietzsche, *Morgenröte* [*Daybreak*] (1881), reprinted in *Werke in drei Bänden*, 1208. Sigmund Freud, in a short article written in 1916, "*Zeitgemäßes über Krieg und Tod*" ("Thoughts for the Time on War and Death"), has a telling anecdote on the question of nonlegal, merely decency-based and self-enforced rules, and about the expectations to which they can give rise. "One of my English friends put forward this thesis [that our dreams are governed by purely egoistic motives] at a scientific meeting in America, whereupon a lady who was present remarked that that might be the case in Austria, but she could assert as regards herself and her friends that *they* were altruistic even in their dreams." Sigmund Freud, "*Zeitgemäßes über Krieg und Tod*" ["Thoughts for the Time on War and Death"], in James Strachey, ed., *The Standard Edition*, vol. 14, 286 (emphasis in the original) Is a person who is *redlich* (sincere) in Nietzsche's sense correctly described as *an altruist even in her dreams*? "Dream and responsibility", an aphorism from "Daybreak" shows a Nietzsche apparently (although not quite) joining the ranks of Jones's interlocutor, as he

vituperates: "In each and every thing you wish to be responsible! Except in your dreams! …", cf. Nietzsche, *Morgenröte*, para. 128 (translation by the author).

41. An addendum, Jacob Taubes, *Die Politische Theologie des Paulus* (Wilhelm Fink ed., 1995), 81, sees in the Lutheran creed's reference to Jesus' divine Father. Taubes refers to late-nineteenth-century Germany, eager to absolutize the evangelical faith in the son at the expense of the "legality" localized within the Old Testament.
42. Nietzsche, *Menschliches*, para. 475, at 685.
43. Nietzsche, *The Anti-Christ*, para. 24, 146.
44. According to a posthumous note from the eighties. See *Werke in drei Bänden*, 578 (translation by the author).
45. See Nietzsche, *Daybreak*, para. 84, 49–50. The passage needs quoting at length: [H]ow the bible is pummelled and punched and the *art of reading badly* is in all due form imparted to the people: only he who never goes to church or never goes anywhere else will underestimate that. But after all, what can one expect from the effects of a religion which in the centuries of its foundation perpetrated that unheard-of philological farce concerning the Old Testament: I mean the attempt to pull the Old Testament from under the feet of the Jews with the assertion it contained nothing but Christian teaching and *belonged* to the Christians as the *true* people of Israel, the Jews being only usurpers. And then there followed a fury of interpretation and construction that cannot possibly be associated with a good conscience: however much Jewish scholars protested, the Old Testament was supposed to speak of Christ and only of Christ, and especially of his Cross; wherever a piece of wood, a rod, a ladder, a twig, a tree, a willow, a staff is mentioned, it is supposed to be a prophetic allusion to the wood of the Cross; even the erection of the one-horned beast and the brazen serpent, even Moses spreading his arms in prayer, *even* the pits in which the Passover lamb was roasted — all allusions to the cross and as it were preludes to it! Has anyone who asserted this ever *believed* it? Consider that the church did not shrink from enriching the text of the Septuagint . . . so as afterwards to employ the smuggled-in passage in the sense of Christian prophecy. For they were conducting a *war* and paid more heed to their opponents than to the need to stay honest."
46. The relevant distinction separates, in his view, not Jews and Christians but, rather, the age of the patriarchs, with its culture of warfare and self-assertion — the age of Jewish "will-to-power," in a word — and, as founders of the "Jewish church," the priests and moral legislators of the period of the Second Temple, as well as their Christian followers and imitators. The distinction, of course, claims only *typological* validity. The well-known fact that, in spite of their typological resemblances, Judaism and Christianism did not effectively merge, but on the contrary sustained their mutual irreconciliation throughout all the centuries that separate us from the times of the Second Temple, programming the most singular and improbable of coexistences, is worth remembering in relation to Nietzsche's "Aryan"-referred privileging of their commonalities at the expense of their unpacifiable *différend*.
47. The five-letter word "antis." or "Antis.", a shorthand for "antisemitisch," "Antisemit," "Antisemitismus," is in constant use in Nietzsche's notebooks, owing to the incomparable frequency of the topic.
48. Romans 3:31; 4:14; 7:5-6. For essential comments of Paul's Epistle to the Romans and their use of the notion *katargein*, "to make inefficient," cf. Agamben, *supra* note 21. Not mentioned is the dialectic Paul stages between *katargein* ("to deprive of effectiveness" — the model, via Luther's Bible-translation, of Hegel's "*aufheben*") and a linguistically related verb of opposite meaning, the equally frequent *katergazein* (to carry out, make happen, perform, complete), which prefigures Bataille's notion of expenditure, another prominent item of philosophical terminology.

CHAPTER 7

Nietzsche's Hermeneutics: Good and Bad Interpreters of Texts

RICHARD WEISBERG

How can the same thinker pervasively attack legal argumentation while equally suggesting consistently that the law can stand as a signpost to justice? *On the Genealogy of Morals*' second essay famously accomplishes both. Nietzsche there displays his customary dissatisfaction with *contemporary modes* of legal interpretation — and by contemporary I mean from the Gospel writers to the legal sociologists of the late nineteenth century — while also endorsing law (if properly propounded and interpreted) as the flawed but nonetheless best means to the end of controlling rancorous violence and establishing good relations among equally situated members of a polity.

Let us heed this central text from *On the Genealogy of Morals*; in the eleventh aphorism of the second essay, Nietzsche first disposes of the link between justice and knee-jerk revenge or *ressentiment*, and then offers us this account of justice on earth:

> To what sphere is the basic management of law, indeed the entire drive towards law, most connected? In the sphere of reactive people? Absolutely not. Much more so in the realm of the active, strong, spontaneous, aggressive. Historically understood, the

> place of justice on earth is situated as a battle *against* the reactive emotions, a war waged by means of that active and aggressive power that here uses a part of its strength to quiet the ceaseless rumblings of *ressentiment* and to enforce a settlement.
>
> The most decisive move, however, made by the higher power against the predomination of grudge and spite, is the establishment of *the law*, the imperial elucidation of what counts in [the codifier's] eyes as permitted, as just, and what counts as forbidden and unjust. … From then on, the eye will seek an increasingly *impersonal* evaluation of the deed, even the eye of the victim itself, although this will be the last to do so.
>
> [I]n welcher Sphäre ist denn bisher überhaupt die ganze Handhabung des Rechts, auch das eigentliche Bedürfnis nach Recht auf Erden heimisch gewesen? Etwa in der Sphäre reaktiven Menschen? Ganz und gar nicht: vielmehr in der der Aktiven, Starken, Spontanen, Aggressiven. Historisch betrachtet, stellt das Recht auf Erden … den Kampf gerade *wieder* die reaktiven Gefühle vor, den Krieg mit denselben seitens aktiver und aggressiver Mächte, welche, ihre Stärke zum Teil dazu verwendten, der Ausschweifung des reaktiven Pathos Halt und Mass zu gebieten und einen Vergleich zu erzwingen.]
>
> Das Entscheidenste aber, was die oberste Gewalt gegen die Übermacht der Gegen- und Nachgefühle tut und durchsetzt — sie tut es immer, sobald sie irgendwie stark genug dazu ist —, ist die Aufrichtung des Gesetzes, die imperativische Erklärung darüber, was überhaupt unter ihren Augen als erlaubt, als recht, was als verboten, als unrecht zu gelten habe; … von nun an wird das Auge für eine immer unpersönlichere Abschätzung der Tat eingeübt, sogar das Auge des Geschädigten selbst (obschon dies am allerletzten …)][1]

This is a remarkable passage because it at first seems so different from what some postmodernists have made of Nietzsche. There is much of the careful philologist in these lines; interpretation not only counts but can be grounded in a tradition of understanding that brooks interpretive departures with some skepticism. Good reading of the code is, furthermore, connected to leading a life of active accomplishment and of justice-doing among peers. And law — as much as law's end, justice — needs not inevitably be associated with violence.[2]

Nietzsche here links to temporal, earthly justice the most controversial and value-laden aspect of his personal moral agenda: the ranking of nobility above *ressentiment*, of action above reaction, of the heroic Old Testament code above the rococo, privatized spiritualization of the Gospels.[3] The will to power emerges from the realm of self-perfection into the world of socialized humanity. The individual striver — think of Moses, the Revolutionary generation, or some recent feminists — *devotes some of her time to codewriting*! And from the time of codification on, as the rest of this aphorism tells us, people's actions are gauged coolly and impersonally along the lines of their *duty*, as prescribed by the codifier.

Happy is the generation whose actions are regulated by such a code, and whose people share the same reverence for its codifier! But Nietzsche lived in a quite different era — or in his terms a more typically Christian era — in which people were overcome by *ressentiment*, so much so that (as he foregrounds in this Aphorism's attack on Duhring's interpretation of justice) they willfully digressed and distorted the codifier's values; they lost sight of the greatness of the code. Consider the *Umsturz der Werte* — the Nietzschean upsetting of the table of values through *ressentiment* — that occurred in France during the Vichy period.[4] Consider this exact moment in American constitutional law, where governments are interning citizens and others without due process and where legal academicians of some liberal repute are busy rationalizing torture.[5] Constitutions codifying lists of human rights can be undone by interpreters who deliberately distort the text's meaning or, to put it better, manage to achieve sufficient power to undermine long held traditions of meaning and value instantiated in the text. Aphorism 11 ends with cautionary words about law itself; law (*Recht*) should not be understood, according to Nietzsche, as an end in itself. It is always the antivitalistic means to the always vitalistic end of justice (*Gerechtigkeit*). To understand Nietzsche's view of the always possible and indeed already there linkage of law to justice, one needs (as I have done often in writings now spanning twenty years or so)[6] to step outside the Second Essay itself, although the first such baby step takes us along to the Third Essay, in which Nietzsche continues a lifelong love affair with the Jewish people — in their deep past as people of the book and in their present incarnations as one of Europe's "strongest, toughest and purest races."[7] (The unfortunate middle period, when the Jewish priestly class managed to produce the new Christian approach to heroic codes, is evoked in *Geneaology*, 3, number 22, in which Nietzsche places these various periods of religious transition in comparative context:

> The reader may have guessed already that I have no fondness for the New Testament. … The Old Testament is another story. I have

> the highest respect for that book. I find in it great men, a heroic landscape, and one of the rarest things on earth, the naivete of a strong heart.

Could there be higher Nietzschean praise, particularly toward the end of his genealogical tour through morals? What could naïveté mean in this context? Perhaps the antiresentful, vitalistic urge to justice, against all odds? But of course, that naïveté is connected, always in Nietzsche, with the Book, with law, with the Code!

> In the Jewish "Old Testament", the book of divine justice [*von der goetlichen Gerechtigkeit*], there are men and things and speeches in such a grand style that Greek and Indic literature has nothing to equal them. One stands in awe and reverence before these enormous remains of what man had once been.[8]

Justice is a positive urge, as Nietzsche reminds us in the Second Essay. But it has been — and could be even in the degraded context of nineteenth-century European values — codified in a book. Such a text can guide a people through millenia, but to do so there are two execptionally rare prerequisites: (1) the text must instantiate the vitalistic urge to justice of the codifier and (2) the text must be — as consistently as possible — *interpreted* from the perspective of that same set of positive values.

Now, in turning from the Book to its interpretation, we again have straightforward if unpostmodern guidance from Nietzsche in the legalistic aphorism with which we started, indeed throughout the *Genealogy*, which is as much about interpretive methods as it is about anything else. A recent account of this method by my colleague Peter Goodrich stresses what I have mentioned often —[9] the *need for patience* while reading, for what Nietzsche calls in fact "rumination" —[10] no leap to judgment but instead — time! — time being as fundamental for a sound act of reading as it is for a sound morality. Understanding and action both progress "as slowly as possible"[11] and are not distracted by current trends, by sophistry, by the newest methods of interpretive distortion; and again, for Nietzsche and unsurprisingly, *new* is a term of derogation that modifies almost all European interpretive techniques since the New Testament.

The word in the eleventh aphorism of Essay Two is "impersonally" [*unpersoenlicher*]; if the reader of the Code can only abstract himself from his own emotion (even in the face of having been traduced or criminally violated, and recapture the impulse of the codifier — and always insisting as we have that the original code strives toward justice and is hence free of *ressentiment* — then the Code will live and will resist the inevitable distortions

of resentment, haste, violence, revenge, or what today we might encapsulate in one antithetical word: "emergency." From how many noble impulses, codes, and books has Western culture been distracted by "emergency," whether it is today's War on Terror, World War II's reversal of human rights in Europe, or the early Gospel writers' prediction that the End of Days was approaching. Every time this happens, the Book suffers, a text is willfully distorted, and interpretive methods are directed toward sacred words with the aim of changing their meaning while still preserving the original language.

Nietzsche injects his most potent interpretive venom into those early Christian exegetes. In Aphorism 84 of *Morgenroete*, Nietzsche gives us all we need really to understand the relationship of interpreter to text — but will we heed him?

> However much the Jewish scholars protested, everywhere in the Old Testament there were supposed to be references to Christ and only to Christ and particularly his cross. Wherever any piece of wood, a switch, a ladder, a twig, a tree, a willow, or a staff is mentioned, this was supposed to indicate a prophecy of the wood of the cross; even the erection of the one-horned beast and the brazen serpent, even Moses spreading his arms in prayer, even the spits on which the Passover lamb was roasted — all are allusions to the cross and as it were preludes to it! Has anyone who asserted this ever believed it? . . . [But] they were conducting a war and paid more heed to their opponents than to the need to stay honest.[12]

We are dealing here, of course, with a characteristic impulse within Nietzsche, with easygoing moves from normative to descriptive language. The *norm* is an impersonal absorption of the codifier's own noble values by the interpreter, and this takes rumination and considerable moral strength, particularly in law. Not only the victims but also judges, to quote P. Christopher Smith on today's panels, "are 'power players' unlikely IN FACT to be 'impartial, rational onlookers.'" But Nietzsche merely describes — with scorn — such self-involved interpreters; he does not wish to suggest that the *temporary* control over hermeneutics of the resentful in Europe constitutes a norm.

So he begins the *Genealogy* with the hope that this text itself will (someday) be understood for what its author means by it, and this can be accomplished only by an unsparingly careful reader [*einige Muehe dabei nicht gespart hat*] through a rumination [*das Wiederkauen*] entirely untypical of modern readers. This is the norm of understanding of great texts; but the everyday practice so digresses from the norm that the New Interpreter —

now finally in the Zarathustrean sense — will have to leap ahead of the (current) herd, become "reckless," interpret again in the ways of the unmoderns.

Or, again, we might say today, such a reader will have to resist trends of understanding that have long developed — against older moralities, pagan or Jewish — in Christian Europe. In a recent article expanding on what my book-length study had previously called the "Vichy hermeneutic,"[13] I indulged a Nietzschean reading of the resentful depths to which Europe, left in the hands of the anti-Semites, might dive; and then I associated with the early Gospel writers the ability of France to adopt quickly during Vichy to abject negations of their own great Code of Human Rights. Nietzsche stands as prophet of Europe's inability *to read*; and Catholic France, for which (with the exceptions of Napoleon and Stendhal, codifier and grand reader) Nietzsche had so little sympathy in the *Genealogy* — struck me as the best example of both the tragedy and of its sources in events several millennia previous.

My thesis there was and remains that a form of *flexible* deformation of ensconced textual understandings gradually permitted lawyers (and others) to overcome their native hostility to Vichy's racial scheme.[14] For French lawyers during World War II first needed to leap a hurdle not present in other countries victimized by Hitler. They had to reckon with their ingrained belief in *egalitarianism*, a staple of the French legal system since 1789 and one that endured throughout the twentieth century, up to and including Dreyfus (which did not involve any statist racial legislation) and even the Vichy years, during which government lawyers consistently invoked the "rights of man" while contemporaneously ejecting the Jew from the circle of traditional protection. My findings firmly indicate that the *private* reaction to Vichy racial laws of most lawyers (even those in the Vichy bureaucracy) was one of aversion to such a fundamental and distasteful change in French legal tradition. Even among anti-Semites at the bar, for example, there was regret that Jews were being singled out, especially those many hundreds of respected colleagues who were not foreign-born. And, even as to the latter group, many felt that discriminatory legislation was simply "not French"; if the Nazis insisted on singling out the Jews, perhaps nothing could be done, but surely the French themselves would not initiate and then instantiate such a gross deviation from the basic egalitarian principle of French law.

To overcome this "gut" aversion to French statist anti-Semitism, the entire legal community benefited from a ready-to-hand hermeneutic of flexibility typical of — and being practiced contemporaneously by — the French Catholic Church. They adopted a two-pronged strategy of a corrupting flexibility toward their foundational texts and of a total rejection

of what lawyers and others called derisively the "Talmudism" of the thus-excluded group.

This flexibility derived in large part from a tradition of Catholic reading strategies that influenced even lay and largely anticlerical professionals. As inbred as the story itself of egalitarianism, this strategy of manipulating foundational texts and concepts allowed lawyers during Vichy to work with the notion of equality and *at the same time* to develop an intricate four-year-long pattern of discrimination against Jews.

I thus suggested that Vichy anti-Semitism, and its acceptance among the masses of the people, was a *hermeneutic* — as much as it was a xenophobic, racist, or even traditionally anti-Jewish — problem. The ability to shift one's ground — fairly quickly and without a sense of profound, seismic change — as to foundational ideas and texts originated, as I saw it, in the early Christian ability to distort the sacred text upon which Christians chose to base their vision: the Jewish Bible. Their contribution instantiated a *way of reading* that wove distortion into the very moral fabric of the emerging religion's followers. This hermeneutic, at its origins and as it continued into the twentieth century — involved a *rejection of close reading itself*, a discomfort with textual fidelity masked in many of Christianity's founding texts as a rejection of *Jewish law*.

How was the Talmudic outsider, with his sin of a (Nietzschean) allegiance to Law and the careful reading it required — how was this Talmudist to be expunged from the protected circle of equal protection? This required an effort, and my archival sources indicated it was a struggle for the French, but one they failed to muster for the good. Even Marshal Petain, their octogenarian leader whose regime autonomously produced almost 200 anti-Semitic laws that often went beyond the Nazi precedents — even he asked his legal counsel at the Vatican in the summer of 1941 to find out if the Holy See had a problem with his regime's laws. The answer Leon Bérard received at the highest levels both apologized for the anti-Semitic laws and — again — rehearsed the Nietzschean observation of Christianity's hermeneutic of deformation of text.

As Bérard's letter to Petain proceeds into *theology*, the flexible hermeneutic of Catholic Europe becomes explicit:

> One could find in our legislation as a whole, as in that of many other states, and for example in our still very much extant Napoleonic codes, many statutes that would not be approved of by the Vatican. Also, [the Vichy] rule denying to everyone who might be baptized the status of Catholic is perhaps, from a theological point of view, not the most serious breach.[15] *The Church has never ceased to practice an essential distinction, full of wisdom and*

> *reason: the distinction between* thesis *and* hypothesis, *the thesis, in which the principle is invariably affirmed and maintained, and the hypothesis, where practical considerations are comprehended [où s'organisent les arrangements de la pratique]*.[16]

The Church thus both asserts an opposition to "racism" and — on the "realistic" plank it calls "hypothesis" — accepts it! Vichy, meanwhile and reciprocally, vaunts its constitutional retention of virtually every individual right proclaimed by the generation of the 1790s and also manages to exclude the Jew. The hermeneutic is ingrained and requires no clear articulation on such high levels of authority. Church and state, preserving their historical functions, can reach a détente. As Nietzsche does so often, so the lawyer fascinated by this process in Vichy can find the sources of this flexible hermeneutic in the Gospel writers.

The Pauline Paradox: Rejecting Textualism while Retaining the Text

Common to an otherwise highly variegated set of early Christian writers is a deep skepticism about *the law*. To the extent these writers perceived "legalism" in the Jewish traditions and also in the practices of some Jews who lived at the same time as Jesus, they often associated the law with an allegiance to *textualism*, that is to a kind of literalism that they felt sometimes overrode the spiritual or more essential elements of the Jewish relgion. According to A. N. Wilson, a very comprehensive and sympathetic observer of Paul, many of these writers initiated

> the attempt to translate Hebrew ideas into a Gentile setting. [This involved] using words either with new senses or with great boldness.[17]

On this reading, Paul's rejection of the Jewish law and of its textual base carried with it a program of *retention* of Hebrew ideas and even the retention of the *full material text* of the Jewish Bible.

It is this paradox that I believe lies at the origins of the French Catholic hermeneutic exemplified tragically during Vichy. It may help to explain later developments — like Vichy — in which a Catholic culture based on Pauline "love" but nonetheless acting governmentally within the world, far exceeds in cruelty anything imagined by the original Jewish textualists against whom Paul rebelled.

I am very mindful, in speaking of Paul in particular, of the caution expressed by post-Holocaust Christianity's true prophet, Franklin Littell. This pioneer allowed that Christianity has much to answer for after the

Holocaust ("the French Catholic community," he reminds us as just one national example, "has a long record of Antisemitism")[18] and he did not hesitate to date virulent Christian theological anti-Semitism to as early as certain first century epistles;[19] he is more equivocal in pondering "the question whether the New Testament is necessarily antisemitic, an issue which is increasingly exercising the skills of exegetes."[20]

Littell observes that Paul needed to use "considerable skill" in order "to graft believing gentiles into an essentially Jewish history of salvation."[21] What seems at first to be an admirable, nay brilliant career of textual manipulation, must — in view of the thousands who followed Paul's *hermeneutic* example during the Holocaust — be reconsidered. To do this, I believe we must pass briefly through the more transparent window of the Gospel according to St. John.

The Example of John: Using the Hebrew Text while Attacking the Textualists at Every Turn

As Nietzsche observed, retaining a sacred text while fundamentally altering its meanings took some work, at least at the beginning of Christianity. By the time we get to John, the methodology is easier (even for an "outsider" like myself) to find, although still as paradoxical as it seems to some when handled by Paul's anti-Platonic, chaotic, but in every way remarkable soul.

Any set of verses from the Gospel according to St. John will reveal the bifurcated hermeneutic aim of *reinterpreting the Hebrew Bible to make it fit Christian beliefs* while also *attacking wherever possible as legalists and textualists the non-accepting Jewish community*. The first prong instantiates the Jesus story — against all the textual odds —as having been "predicted" by the older text; the second prong *justifies sloppiness in the readings of those older texts by attacking, precisely, the "Jewish" reading strategy of textual legalism*. John, so to speak, has his cake and eats it, too. In case — as for most knowledgeable readers of the Hebrew texts — the alleged allusions to Jesus as Messiah simply will not do — he attacks the very idea of sticking closely (label it, say, legalism) to a text altogether.

While John, perhaps in particular, has been the critical object of much commendable post-Holocaust Christian commentary — from all of which I have benefited and will continue to learn —[22] I am not sure on the readings as yet called to my attention that this twinned hermeneutic has been noticed as an essential contribution to anti-Semitism, as important as the increasingly discredited, more direct, anti-Jewish verses in the New Testament.

In John 7, Jews respond to the idea that Jesus might be the Messiah with some textualist skepticism. They nitpick (in verses 40–44), for example, about whether the Messiah was supposed to descend from David and come from Bethlehem. Opposition to Jesus is both textually derived and linked to the hermeneutic strategy of *sticking to the text*. Commentators call this a quibble: "there is a division among the people over superficial matters," says one.

Now the textual basis for Jesus as Messiah is usually given as a compendium of allegedly prophetic verses in such Hebrew texts as Isaiah, chapters 52 and 53, or Psalms (e.g., 69:9); both of these are evoked in John. Yet any reader of these two texts must grapple with the long tradition of understanding — still (frustratingly?) adhered to by Jewish exegetes — that denies any plausible prophesy of someone like Jesus, however admirable, as the Messiah. Thus, in a superb and traditional commentary on Isaiah 53:3 ("he was despised . . .") and the surrounding verses, the traditional understanding is espoused that Isaiah is beautifully rendering no single individual at some future time but instead, "the Babylonians, or their representatives, having known the servant, i.e. exiled Israel idealized, in his humiliation and martyrdom, and now seeing his exaltation and new dignity, describe their impressions and feelings."[23]

John is annoyed that some Jews just could not see these sacred texts his way. But to take them with his understanding required more flexibility than they (or, I imagine, most reading communities up until then) were willing to show. These were, after all, *sacred texts received not without creative variation but nonetheless within certain hermeneutic bounds* that were being stretched to fantastical limits.

John needs, in the face of such opposition, to go further. Not only must the textual understandings be distorted; *distortion as a hermeneutic principle must be ensconced and ratified*. "By no means," Paul wrote, has G-d abandoned Israel (Romans 21:1), but apparently all the time-honored rules of understanding Him have been changed in the twinkling of an eye. For most Jews, methods of reading are indistinguishable from ways of living life morally, so *has* there been no abandonment?

Perhaps impatient with the traditional Jewish mix, John goes on to pepper his account of the Jews with a kind of gratuitous distaste, mostly centered around the Law and people's textual allegiance to it. Consider a reader coming fresh to the Gospels:

> 5:1. After this there was a feast of the Jews and Jesus went up to Jerusalem. 2. Now there is in Jerusalem by the Sheep Gate a pool … which has five porticoes. 3. In these lay a multitude of invalids, blind, lame, paralyzed. [Jesus sees a man who had been lying

> there sick for 38 years]. … 8. Jesus said to him, "Rise, take up your pallet, and walk." 9. And at once the man was healed, and he took up his pallet and walked.

This is a beautiful story. But what follows is not, in fact, one wonders why such verses as the following are necessary to John's mission:

> Now that day was the Sabbath. 10. So the Jews said to the man who was cured, "It is the sabbath, it is not lawful to carry your pallet." 11. But he answered them, "The man who healed me said to me 'Take up your pallet and walk.'" [Later] 15. The man went away and told the Jews that it was Jesus who had healed them. 16. And this was why the Jews persecuted Jesus, because he did this on the sabbath.

This gratuitous slur, difficult to believe in view of the original miraculous story, leads to a teaching of Jesus that articulates and forever ensconces the anti-Jewish, antitextual principle:

> 39. You search the scriptures, because you think that in them you have eternal life; and it is they that bear witness to me.

In other words, Jews, you need to be more flexible in the way you interpret your own texts so that you will see me in them.

> 40. Yet you refuse to come to me that you may have life.

One way of reading these passages — and I think the way Nietzsche probably read them from boyhood on — is as a rejection not so much of the Jews as of their *manner of reading the Law*. Insistence on faithful readings is forever challenged as a hermeneutic method. Words can be used "flexibly" to suit the needs of the reader and his or her community. From now on, even if you cannot accept the new view of the old text, it has become immoral even to *look* to the text. The early Christian writers — or those Jews from whom Christianity emerged — felt they were in an eschatalogically new situation that mandated a distorted look at the old texts. More than this, it seemed to them to mandate a departure from text altogether.

Let me end briefly with a question and three brief answers: If Nietzsche's hermeneutic approach is as consistently text- (and even author-) oriented as I suggest here, and if he is opposed to faithless readings of otherwise sound texts in the service of some new vision, is his

hermeneutics agreeable to us as modernists, as pluralists, and even as postmodernists?

First, as constitutional lawyers, we might welcome at least occasional "new" readings of sound texts, the kind of interpretive flexibility shown, for example, by the Court in *Brown v. Board of Education*, where allegiance to text and intent is forthrightly disavowed in favor of America's needs in the mid-twentieth century. Recall however that Nietzsche's insistence against *Brown's* methodology only applies when both the original text and the interpretation that follows it are nonresentful and constitute for that reason worthy (and occasionally sacred) texts. If *Brown* is reinstantiating (against *Plessy*, specifically) the true interpretive intent of the Framers as to equality, then it is interpreting superbly according to the Nietzschean hermeneutic.[24]

Second, the interpretive traditions and methodologies associated here with "Catholic flexibility" grew in part out of the creatively imaginative readings associated with the Talmud. But it is quite unclear that a Talmudist would ever permit herself the sheer scope of "flexiblity" (in my sense) that originated in the Pauline tradition. Such differences and similarities are the stuff of some of my current work. What we do know is that, under Vichy at least, the Talmud did clearly stand for an unyielding tradition based on the letter of the law, and this view evoked a double-barreled legal strategy to rationalize the anti-Semitic laws France promulgated. The Talmud both revealed the need for a special law to regulate a group that has defined itself as legally special and legitimated persecution of that group through loose, amorphous, and often incoherent readings of history, religion, and France's own sacred legal texts. If you're faced with a people whose insignia of "otherness" is their long-term allegiance to literal acceptance of law, what better way to condone getting rid of them than by interpreting one's own laws with sufficient flexibility to ignore the egalitarian principle imbedded in them?

Finally, I believe that Nietzsche would want us to situate these very differences (and similarities) along a hermeneutic grid that might help us to understand developments in interpretive theory such as today's various "postmodernisms." More to the point of this paper, and as to any alleged hermeneutic links between Nietzsche and deconstruction: I am indebted — and hence must respond — to Peter Goodrich for an argument whose syllogism about my thinking permits it at one and the same time to appreciate and to trash the theoretical thrust of my work on Vichy. Because that reaction is both well informed and everywhere relevant to the work going on in this paper, it takes pride of closing place here. Briefly, Goodrich accepts that Jewish interpretive methods differ from those brought on by

the Christians, and he also accepts the relatively greater honesty and rigor of the former contrasted with the value-imbued "flexibility" of the latter. So he endorses my embedding of the Vichy hermeneutic within the Catholic traditions, a task I continue in this paper. Anathema, however, to Goodrich (and others who have responded to my work, but perhaps with less sensitivity to its arguments) is any implication that "Grammatology" — or its subcategory deconstruction — shares with Christianity precisely that fatal flexibility that so characterizes the Christian "alternative" to Talmudism.

Instead, Goodrich — in a remarkable and creative turn of thought — wants to see "Grammatology" and the Derridean intervention as — precisely — a "Talmudic" rendering complex of interpretation, as a ruthlessly systematic insistence on an "infinitely layered text."

> Grammatology was predicated upon a Talmudic conception of an infinite text, and belonged to a tradition of interpretation that was at root pre-Christian. [9, 27]

Now for one like myself, for whom the source of Derrida's hermeneutics lay more in Heidegger than in Raschi (or, I might add, Nietzsche!), Goodrich's assertion is quiet surprising.

Syllogistically, it is certainly true that if Derrida is a Talmudist, then the faults I lay at the feet of those who practiced the "Vichy hermeneutics" (with all their hatred of the Talmud) cannot be transferred to Grammatology or deconstruction. But Goodrich is wrong, I believe, to situate Derrida among "pre-Christian" traditions, at least he is very wrong to think of Derridean hermeneutics as basically Talmudic. Although my fuller answer to Goodrich is being developed as part of a larger project distinguishing Nietzscheanism (and justice) from Grammatology and deconstruction,[25] it is appropriate to my argument throughout this paper to reiterate one of my conclusions from a much earlier article:

> On the other Heidegerrian pole [from Hans Georg Gadamer], Jacques Derrida has extended the very notion of text so far that it sometimes seems merely an extension of the interpreter's Dasein. Yet in the most significant remark I have seen or heard him make, Derrida once told a group of somewhat incredulous faculty disciples [at Cornell on Sept. 27, 1975] that "*Le texte se passe de nous*," or "The text is indifferent to us". His brilliant work, at once playful, poetic and shockingly synthetic, always derives from a text; or a series of texts strikingly juxtaposed; or, as in taking off from the

> text's signature, from evocations of the text that only emphasize its inevitable absence, or shall we say, its inevitable indifference.[26]

I stand by this (admiring) early description of Derrida but see nothing in it of Goodrich's Talmudic Grammatology. Now Goodrich and I do agree with one of the essential features of Nietzsche's genealogical work: we must grapple with the fact that "there is a dimension of conflict between traditions and faiths", although such reminders "may not be popular."[27] (I have argued elsewhere that we must learn from Nietzsche the still-difficult and often-overlooked lesson that the hyphenated phrase "Judaeo-Christian" is grotesque given the hermeneutic and moral differences separating these sets of beliefs.) And I find it admirable that Goodrich chooses to associate postmodernist faith with a form of Talmudism! But surely such a stretch is no less surprising than is my opposite argument, namely that deconstruction is old wine in new bottles: a reiteration (on behalf, of course, of unstated rather than explicitly dogmatic beliefs) of the old Catholic game of working cleverly with texts to avoid their long-received traditional meanings.

So — as a faithful Grammatologist — Goodrich must categorically deny my assertion that Vichy's "flexibility" ironically foreshadowed "Grammatology"[28] (Heidegger, of course, was alive and well during World War II!) as much as it looked backward to Catholic modes of exegesis![29] Still and all, as a Nietzschean who has also studied Talmud, I cannot locate deconstruction centrally within a "Talmudic" hermeneutic locus. For all its wonderful readings, deconstruction — in establishing what Geoffrey Hartman calls the text's "nimbus of density," in avoiding "grand narratives" such as law and even Justice, and (perhaps for ethical reasons after the Holocaust, an irony I explore further in my current project) in eschewing direct modes of speech linking sign to referent — some postmodernisms descend directly from Christian exegetical methods and, as Derrida himself puts it (in)famously, posit "the violence of the Letter."[30]

Nietzsche at least would not have put "violence" together in the same sentence with the "Letter." This is not to say that Jewish tradition abjures creative and, indeed, "flexible" readings, often embodied in the oral as opposed to the written tradition. (To compare the imaginative embellishments of Jewish and Christian interpretation is the task of a lifetime.) But it may well be quite fair to say that the work done by early Christian exegetes on the Tanakh, or Hebrew Bible, broke all the rules revered then — and now — by traditional Talmudic exegesis.

Opposed to the "Letter" is, of course, the "Spirit" This paper has hoped to demonstrate that, for Nietzsche (consistently) Justice must be on its

guard against the "Spirit." Law, for its part, may perhaps be appropriately described as follows, in the words of a respected thinker on the Talmud:

> A viable system of law must not sacrifice either its spirit or its letter. Hasty compromises, unfounded alterations, and whimsical abandonment of legal traditions lead only to chaos. In order for a legal system to endure and flourish, it is necessary for the law to be flexible, elastic, and fluid, as well as definitive, clear, and steadfast.[31]

Notes

1. *Genealogie*, II, 11, vol. 76, pp. 306-07 (my translation).
2. I do not mean to conflate the concepts "law" and "justice" any more than does Nietzsche in this aphorism. He is discussing "law" here, the practical, indeed even positivistic effort by rulers to regulate conduct among individuals under their jurisdiction. But "law" has the potential to *do justice* in Nietzsche, as we are demonstrating. As the proof of this develops, by reference not only to II, 11 but to the *Genealogie* more broadly, we see the difference between Nietzsche and Derrida on this point. (See, e.g., Derrida's preference for the descriptive phrase "la justice comme droit", always violent (for him) passage to any form of positive law from the infinitely complex, amorphous, and unreachable narrative of justice, in "Force of Law," *Cardozo Law Review 11,* 920 (1990):924 et seq. In a notably distinguishable manner, Robert Cover speaks of the law's violence while always insisting that "judges are [i.e. can be] people of peace," Minow, Ryan, and Sarat, eds., *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995), 155. As we shall see throughout this essay, the Derridean notion of the inevitability of law's violence is less nuanced than Cover's textured, more Nietzschean appraisal. Derrida, as Dominick La Capra first observed, also makes the unexamined (and certainly un-Nietzschean) leap to the view that violence itself is always bad. See LaCapra, "Violence, Justice, and the Law," *Cardozo Law Review* 11, 1065 (1990):1071 (discussion of Derrida's reading of Benjamin).
3. See, e.g., *Beyond Good and Evil*, aphorism 52.
4. See my *Vichy Law and the Holocaust in France* (New York: NYU Press, 1996).
5. For a debate between Sanford Levinson, Henry Shue, and myself on this point (which will be elaborated with many other contributors in a volume on Torture to be published in 2004 and edited by Prof. Levinson), see *Dissent* (Summer 2003):79–94.
6. From *The Failure of the Word* (New Haven: Yale University Press, 1984) through "De Man Missing Nietzsche," in Koelb, ed., *Nietzsche as Postmodernist* (Albany: SUNY, 1990) to, most recently, "It's a Positivist, It's a Pragmatist, It's a *Codifier!*," reprinted from *Cardozo Law Review* 18, 85 (1996) in Dickstein, ed., *The Revival of Pragmatism* (Durham: Duke University Press, 1998), 312–33. See also infra, note 26.
7. *Beyond Good and Evil* (Marianne Cowan, trans), aphorism 251.
8. Ibid., aphorism 52.
9. See Goodrich, "Europe in America: Grammatology, Legal Studies, and the Politics of Transmission," *Columbia L Rev* 101, 2033 (2001):2065.
10. See Weisberg, op. cit at note 6, "De Man Missing Nietzsche."
11. *Beyond Good and Evil*, aphorism 251. The statement is made in admiration of the Jewish people through the millenia. The Christian theologian, Franklin Littell, puts the thought only slightly differently: "In stubborn fashion, and in spite of flirtation with assimilation at different times and in different places, the Jews have clung to history, earthiness, concrete events. And Israel, which came into existence as part of a specific series of historical events, cannot properly be judged by persons whose dominant thought patterns are ruled by a flight from history." Littell, *The Crucifixion of the Jews* (New York: Harper and Row, 1975), 95–96.

12. DeGruyter, original of "Dawn of Day," vol. 1, 76. For a cogent view of Nietzsche's interpretive method in this sense — and one differing considerably from the way he is perceived by many postmodernists — see, e.g. Henrik Birus, "Nietzsche's Concept of Interpretation," *Texte: Revue de critique et de theorie litteraire* 3 (1984):78–102.
13. See *Vichy Law and the Holocaust in France*, particularly chapter 10.
14. See Weisberg, "Differing Ways of Reading, Differing Views of the Law: The Catholic Church and Its Treatment of the Jewish Question during Vichy," in Levy, ed., *Remembering for the Future: the Holocaust in an Age of Genocide*, vol. 2 (United Kingdom: Palgrave, 2001), 509–30.
15. Perhaps Bérard, by the summer of 1941, had in mind arrests and encampments — in inhuman conditions eventually leading to the death of three thousand Jews *on French soil* — all under color of Vichy law, beginning with the anti-Semitic statutes of 3–4 October, 1940.
16. Bérard letter in full, Centre de Documentation Juive Contemporaine (CDJC) # CIX-102, p. 10 of letter, cited with rest of letter in Weisberg, *Vichy Law.*
17. A. N. Wilson, *Paul: the Mind of the Apostle* (London: Pimlico, 1998), 28.
18. Littell, *The Crucifixion of the Jews*, 84–5.
19. Ibid., 26–7.
20. Ibid., 24.
21. Ibid., 29.
22. See, for example, Henry F. Knight, "Facing the Holy Whole: Reading John 8 with Chastened Eyes" (unpublished paper distributed at the Holocaust Scholars Conference, March 2000, Philadelphia); George Smiga, *Pain and Polemic: Anti-Judaism in the Gospels* (New York: Paulist Press, 1992); Robert Kysar, "Anti-Semitism and the Gospel of John," in Evans and Hagner, eds., *Anti-Semitism and Early Christianity* (Minneapolis: Fortress Press, 1993).
23. I. W. Slotki, ed., *Isaiah* (London: the Soncino Press, 1949), 261 — the Soncino version being a respected commentary on the Tanakh — no Jewish reader, even after the long centuries of Christian interpretation (and surely not at the origins) would even *imagine* that this text has anything to do with a figure like Jesus. See e.g., Rabbi A. J. Rosenberg, "So-called Christological Inferences," in "Preface," *The Book of Isaiah*, vol. 2 (New York.: The Judica Press, 1995), xiv–xv. Most Jews have not even thought about the idea. John, however, indicates that some *had to* in the days of the historical Jesus. He does not seem very sympathetic with their quite traditional and utterly mandated skepticism in the face of such uses of sacred texts.
24. For inquiries into the different "intents" we may say we are looking for — and sometimes trying to preserve — in Constitutional Law, see, e.g. H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard L Rev* 98, 885 (1985); Paul Brest, "The Misconceived Quest for the Original Understanding," *B.U. Law Rev* 60, 204 (1980); Weisberg, "Text into Theory: A Literary Approach to the Constitution," *Georgia L Rev* 20, 939 (1986).
25. Further thoughts were presented as part of a lecture on "Vattimo's Paradox: The Hermeneutics of Earthly Justice" at the School for Criticism and Theory (Cornell, Summer 2004).
26. Weisberg, "Text into Theory," 948. The article was reprinted and expanded as "On the Use and Abuse of Nietzsche for Modern Constitutional Theory," in Levinson and Mailloux, eds., *Interpreting Law and Literature* (Evanston: Northwestern University Press, 1988), 181–93.
27. See Goodrich, "Europe in America: Grammatology, Legal Studies, and the Politics of Transformation," op. cit. at note 9, p. 2057.
28. Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976).
29. See my argument in *Vichy Law and the Holocaust in France*, 388, and see op. cit., note 26.
30. Ibid., 101. And neither can I agree with Goodrich that Derrida has interpreted Nietzsche faithfully in his *Spurs*. See, for example, my "De Man Missing Nietzsche," rp. cit. at note 6.
31. Samuel N. Hoenig, *The Essence of Talmudic Law and Thought* (N.J. and London: Aronson, 1967), 13. For a relevant related text, see Susan A. Handelman, *The Slayers of Moses:The Emergence of Rabbinic Interpretation for Modern Literary Theory* (Albany: SUNY Press: 1982).

CHAPTER 8

The Fourth Book of the Legislator: Nietzsche and John Neville Figgis

ADAM GEAREY

Ignite it.

— Proudhon

The Sun at Noonday

If Nietzsche is to be central to a jurisprudence for our times, it is necessary to examine a particular moment in his Anglophone reception: John Neville Figgis's political theology; a critical resource within "established jurisprudence."[1] This essay will argue that Figgis's work provides a site from which a Nietzschean form of critical legal studies can be developed. Critical legal studies must become a thinking of attachment, community, the legitimacy of the laws that are imposed upon us, and the laws that we write for ourselves.[2] After Nietzsche, critical thought presents itself as a philosophy of life, a "yea saying,"[3] a foundation of itself anew.

This argument requires both a backward and a forward glance. Figgis's work on late-medieval and early-modern political theory suggests that the key to the problems of the present lie in the past. Even though its discourse is "dead beyond any language ever spoken," its concerns long since "forgotten"[4] and its disputes ringing but as a faint echo, these dead forms haunt contemporary politics. My reading, then, locates critical legal studies in a

historical perspective far broader than that traditionally proposed[5] in the hope that this can better illuminate present concerns. Figgis's revisionist reading of Nietzsche is also helpful. If Nietzsche correctly identified the crisis that is the contemporary, he misidentified its cause. The antidote is not so much the rejection of religion, but its radicalization in the name of a philosophy of life. Although Figgis raised this issue in a Christian sense, this essay will claim, more minimally, that understanding law and power in the west means addressing a Christian inheritance. Furthermore, what is central to this account is a concern that is not exclusive to the Christian tradition. Figgis is ultimately pursuing an issue of personality, of subjectivity and interiority. The central question is that of how one lives a history that is at once communal and personal: a question of emotional attachment, of investment in symbols, rituals and places. How can an account of an interior, religious life provide a thinking of critique?

In recovering this genealogy, the first move is to investigate in more detail the critical jurisprudential engagements with Nietzsche. Although it would be possible to trace this through into the contemporary version of, say, critical race theory,[6] this is not the main focus of this chapter. Our concern here is to see how legal scholars created a particular version of Nietzsche and how this reading now needs to be qualified. Nihilism may be one of the key Nietzschean themes, but it is necessary to see that it is part of a much broader problematic. Tracing the contour of this problematic will reveal the need to engage with a somewhat different set of concerns. The argument will proceed in a number of stages. After a brief review of Nietzsche's reception in legal scholarship, we will engage with some specific themes in Nietzsche's jurisprudence. We will then see how Figgis's own interpretation of these themes is instructive, before addressing a possible continuation of this thinking in contemporary scholarship. The final section will address a possible future for critical legal thought.

Welcome to the End Time

> Nietzsche may be absent from the debates that appear to have been conducted in his name.

What follows is not meant to be a definitive account of recent intellectual history. It merely offers a number of orientating concerns. Speaking crudely, one might characterize the debate around Nietzsche as focusing on a number of distinct but related themes: the problem of nihilism in legal theory, the appearance of "deconstructive" strategies in journal articles, and the explicitly postmodern jurisprudence that has developed many of these issues.

Critical legal scholars made the first references to Nietzsche in a debate about nihilism. The engagement with nihilism has gone through a number of shifts of focus. Reading back over the seminal texts that compose the first engagement, one finds an ongoing discussion of matters of determinacy and indeterminacy in legal interpretation, and various attacks on, or defenses of, rethought versions of a nihilistic philosophy.[7] Nowhere, though, is there an extended reading of the Nietzschean text as such. Even those versions of critical legal studies that are seen as nihilistic, or part of a nihilistic wing of the 'movement', do not present themselves as written in a Nietzschean tradition.[8] The slightly later development of this debate, which provided the first grappling with deconstructive writings in law, also appears to avoid any explicit treatment of the Nietzschean tendencies in deconstruction.[9] There are notable exceptions, but these texts provide a commentary that remains eccentric to the mainstream.[10] We will make use of this trajectory as this article develops. However, the debate about the death of critical legal studies obscures a different, possibly more authentic discussion of the relevance of the master.

Other contexts where one might find an engagement with Nietzsche avoid extended discussion of his work. Within the postmodern turn of critical legal studies, there are frequent gestures to *Zarathustra* and other texts, but, the primary reference point is to Derrida and only indirectly to Nietzsche.[11] There are certainly energies alive in this writing that could be called Nietzschean, but no sustained analysis of this aspect of their inheritance. One might have thought that law and literature would have offered another site for a Nietzschean jurisprudence to flourish. There was indeed an explicit reading of Nietzsche with reference to the fraught question of constitutional interpretation.[12] Although this forms an important reference point, it is perhaps still too narrow in focus to form a point from which the critical legacy itself can be refigured. *Ressentiment*, a notion taken from *The Genealogy of Morals*, does become an organizing idea in one of the key texts. However, this term is used to found a way of thinking literary jurisprudence, and not to elaborate the possible terms of a reception of Nietzsche into critical legal thought.[13]

One of the most promising sites for the reception of Nietzsche is provided by Roberto Unger's texts that articulate a philosophy of life.[14] This work represents a reinterpretation of critical legal studies through a complex mix of theology and political theory that works through the tensions of a critical account of law.[15] The fundamental contradiction reappears as the tension between the need to realize social solidarity and to create flexible institutions that do not stifle creativity or destroy the social world. Although Nietzsche is not a reference point as such, it can

be argued that Unger's work represents one of the most vital contexts for the introduction of his thought. At the same time, there is a rage for order in this work; a need to write an inclusive account of the world that could degenerate into an inflexible form of contemporary theologizing. What is required is a way of thinking that is flexible enough to make possible a critique of the interrelations between the power of the state and the law. A philosophy of life is useful, but it must allow a certain intensification of theology in the name of critique.[16]

A Nietzschean jurisprudence should cast its eye back on the tradition from which it emerges. The sense of the postmodern as a significant break with the past needs to be rethought as a slightly different problematic. How can the resources of the tradition be redeployed to face the tasks of modern thought? The risk is that in drawing on Nietzsche his work is dehistoricized, and certain complexes or tropes are seen as providing the universal "meaning of the law". More 'properly,' Nietzsche's work should be seen as a source of anxious contestation. The central question: how does one continue this mode of thought? Arguably, this is the Nietzchean energy that animates Gillian Rose's *The Dialectic of Nihilism,* a book that has been footnoted many times in the debates over nihilism, but has never been placed at the center.[17] The text of *Zarathustra* traces an interrelation between law and morality that has been "effaced." Zarathustra is too wise to fall into the trap of re-erecting a polar distinction. His most pressing question is that of how law becomes identified with a way of living so that life becomes simply a way of living the law. This is arguably the focus of Nietzsche's own "jurisprudence." In now developing these issues, the hope is twofold: it will be demonstrated that Nietzsche's own jurisprudence was built on a set of issues somewhat different from those that have been linked to his name by the critical scholars; secondly, it can be suggested that the jurisprudence of the Antichrist is itself merely a starting point, and needs to be radically reassessed if it is to open onto a philosophy of the future.

The Great Contempt: Law and the Modern State

In this section I will concentrate on the "last" text, *The Antichrist,*[18] as this book shows Nietzsche's jurisprudence in its sharpest light (although we will also appreciate the connections between this text and earlier works). Law is unquestionable and awesome. It is founded and perpetuated by a heroic class with the power to determine the shape of a world. This truth can no longer be appreciated because of the corruptions wrought by Christianity. Law can only be saved by the complete destruction of this baneful influence. This approach is not useful. To reassess this thinking,

one needs to be aware of its inherent tensions. Could it be that one of the strangest features of Nietzsche's text is a return to the Church and its values? May it be that a need to re-found community is the irresolvable base of this jurisprudence?

The passage with which we are most concerned occurs at the conclusion of the engagement with the corrupting nature of Christianity and the comparison of "Christian purpose"[19] with "the Manu law book." Manu is representative of "every good law book"[20] as it is an archive, a summary of centuries of experience. It "creates nothing new." This leads to a possible contradiction, the "preconditions" for this kind of legal foundation are different from the demonstration of that authority. A book of law can only state and catalog the law. It cannot account for the law. Any apologetics would detract from the imperative that the law must be obeyed. Law is a "thou shalt" that does not allow reasoned investigation. Once a legal code has been established, there can be no further experimenting or questioning of the values that have been fixed in law. This is further strengthened by the ascription of divinity to the origin of the laws. Laws are the work of gods, not of men. Law appears in the world complete and perfect, a communication from beyond. An argument from divinity does not, however, erase the role of tradition. The law is doubly sacred for not only is it a divine gift, it has also been lived by the ancestors. Indeed, law must infest the everyday to such an extent that it becomes unconscious. The "art of living" is an art of remaining true to the law in the activities of daily life. Presupposed is the need for mastery of the laws, the need to achieve a perfect realization of law in life:

> The order of castes, the supreme, the dominating law, is only the sanctioning of a natural order, a natural law of the first rank over which no arbitrary caprice, no "modern idea" has any power.[21]

Following from this assertion is a thinking of a hierarchy of ranks that are essential to social order. These divisions are sanctioned by nature, not by the law; "the supreme law of life itself."[22] For the language of "right" to make any sense at all, this hierarchical structure must be preserved. Indeed, the foundation of the social is inequality and this is written in being itself. Anything that disturbs this natural order must be worthy of contempt, a contempt that is directed at Christianity.

Christian piety, or rather the imposition of ideas of guilt, punishment, and sin, must be seen as directly in opposition to the *Imperium Romanum*, as the last blossoming of the pagan world. The latter represented an embodiment of the law understood in the sense above, a noble and awesome structure that is the work of ages. Thus "Christianity was the

vampire of the Imperium Romanum."[23] A sense of the scale of this argument is indicated by the observation that Rome was itself merely the preparation for something that would take millennia to reach fruition. Its resilience is seen in its ability to endure bad emperors and evil reverses. Rome does not merely exist in its empire. Empire is an art of living that extends across culture.[24]

There is insufficient space in this chapter to trace the developments of this argument. We need to focus on one particular feature: This discourse on law needs to be connected to the thinking of the modern state. At this point it is necessary to refer back to *Human All Too Human*. The possibility of the state is provided by religion; the crisis of the state, and modern law, can be seen as a development of the corrupt Christianity that provided its foundation. There is a second set of questions: What remains when one has "unmasked" Christian morality?[25] Does the state come crashing down? Although these questions are provoked by the Nietzschean text they are left most dramatically unresolved. It may even be that one response is a qualified return to the notion of the Church. This theme is easy to misunderstand; the more so because it is necessary to deal with issues in a manner that is not particularly suited to their careful exposition.[26]

In order to trace the precise contour of this issue, I will focus on a single theme. Religion is essential to the state[27] so long as the state is thought of as a guarantor of a particular social order. This approach to politics is based on the need to preserve a "sacred mystery" that has a "religious origin". Rational and democratic politics tear the "Isis veil" that preserves "reverence" for the business of government. Put somewhat differently, Nietzsche attempts to imagine the "decay of the state."[28] This may read as a very schematic and determinist account of what at best could be described as a possible political trajectory in modernity. It is probably best read as an extended meditation on the contradictions of Nietzsche's politics rather than a historically accurate description. I will try to locate the former sense as the argument develops.

The destiny of religion is bound up with the future of the state. Religion provides succor in those areas of human suffering where the state is unable or unwilling to act. Moreover, religion provides legitimization to governmental power so that it appears that divine providence has mandated not only the established government but also any particular personal misfortunes or inequalities of position. It is not surprising, therefore, that "divine" and "human" governments are "fused,"[29] and this fusion keeps priests in work. But this use of religion as a tool of governance presupposes the possibility that those in the ruling elite will feel themselves superior to it, as they can appreciate it as a necessary superstition. Interestingly,

"free-spiritedness has its origins here."[30] As *Human All Too Human* advertises itself as a book for free spirits, it might be thought that, like *The Prince*, Nietzsche's book is a manual for politicians; it soon becomes clear, however, that rather than clear practical advice, this text recommends a broader meditation on the mystery of power; more precisely, it poses the following question: how does the fusion of divine and human power reorient itself in a democratic polity where there is no recourse to transcendent divinity, but to foundational and immanent popular power? As democratic plurality prevents the consensus necessary for a single state religion, the only recourse is to treat religion as a private matter of "conscience" for every individual. This has the potential of sowing division; creating a fissiparous proliferation of "sects" that is damaging to the coherence of the state and hence provokes a drive against religion in the name of the unity. The state thus loses the cooperation of those spiritual bodies that may have been willing to legitimize an existing political order. For Nietzsche there are two possible outcomes: the triumph of a reactionary despotism that can speak for unity and religion against democracy, or the defeat of organized religion and the absolute cult of the state.

The conclusion of this meditation takes a strange turn. It would appear that this process is inevitable: the state is destined to disappear. To "work" for its realization, however, is far too presumptuous; it would show a poor understanding of history, and a poor strategic sense of more local developments. We need faith in "prudence and self interest" to restrain the "precipitate and overzealous."[31] Coming shortly after this meditation on the state, in *Human All Too Human*, is a consideration of the medieval church as "an institution possessing a universal goal embracing all mankind."[32] Comparing this institution with modern states makes the latter seem petty and insubstantial. As soon as Nietzsche has allowed himself this unguarded moment of admiration, he checks himself, and reminds us that the church rested on "fictions"; moreover, what is coming will sweep away the church and provide institutions that will "serve the true needs of all men."[33] Any possible irony in this passage must be reassessed in the light of the following from *The Gay Science*. It returns in some senses to the earlier meditation on politics and revolution, for its context is Luther's revolt against the church:

> Let us not forget in the end what a church is, as opposed to any "state". A church is above all a structure for ruling that secures the highest rank for the more spiritual human beings and that believes in the power of spirituality to the extent of forbidding itself the use of all the cruder instruments of force; and on this

> score alone the church is under all circumstances a nobler institution that the state.[34]

There are of course many contexts for this passage, and many themes that one could use to gloss it. What seems strangest, though, is not so much this valorization of the church in the very same book that had earlier announced the death of God, but the coupling of Luther and Nietzsche's fate. Later, in *Ecce Homo*, when Nietzsche returns to this theme, he accuses Luther of restoring the church at the very moment when it was at the moment of defeat.[35] Does Nietzsche not suffer a similar fate? As soon as he announces the death of God, the study of the implication of the state and religion propels him toward the restoration of an idea of the church. This may be a church stripped of Christianity; Nietzsche may be celebrating an institution that has survived, that has preserved an elite order against the corruption of democratic politics, but the great discourse against the church and the state seems to conclude by echoing its forms.

This is exactly Nietzsche's relevance for Figgis. His account of Christianity as the corruption of the state is more properly an account of a tradition that corrupts the very idea of law. Figgis tries to locate Nietzsche as the end point of a tradition that would include Luther and Machiavelli. When Luther burnt the *Corpus Iuris Canonici* it signaled a revolution, a break with the notion of a Holy Roman Empire and its law, the establishment of a new law, a new right. Figgis's point is that this rupture is one of the conditions that allow Machiavelli to appear. Machiavelli created, or justified, a new form of politics that took Luther's revolt to some of its "logical" conclusions. Stripped of theology or ethics, the Machiavellian notion that the end justifies the means comes out of the power struggles of the Italian city-states. Machiavelli, though, is also a break with Luther, as he is not interested in justifying the actions of the prince through any "philosophy of right".[36] There is no concept of "natural law" that underlies thought or action. This, in turn, is precisely one of the conditions for the emergence of the modern state: "[t]he more law comes to be thought as merely positive, the command of the law giver, the more difficult it is to put restraints upon the actions of the legislator."[37] The law is expediency, as judged by the executive, or, to put this somewhat differently, the preservation of the power of the state is the ultimate end.[38] Figgis's approach to Machiavelli can thus perhaps be seen as an anticipation of the Schmittian sovereign.[39]

Figgis poses a difficult question to the Nietzschean text: Can there be a theology of community against the state? Can there be a way of living outside the law? Might it be possible to argue that these themes make sense through a qualified reworking of a theological argument? Could this make

for a return to the form of the church that Nietzsche tried so hard to reject? The argument will proceed in two stages. First, I will turn to Figgis's reading of the Gospel of Nietzsche; I will then study the extension of this account into a reading of the problem of law and the modern state.

The Fellowship of the Mystery: Figgis as a Reader of Nietzsche

> Yet Nietzsche remains.
>
> — Carl Schmitt[40]

For Figgis, Nietzsche remains too much part of European culture to be easily dismissed or expelled; a form of emetic — an irritant or a scourge. Figgis's reading of Nietzsche is part of a defense of Christian culture. It parallels his work on the church and the state that we will look at presently, as it concerns a malaise that stretches throughout the Christian world. Indeed, the texts gathered together as *The Will to Freedom* were originally given as the Bross Lectures in Illinois. Nietzsche's nihilism is old news. There is something more disturbing for Figgis. Nietzsche's work is an assault on the church, its ethics, and its teachings from within the tradition itself. Nietzsche is a fifth columnist, a subversive working within. He attempts to position himself as a thinker powerful enough to substitute his own name, or that of Dionysus, for that of Christ. However, Nietzsche's critique creates a kind of straw man Christianity. It is as if the most difficult and risky aspects of Christian thought are ignored. Figgis does not so much reject Nietzsche as imagine a new Nietzsche. Nietzsche's energy of critique could be redirected to the extent that it fixes attention on the creation of subjectivity and an ethics of community.

Figgis tries to recover a sense of Christianity's dynamism from Nietzsche's somewhat skewed reading of the Bible and eccentric views of church history. Christianity is not simply a "creed";[41] it is a "way,"[42] a form of life, or later "a house of life for men."[43] But, there is still something more; something that concerns the necessary involvement of dogma and the way it is lived. This can be put into communication with the idea of law as a mode of attachment, a way of creating and instituting life. Of course distinctions can be made between ecclesiastical and juristic forms of attachment, but perhaps the logic of their operation is similar. Both law and religion create codes that define the permissible. One could even speak of subjectivity as created within these matrices. So, a form of life is always the living of a code. Christianity elaborates these terms. Rather than seeing a creed or a dogma as lived unproblematically, life is both the

attempt to live by the creed, and its rearticulation through the existential crises that the conjunction between life and dogma brings about. This seems a far more compelling account of the intersection between the text and the life than the affirmation of an awesome, fixed, Manu code.

It is in this engagement with experience that Nietzsche remains deeply Christian. This becomes a thinking, from the Christian perspective, of the doctrine of eternal recurrence.[44] Suffering and joy are the structures of experience that will repeat themselves. They are inseparable. The religion of life affirms the recurrence of the "courage"[45] to live through the trials of existence. Once again, the valorization of risk taking and daring can find a Christian analog: "whoso loseth his life shall save it."[46] The doctrine of the Superman, in certain manifestations, is a Christian doctrine. This would relate to a notion of personality, that, unlike, say that found in Buddhism or in Schopenhauer, retains the essential worth of the individual. Suffering is not to be endured for its own sake, but for the realization of joy and the fullness of life.

Do not misunderstand: Although there are Christian resonances in Nietzsche, he is condemned for preaching the doctrine of the redemption by the superman,[47] which is the motivated by pride. Pride is the opposite of fellowship: "Nietzsche's theory is at bottom a denial of rights to the mass of men. Its protest is carried to its utmost limits against the maxim: "*Homo sum, humani nihil a me alienum puto*." The original mistake is to misconstrue a kind of social ontology. Pride is the token of a form of life that wills its own self-sufficiency, and, for Figgis, lies behind the need to enslave others. Freedom is the coming to being within a community where one has to rely on others, and be relied upon. Why has this ontology of social solidarity been lost?

What emerges with this critique of Nietzsche is a version of Christian ethics, a recognition of their essentially political nature. Thus, ethics are not about the "denial" of the self. So much Nietzsche shows to be moral hypocrisy. Ethics, most properly, are about self-creation, the determination of "character"[48] and hence of a possible politics.

Imperial Authority and Fellowship

How can we make sense of this as a politics? The crucial issue is that ways of living that cohere in legal forms are modes of belonging. Figgis's approach to this issue is instructive. He is not seeking an "outside" to the law, rather, a way for the resources of jurisprudence to be turned to thinking a peculiarly contemporary problem. One needs to read carefully. Figgis was a man of his times. Our concern with his work is not so much with his defense of Christendom, but with his stress on a central problem: the

creation of a subjectivity that is necessarily communal. It is not enough merely to condemn the perversions of modern "democratic" industrial civilization. It is not a question of economics, or who controls government. The crisis demands the tracing of a legacy, a historical/genealogical problematic that invests European thought. The crisis, the cancer spreading through the body politic, is the increasing dominance of the form of the absolute state. The state begins to control every aspect of communal life. There are theological, philosophical, and historical dimensions to the jurisprudential crisis that concerns Figgis. It is useful, analytically at least, to separate out these various strands. We will then turn to their contemporary relevance in critical jurisprudence.

At the philosophical level, Figgis argues that communal personality is inherent in social life; it should not exist merely at the grant of a legal or politically sovereign power. The denigration of social life in modernity means that the social field is composed of two entities: the state and the individual; the former operating in the public sphere, the latter confined to the private. This structure of authority militates against any communal body that is not recognized and granted legal being by the state. Underlying this argument are two claims: firstly, that the real genius of social life lies in civil society, in the network of "families, clubs, trades, unions, colleges, professions."[49] These bodies have a claim to a social reality that is at least as real as a "municipal corporation or a provincial parliament."[50] Secondly, human life is inherently social; "personality is a social fact" and within "fellowship" the individual is constantly recreated. Political theory misunderstands this reality when it posits the state as the central structure. The 'social state' may have been the case in the Aristotelean city-state, where the people could all be gathered in a single meeting, but this cannot be the case in contemporary times.

This error can also be traced through jurisprudence. The Aristotelean notion that the human subject is a political animal becomes distorted when the theory of the city state is applied to the Roman Empire. Authority becomes concentrated in the emperor and other institutions are strictly subordinated to "the unity of the sovereign."[51] This doctrine becomes transformed in the modern period and linked to the popular origins of "Imperial authority."[52] The civilian tradition can thus provide a foundation either for democracy or autocracy. For Figgis, it does not matter so much whether the origin of authority lies with the will of the people or the emperor, the consequence is the same: authority is unitary.

Medieval history reveals related features of this same problem. The medieval church was itself committed to a notion of a unitary society that fused the temporal and spiritual powers: conflict between these two bodies

was seen as disagreements between different officials. Claims about the liberty of the church were bound up with defenses of the hierarchical organization of the social structure. The church's claim to freedom, or the assertion of the rights of the temporal power, were arguments about a relative dominance or supremacy within this hierarchy of unified power.

In the later medieval period, one could trace the rise of national, secular powers against the relative weakening of the notion of a single Christian Europe. The state itself becomes the "*communitas communitarum*."[53] However, rather than a settlement or compromise in which spiritual power is incorporated into some form of federal power sharing, one finds the rise of the Prince. The Prince was understood as the single, undisputed ruler in whose hands were concentrated earthly and spiritual powers.[54] One can see this in the Kingship of Henry VIII — and in the theories of Bodin and Hobbes. In the seventeenth century, the theory of unity becomes expressed as the divine right of kings. Another form of thinking presents the ascendancy of parliamentary government in the eighteenth century as a different inflection of absolutist theory. [55] Absolute power is located in the will of the people. Thus, Figgis can conclude that:

> The great Leviathan of Hobbes, the plenitudo potestatis of the canonists, the arcane imperii, the sovereignty of Austin, are all names of the same thing — the unlimited and illimitable power of the law giver in the State, deduced from the notion of its unity. It makes no difference whether it is the State or the Church that is being considered.[56]

In political philosophy the problem takes a different form. Hegel and Bradley provide a thinking of the absolute state that compares with the Nietzschean doctrine of the superman:

> [A] superman ruling individuals who are below men … is like the absolute of Bradleyan philosophy which ultimately annihilates all individual distinction.[57]

The problem of authority also manifests itself at the level of practical politics. Take Emile Combes words as a starting point: "There are, there can be no rights except the right of the State, and there are, and there can be no other authority than the authority of the Republic."[58] This statement represents a terminal point of the development of a certain doctrine that would reduce all of life to the authority of the state. Figgis's concern is not to trace the possible resistances to this thesis (that draw on theories of individual rights), but to forward an argument for corporate freedom.[59]

This is not to be confused with the liberties of limited companies. The modern state allows legal status to those corporate entities that make money. The form of corporate being that an ecclesiastical organization is permitted, however, is artificial and restrictive; it is imposed on a body of people who have not chosen mutual solidarity for the "convenience"[60] of the state. A fiction is imposed by the law that allows property to be held, permits an association to be held liable and to pursue its own actions. The *ecclesia* has a legal existence at the sufferance of the sovereign. Other associations are denied even this form of legal being. They are merely individuals held together in contract, and, as such, have no corporate personality at all. In Roman terms, they are *collegia* or *societa.*[61] Civilian doctrine was definitely stated by Pope Innocent IV in the light of the need to clarify the status in canon law of church orders and cathedral chapters.[62] Although such bodies could be designated "persons," they were only so *nomen juris*, and within the jurisdiction of the earthly power. This is the root of the "concession theory of corporate life"[63] and its influence on the common law can be traced through the work of various Lord Chancellors down to Geldart's text on legal personality. This abstract theory increasingly fails to accord with the inherent dynamics of communal organization or social reality. Consider the House of Lords ruling in the Taff Vale decision. As Trade Unions were not corporate bodies, they were not liable for the acts of their agents. However, the House of Lords held them so liable because, although not strictly corporations, they were so alike corporations as to be indistinguishable from them; a situation only remedied by statuary intervention. This same prejudice is apparent in the Osborne judgment, which held that as members of a Union were individuals, the Union could not use its funds to sponsor members of Parliament.[64] These cases are significant as they show that, despite the abstract doctrine, law acknowledges that "the unity of life and action is a thing which grows up naturally and inevitably in bodies of men united for a permanent end."[65]

A similar theme runs through Figgis's analysis of the Free Church of Scotland Appeals; a case read not so much for the law that it reveals as for what the case obscures: the prejudices and suppositions of the lawyers involved. Its details need not concern us in depth; suffice to say that it concerned a conflict within the Free Kirk of Scotland over a union with the United Presbyterians. This was resisted by a faction in the Free Kirk on the grounds that it was *ultra vires*.[66] They also argued that union would dilute the Calvinist doctrines of the Free Kirk. The House of Lords held that the union was indeed *ultra vires.* Figgis's concern is with the doctrinal justification of what appeared an absurd decision. The root of the problem is the judicial reluctance to consider the nature of the church. It was not as

if the court refused to hear theological argument. It is precisely because such arguments were allowed, that the court's final judgment appears to be both licensing a particular theology and denying the Free Kirk its own power to so do. Figgis argued that if the court allowed the Free Kirk a "real life," and a power to develop its own doctrine as an organization, then the issue of the theological agreement between the old and new bodies would have been a question of fact. On the strength of this argument, the majority in favor of the union of the two bodies would have constituted "sufficient evidence" for the union.

It is at this point that one is reminded of the great Nietzschean fear of Christianity: it has the power to mandate its own law, its own forms of community against those of empire. But note that this cannot be a simple opposition. Such was the power of Christianity that it replaced the *Imperium Romanum*, or, perhaps more precisely, the church's notion of community itself became imperial: in its ascendancy, the Holy Roman Church saw itself as a single, indivisible world power. If our concern with Figgis is to make use of his insight into this unstable opposition, into this theologico-legal power complex, the question becomes not how one "saves" a Christian polity, but how one can build this particular mode of analysis. How might a claim to social being outside of the forms prescribed by the state be relevant for a critical jurisprudence? Figgis's jurisprudence is in search of a law that prescribes personality; that makes human life its ultimate concern. How can this thinking be both continued and interrupted ?[67]

We have to start by accepting a kind of Nietzsche/Figgis complex as a condition for a thinking of law's authority that is thoroughly genealogical. To uncover this complex would involve tracing the roots of law to the theological discourses that tied the soul of the faithful to the church through ritual and doctrine, a capture of the soul that worked though images. Just as theological order is founded by the symbols that represented an absent God, the need to represent an absent source lies at the base of civil law. Justinian's *Institutes* suggest that behind the letter of the law is the presence of an occulted other in whose name the law binds. In the same way that the image or the icon spoke to the believer and brought them into the community of the church in the celebration of the presence of an absent God, the institution of the law attempted to take hold of the soul. Law becomes the very possibility of institutional being; images and rituals the possibility of its perpetuation. This complex lies behind the personification of the state in the icon of the emperor as the *pater legum*, the father of the law, a metaphor that can be traced into the very notion of filiation or legitimacy, a symbolic "manipulation of

Kinship." Thinking this institution is understanding the linkage of two bodies of law, the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici* into a symbolic conjugation that allows the law to speak the truth. The word of the emperor is law, the emperor himself is "*corpus Iuris*" "God's representative on earth." This is where the structural principle of the law derives: the foundation in perfect speech that is as close to the divine source of law as the human can get. It is the principle that lies behind the legal concern with transmission and the archive that preserves and repeats the truth of the law in writing and in the text of the law. The implications of this are far-reaching:

> the Church does not inhabit a territory … it does not capture the subject through the corporeal arms of a specific locality, but through a terror of definition which knows no geographical boundaries. The speech of the law is directed at the soul, at the principium or moving principle of the subject.[68]

This reading of law's "mental space" and this theory of the power of law seems to describe a monolithic historical order, an order whose very pervasiveness makes it impossible to criticize. Admittedly the tradition is "inescapable,"[69] but to see law's control of the soul as complete would be to read this as a jurisprudence of despair, an exhaustion of the critical project rather than its continuation. At the root of the creation of the subject by the text of the law is the notion of the plastic subject and the belief that institutions are a product of a material history. There can be no call to revolution, to a sweeping away of the law, but there can be a critical questioning of the form of the institution the law, a rejection of the notion that the law speaks for an atemporal knowledge. This project holds out the possibility of "interpretation": there was always within legality a "distance between absolute knowledge and its subjective applications."[70] In a sense the power of law is a fiction and its ultimate truth, the ground from which it speaks, has to be imagined and figured. It is this gap on which law is founded and which makes critique possible; the theological foundation of the law carries with it its own rewriting and the genealogy of law. Studying law's ancient constitution also recovers the possibility a critical legal studies, which must "reappropriate the space of interpretation [and so recreates] the distance necessary to communication."[71]

How Do I Live?

What would this mean for a critical legal studies?

One of the great announcements that initiated the critical project was the end of a kind of jurisprudence. There was no longer a need to answer the great question: What is law? The traditional debate had stagnated into a "jaded pedagogy of theory"[72] and become frozen into an armed peace between various warring jurisprudential factions. But (and more importantly) the question 'what is law' represented the terminus of a particular mode of enquiry. The more pressing concern became that of how law is lived in particular situations. Study shifted from an analytic scrutiny of the logic of legal structures, or a focus on the abstract categories of legal reasoning, and slowly began to open a space where questions could be asked about law's involvement with bodies that are sexed and gendered, to people that are of race, with memories and histories different from those licensed by the doctrines of case law and conventional legal philosophy. This is perhaps to conflate the first and second waves of critical legal scholarship, but, the point is to realize how this questioning is indebted to a form of Nietzschean questioning that can be understood as a philosophy of life.

If we accept that critical legal studies must engage with a theology of power as a central aspect of a philosophy of life, how might this set a new agenda? The first observation would be that this approach reorientates the history of critical thinking. Finding the origins of critical legal studies in legal realism may offer one way of accounting for critical thinking, but it is somewhat limited. Figgis's work on political theology offers itself as an alternative. It suggests that the central thematic might become a study of how one becomes bound to the symbols and the rituals that allow one to 'live' the law. Political theology indicates that Christian opposition to state law was in the name of another law; might we call this a law of solidarity or a demand for an ethics of community? If one accepts this reading of the roots of critical thought, it could initiate a new set of questions and debates about the possibility of legal critique, and the need to re-engage with a thinking that one finds in faith traditions and the Nietzschean engagement with law and religion. This takes us some way from legal realism and the present debates on conventional and critical jurisprudences. As Figgis suggests, the correct time scale for a writing of theological jurisprudence, is "long period value."[73] The quest is for the causes of the present in a past that is forgotten. Our present reality is unthinkable except to the extent that we can communicate with these ghosts: "[t]hey are part of our own world."[74] Speaking with these ghosts may be the first mutterings of a future jurisprudence.

Notes

1. Thanks to Peter Goodrich, Costas Douzinas, Peter Fitzpatrick, Nathan Moore, and Mary Gearey. Given Figgis's present obscurity, a brief biographical sketch is necessary. The work of John Neville Figgis can be seen as central to Nietzsche's reception in England. His work was important to theology and political theory, in particular English pluralism and guild socialism. To date, Figgis's engagement with Nietzsche has not been systematically studied, but see David S. Thatcher, *Nietzsche in England, 1890-1914: The Growth of a Reputation* **(1970).** Figgis was born in 1866, educated at St Catharine's College, Cambridge and ordained as a priest in the Church of England in 1895. Briefly a curate at Kettering, he was then a lecturer at St Catharine's in 1896 and was received into the community of the Resurrection at Mirfield in 1907. Figgis's major publications would include *The Theory of Sovereignty in the Middle Ages*, *From Gerson to Grotius* (1907), *Churches in the Modern State* (1911), *The Gospel and Human Needs* (1909) and *The Antichrist* (a collection of sermons) (1913). Figgis gave the Noble lectures at Harvard (1911), the Paddock lectures at the General Theological Seminary, New York (1913), and the Bross Lectures at Lake Forest College, Illinois (1915). In 1918, while on the way to the United States, Figgis's ship was torpedoed in the Irish Sea. He never properly recovered from the experience, and died shortly afterward. Biographical fragments tell of Figgis's wit and erudition. (See Mark D. Chapman on John Neville Figgis, *Oxford Dictionary of National Biography* (2004), 537–8. Elton describes Figgis as "[f]undamentally unhappy, suffering through life from a heavy sense of sin and inadequacy." See G. R. Elton introduction to Figgis's *The Divine Right of Kings* (1965). On "established jurisprudence," see Paul Hirst and Phil Jones in *Critical Legal Studies* (Fitzpatrick and Hunt, eds., 1989). See also Peter Goodrich "The Critic's Love of the Law," *Law and Critique* 10, 351 (1999). Political theology is understood partly in the Schmittian sense, as outlined below. However, there are also echoes of liberation theology intended here, which accord neither with Schmitt, nor with Figgis, but are made necessary by the need for a thinking of the present crisis.
2. John Neville Figgis, *The Will to Freedom* (1917), 63.
3. Figgis, *The Will to Freedom*, 67.
4. John Neville Figgis, *Studies in Political Thought, from Gerson to Grotius 1414–1625*, (1998 [1916]), 2.
5. See Neil Duxbury, *Patterns of American Jurisprudence* (1995).
6. For elaboration, see Adam Gearey, *Law and Aesthetics* (2000).
7. Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory," *The Yale Law Journal* 94 (1984), Nihilism has both epistemological and moral aspects (4); it forces the question of how one is to live the good life in the absence of any possibility of rational justification of one's position. If, as critical work has shown, reason is itself contradictory, the idea that law can provide a guide to action or a restraint to government can no longer be sustained. Thus, the "fundamental premise" of nihilism is that reason is unable to "adjudicate value conflicts" (51). Once one accepts that the old philosophies have loosened their hold, then thinking about the world in a new way becomes possible. One need not be trapped in the polarities of reason and emotion, law and politics, objectivity and subjectivity. In the field of legal theory, reason's passing allows a conceptualisation of legal reasoning as a form of conversation in which value claims are made and contested in the absence of right answers. See also John Stick, "Can Nihilism be Pragmatic," *Harvard Law Review* 100, 7 (1986). Stick's concern is with a reception of nihilism through an "Anglo-American" tradition (334). "Continental philosophy" can be misread if one does not put alongside its irrationalist tendencies, competing rationalist traditions. His mission is to reorientate critical legal studies on a rationalist tradition and to locate it as the "true heir" (401) of the liberal tradition. Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," *Southern California Law Review* 58 (1985):136–176, introduces the idea of a "new nihilism" — see 136–174. A new direction in the debate over the ethics of deconstruction and nihilism may be found in H. J. Staten, *Deconstruction of Kantian Ethics and the Question of Pleasure*, which argues that ethics can be motivated by pleasure; altrusim masks the will to power — primarily a reading of Bernard Williams, *Cardozo Law Review* 16 (1995):1547–1567.
8. This analysis is taken from Daniel Chow, "Trashing Nihilism," *Tulane Law Review* 65 (1990):221.

9. Fiss, for instance, argues that nihilism rejects interpretation in the name of politics to the extent that given any interpretation is possible, the choice has to be political. Thus, "all law is masked power" (741). Nihilism is seen as an extension of legal realism; deconstruction is its most recent manifestation (746). Nietzsche does not play a role in this account of critical legal studies. See Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1981/82):739.
10. Peter Goodrich, *Reading the Law* (1986). For further commentary, see Adam Gearey, "We Fearless Ones; Nietzsche and Critical Legal Studies," *Law and Critique* 167 (2000).
11. It is difficult to determine the boundaries of postmodern scholarship, but one of the central texts is Costas Douzinas, Ronnie Warrington, and Shaun McVeigh, *Postmodern Jurisprudence* (1991). See also *Law and the Postmodern Mind* (Peter Goodrich and David Gray Carlson, eds., 1998). In terms of a review of the American scholarship, Nietzsche is absent from the pages of Gary Minda's work on postmodernity in legal theory, see Gary Minda, *Postmodern Legal Movements* (1995); neither is he central to Feldman's intellectual history, see Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism* (2000).
12. See Sanford Levinson in *Interpreting Law and Literature: A Hermeneutics Reader* (Sanford Levinson and Steven Mailloux, eds., 1988). See also Richard Weisberg in the same collection.
13. Richard Weisberg, *Poethics and other Strategies in Law and Literature* (1992), and *The Failure of the Word* (1984). See also "It's a Positivist, It's a Pragmatist, It's a Codified: Reflections on Nietzsche and Stendhal," *Cardozo Law Review* 18 (1996) 85–97. In this piece, Wiesberg provides an intriguing description of Nietzsche as a codifier: "an actor who deliberately seeks to embody in law a revolutionary programme already situated pre legislatively on the brink of social acceptance by the actor's . . . political, military and/or verbal achievements" (87). However, Figgis would probably disagree with the characterization of "the rococo, privatized, spiritualization of the Gospels" (93).
14. Roberto Unger, *Politics,* New York: Cambridge University Press, 1998.
15. A possible way forward is provided by Austin Sarat and Thomas Kearns, "A Journey through Forgetting: Toward a Jurisprudence of Violence," in *The Fate of the Law* (Sarat and Kearns, eds., 1991).
16. Constable's work contains a suggestion for a genealogy of jurisprudence that draws on a Nietzschean typology of modes of thought. Her concern is primarily with the operation of a sociological jurisprudence that seems the inheritor and end point of a way of thinking law. Sociological jurisprudence can be criticized for replacing the "world" with its own methodological fictions. Sociology is rapacious to the extent that it can include the whole world into its interpretative grid: "sociology simultaneously provides and becomes the law of society" (589). At this point, she rejoins the nihilism debate: "Nihilism . . . indeed accompanies a nihilistic sociological jurisprudence that denies the distinction between the real and the apparent worlds"; it insists on the undeniable separation of "ought and is" in the name of the correctness of its own procedures and worldview. "Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law," *Law and Social Inquiry* 19 (1994):551–591. See also Phillipe Nonet, "What Is Positive Law?" *Yale Law Journal* 100 (1990):667.
17. See Gillian Rose, *The Dialectic of Nihilism* (1984).
18. Friedrich Nietzsche, *Twilight of the Idols/The Antichrist* (R. J.Hollingdale, trans., 1990).
19. Nietzsche, *supra* note 18, 188.
20. Ibid., 188.
21. Ibid., 190.
22. Ibid., 190.
23. Ibid., 192.
24. This section of *The Antichrist* carries an illustration of Nietzsche's paganism; indeed, according to a paragraph from *The Twilight of the Idols*, "What I owe to the ancients" — it was the Romans who taught Nietzsche to write, his "Roman style" (116). Nietzsche finds in Horace a kind of poetic or writerly equivalent of the law. Horace's words exist in their intensity, each gaining support from the others, in much the same way that the ranks of the healthy society mutually complement each other. A healthy pagan society, and healthy pagan law, are marked by the same token; an energy, an affirmation of life.

25. Friedrich Nietzsche, *Ecce Homo* (R. J. Hollingdale, trans., 1979), 131.
26. It is too easy, though, to conclude that Nietzsche merely provides an apologetics for dictatorship. Indeed, there is a possible approach to Nietzsche's politics that would present him as an ally to the response to modernity of certain Catholic theologians and apologists for natural law.
27. Friedrich Nietzsche, *Human All Too Human* (R. J.Hollingdale, trans., 1986), 170.
28. Nietzsche, *supra* note 27, 173.
29. Ibid., 171.
30. Ibid., 171.
31. Ibid., 171.
32. Ibid., 175.
33. Ibid., 171.
34. Friedrich Nietzsche, *The Gay Science* (Walter Kaufmann, trans., 1974), 313.
35. Nietzsche, *supra* note 26, 121.
36. John Neville Figgis, *supra* note 2, 74.
37. John Neville Figgis, *supra* note 4, 75.
38. Ibid., 76.
39. Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty* (George Schwab, trans., 1985). For Schmitt, political theology is the symptom of a return to theology as a means of thinking modern politics and law. Schmitt's own genealogy would run through Leibniz, who rejected mathematics and preferred theology as a model for jurisprudence as both disciplines worked with concepts of inherent reason and a text that contains positive prescriptions (38). One of the central claims of this thinking is that the "omnipotent state" functions in its executive, legislative, and pardoning role as an institution whose model is a theological notion of divinity. Furthermore, in the modern period "personalistic" and "decisionistic" elements that were associated with God become linked with the people. American political thought reveals this trope in the idea that "the voice of the people is the voice of God." To try and develop this thinking, however, is not to subscribe to the other elements of the Schmittian project. Schmitt was attempting to produce a systematic sociology of the concept of sovereignty that would be able to penetrate through to the specific consciousness of different eras and trace the juridical concepts that emerged. It must remain open to question whether this could be founded on a study of metaphysics as "the most intensive and the clearest expression of an epoch" (46). More importantly, political theology is a kind of analogue to Nietzsche's political thinking. Schmitt describes a response to democracy in Catholic theologians that is comparable with that of Nietzsche. If the notion of legitimacy has shifted to a notion of positive power founded and justified on the "voice of the people" — then the response of thinkers such as Donoso Cortes was to argue that the era of royalism was over. As there could no longer be kings, the best solution was "dictatorship" (52). See Schmitt, on Cortes and De Maistre, 58–9. Schmitt's problematic has been most recently taken up by Giorgio Agamben. See, in particular, *Homo Sacer* (1998). Agamben is concerned with the figure of homo sacer in Pompeius Festus's treatise *On the Significance of Words*. Homo sacer is a paradoxical figure. He has been found guilty of a criminal act. He can thus be killed, but he cannot be sacrificed. To understand the homo sacer, it is necessary to see that he is excluded from both the *ius humanum* and the *ius divinium* (74). Homo sacer is excluded from the former in that he can be killed, and his murderer will suffer no penalty; and from the latter as he is not a worthy sacrifice for the gods; "a double exclusion" (82). Thus, in Agamben's argument, the "nomos" of law is not simply the power to divide up and lay claim to territory. Law's nomos, law's own order, is a "taking of the outside." To exemplify this structure, we can refer to the ancient German term *ban.* Ban refers to the subject who is banished from the lawful community; as such the banned subject is both marked by the law and abandoned by the law to the forest; the wilderness. This can be described as the paradox of the exception. The sovereign power of the law exercises itself by excluding from its order. The excluded is marked and banished. If the "force of law" that traces this line "includes through its exclusion" (18), then Agamben's work perhaps indicates what could be described as a divinity that is both immanent and absent to the world. Law is founded on this paradox.
40. Figgis, *supra* note 2, 8.
41. Ibid., 2.

42. Ibid.
43. Ibid., 5.
44. Ibid., 69.
45. Ibid., 70.
46. Ibid., 74.
47. Ibid., 148.
48. Ibid., 86.
49. John Neville Figgis, *Churches and the Modern State* (1914), 70.
50. Ibid.
51. Ibid., 73.
52. Ibid.
53. Ibid., 80.
54. Ibid., 81.
55. Ibid., 84.
56. Ibid., 79.
57. Ibid., 86.
58. Ibid., 56.
59. Ibid., 58.
60. Ibid., 59.
61. Ibid., 60.
62. Ibid., 61.
63. Ibid., 62.
64. Ibid., 74.
65. Ibid., 64.
66. Ibid., 19.
67. For instance, it would be possible to describe Figgis as engaged in a political theology of empire. Empire is only justified to the extent that it is about the creation of "the character of nations" (92). This is of course a version of the "white man's burden," and reflects a broader change in the ideology of Empire that gained influence in the aftermath of the First World War. It is part of Figgis's legacy that is of least contemporary usefulness.
68. Peter Goodrich, *Languages of Law* (1990), 278.
69. Ibid., 265.
70. Ibid., 295.
71. Ibid., 296.
72. Ibid., 1.
73. Figgis, *supra* note 4, 2. Figgis's determination of this "unconscious presupposition" depends on a historical analysis and a question of "origin" (55). An interesting parallel is Owen Barfield, *History, Guilt and Habit* (1979), the "subconscious foundation of our conscious" (73) offers another possible English genealogy for Figgis's Nietzsche; crudely sketched, this goes through Coleridge's distinction between imagination and fancy. Imagination is active thought that breaks out of habits. Barfield supports this argument with a reference to George Eliot's depiction of "poetic energy" in Daniel Deronda. This is "the force of imagination that pierces or exalts the solid fact, instead of floating among cloud pictures." (80). For a useful overview of the translation of these terms through primarily American pragmatist theory into a "sentimental jurisprudence," see Ian Ward, 13 *Law and Critique (2002)*. For a critique see Adam Gearey, "The Refusals of Poetry," *Liverpool Law Review*, forthcoming.
74. Ibid.

CHAPTER 9

Slow Reading

PETER GOODRICH

There is walking and by extension there is dance, although in Nietzsche dancing is emblematic of the divine and is used as a metaphor when applied to the process of thinking and the mobility of ideas. Walking is the key. Nietzsche's method of study was ambulatory and his thoughts — his insights — were interruptions or apprehensions that seemingly occurred while vigorously in motion.[1] Great thoughts were literally vistas perceived from great heights while mobile, vigorous, and alone. By the time he wrote *Ecce Homo* it was even apparent to him that sedentary thought was a sin: "Remain seated as little as possible, put no trust in any thought that is not born in the open to the accompaniment of free bodily motion."[2]

Contrary to the classical humanist representation of the sedentary scholar surrounded by texts in a dimly lit cell, the great philologist Nietzsche expressed his friendship for logos by leaving the cavernous space of texts and striding out into the open. He was a nomad, a nihilist, a thinker in search of novel vistas and new values. His dictate was that one start in motion, that mobile ideas are best apprehended by the walking body, with the blood coursing and the brain engaged. Walking came before sitting even if it has to be admitted that it is somewhat hard to write while mobile. But that simply means that the great effort of sitting should only come after the inspirations of ambulation.[3]

Don't sit. Not yet at least. "Get off your arse" is never bad advice for a scholar, and that is certainly one dimension of our man's injunction to

walk. He enjoins action, embodiment, conceptual digestion, and freedom of thought. All of which are virtues that are not most obviously associated with philology, with classicism and the painstaking reconstruction of ancient texts that, it should not be forgotten, was Nietzsche's disciplinary home and only academic appointment. He started out with an inaugural lecture on philology and among his last works was the incomplete treatise "We Philologists." Beginning and ending, first and last lines, were on the topic of philology and the theme never strayed far from his thoughts. Then again, and mincing no words, he remarks that "ninety nine philologists out of a hundred should not be philologists at all."[4] There are many reasons for that summary judgment. Two books full of them, in fact, but I will restrict myself to the reasons that come closest to law.

Against Law

Nietzsche doesn't say a lot about jurists, indeed his lack of attention to lawyers is distinctly unflattering to the profession. Where he does make reference to them, it is dismissive and secondary. The jurist is a subspecies of philologist, a second order of linguist or worse, an epigone, a filing clerk, a dust bug. While the jurist doubtless shares the numerous faults of the improperly qualified philologist — he is earnest, boring, derivative, literal minded, inexperienced, and lifelessly sedentary — he doesn't merit much attention. That is in part because the jurist doesn't do anything, he simply repeats, he inscribes between the lines or glosses around the text of prior law, but he doesn't leave the library, he never gets beyond the books, and hence he never encounters life. If the jurist remains amongst the debris of the past, locked in the library or lost among the droning particularities of the register of writs, or glosses to the code, it is scarcely worth mentioning because these defects are but a subclass of a broader phenomenon. The jurist is not the author of his mistakes. He simply exemplifies a philological failing: "The philologists themselves, the historians, philosophers, and jurists all end in smoke."[5]

That the jurist was by training a philologist should not come as news. It was common currency, obviously enough, during the Renaissance and early modern period. Common lawyers and civilians alike were the custodians and promulgators of ancient texts or books of law. Their craft was that of custody or servile preservation of an earlier and greater *logos*, word and norm. At the root of the discipline of law was the art of transmitting ancient texts, and thus Selden, to take just one example, talks at the beginning of his *History of Tithes* of philology as the "Queen of the sciences." Indeed "true philology … establishes the principles to every facultie" and "this great Lady of Learning with her attendants, [is] fit for a student of the

common laws of England, as for any other pretending what facultie soever."[6] Guillaume Budé, to take an even better example from the continent, explicitly acknowledges that the study of texts, *literarum studium*, was his first and greatest love, his mistress (*altera coniux*), the object of all his passion and his time.[7] Others, François Hotman for instance, observed the same dependence of law upon philology and in his case viewed that servility to the antique and reliquary as unhealthy, unlearned, and, to borrow his term, mystagogic.[8]

If the priority of philology over law is unassailable, the modes of its practice were open to question. Ironically or perhaps just recursively the flaw in the practice of philology that most irked Nietzsche was the impulse to subject ancient texts to "a morphological law." There was much of the father in the son, and much of the son in the father, or so it turned out. The jurist was guilty of simply repeating the faults of the philologist but then it transpires that the worst of the philologist's flaws was a tendency to subject the past to law. In doing so, the young Nietzsche opines, "we always lose the wonderful creative force, the real fragrance of antiquity; we forget that passionate emotion which instinctively drove our meditation and enjoyment back …." to the ancients.[9] Friends, and this is the language that Nietzsche uses, of the classics have to be equal to the classics and competent to engage in dialogue with them. Subservience, parroting the earlier and "greater" text, supine repetition is not friendship but simply flattery or base utilitarianism. It is bad enough that lawyers genuflect before the text — the law — but seemingly worse that philologists would give themselves up and do the same. In fact, however, there is not much difference because both the philologist and the jurist are subjects of comparable and fundamentally Christian commandments.

Nietzsche was inclined toward the Old Testament and the Talmudic tradition of text and its infinite interpretations. At least the rabulistic Talmudists were a useful foil with which to chastise the Christian manipulations of interpretation. The religion of the *logos* with its primary assertion of the "word," of *logos* as being the beginning and as being with God, instituted a whole series of possible interpretive frauds.[10] Philology, friendship for the word, required an equality, a dialogue, recognition, whereas the danger of the Christian *logos* lay in its assertion of a unitary origin, a divine — if later Trinitarian — source from which the word emanates and toward which the text refers. The theology of *logos* undermined the philology of the text because one could not be friends with the divinity: God legislated and his subject the philologist obeyed. *Deo auctore*, as Justinian immodestly put it in the preface to the *Digest*, God spoke and that was the law. It preceded and dictated anything that the philologist, historian,

philosopher, or lawyer could subsequently say. Indeed, they didn't speak, they were trained to recover, reinstitute, and relay. The irony of that relation was that far from bringing the subject and the divinity closer together it forced them apart by radically opposing eternity to temporality, the afterlife to the mundane, God to man, truth to text.

Nietzsche's antipathy to the jurist is simply one dimension of his polemic against a Christian law, the philology of its transmission, the legalism of its interpretation. The object of his ire, in other words, was a law that instituted a particular and highly restrained form of life, namely Christian asceticism, bourgeois moralism, the depression of lawyers. In this regard he was in the most positive of senses an anarchist, a proponent of a Dionysian multiplicity of orders, an advocate of internal legislation, of poet lawmakers, of Gods who dance and of lawyers who walk before judging. What's in the walk? The question that remains is not that of abolishing the law, of eradicating either law or history, which cannot be done. The question is that of sharing the law, of allowing for the multiplicity of laws and for the play, the pleasure, and plurality of legal meanings. It was not as if Nietzsche was above inscribing his own law tables, even if they were at best half-written. Zarathustra was a walker and a legislator, an anti-Christian but nonetheless defined by an inverse law. As Gillian Rose memorably put it, Nietzsche "asked that the law tables be subjected to philological and historical investigation since he would have us know more not less about the law."[11] The fault of the jurist, his failing, transpires not to be that of loving the law but rather that of not knowing the law, of not loving it well enough.

I will specify. The notion of being against law implies an investment in law as well as an antipathy to current practices of it. Nietzsche was against law in the sense of being a critic, a friend and not a flatterer. He did not hate law, but rather offered it tough love. His polemics were not lawless, but they did express disappointment, frustration, anger even at the sloppiness and sedateness of jurists, at their lack of friendship or more vividly at "the disgusting erudition, the lazy, inactive passivity, the timid submission."[12] They simply didn't understand and their "epistemania," their obsession with the narrowest and most limited of meanings, with normalcy was simply a failure of method. There was more to law than the jurists allowed, they failed to capture the depth and the scope of legal meanings, they ignored the legal institution of life and in doing so instituted life-denying forms. In sum, law was too important to be left in the hands of jurists.[13] It had to be wrested away, allowed to walk, set free, or at least set to music, given a rhythm, a rhapsody, a rap.

Start with the form of Nietzsche's criticism of jurists. The figure of the jurist is portrayed with surprising consistency as being infantile. They are infants in the sense of being children, the sons of philologists, the progeny of filing clerks because, obviously enough, the law of the father has to gain its enunciation through the mouths of his sons. They are children also in the sense of being young and inexperienced, in the sense of being hidden from life and in consequence knowing remarkably little: "A young man cannot have the slightest conception of what the Greeks and Romans were."[14] They are children also in the sense of being modern, the inheritors of the classics, contemporaries who had a tendency to flee the present and bury themselves in the remains of the past. Why the figure of the child, of the jurist as necessarily *filius* or son? Among the possible answers, the most constant is the least obvious. The child is immature or intellectually premature, lacking in experience, in need of protection, prone to collapse, given to subordination, but these are not the relevant connotations. Prematurity perhaps comes closest. The significance of the figure of the child, of the jurist as juvenile, lies in its substance. The child acts too hastily and it is the figure of haste that is common to all of the various senses of childishness that are imputed to philologists and their progeny the jurists. Kinship, in other words, is no qualification at all: "Do the sons of philologists easily become philologists? *Dubito*."[15] It is no qualification at all.

The pedagogues and scholars who swell the ranks of the philologists and act as the model for the juvenile jurists generally retired from life too early, they fled the contemporary for the classical before reaching maturity or having anything of substance to share with the ancients. "Experience, therefore, is an essential prerequisite for a philologist — that is, the philologist must first be a man; for only then can he be productive as a philologist. It follows from this that old men are well suited to be philologists if they were not such during that portion of their life which is richest in experiences."[16] Even if there is something seemingly utopian in attempting at a relatively late age to advocate for the preservation of one's professional calling to the exclusive inhabitation of the elderly, there is a symmetry to the argument that the study of antiquity — old texts, ancient laws, lengthy precedents — requires an appreciation of age. It is possible, indeed it is in some accounts endemic, that the moderns act too hastily, that the contemporary clings to utility, and that youth, in Aristotle's phrase, desires everything too much, and wants it too soon.

Slow Reading

The core of the case against law turns out to parallel the criticism of philologists and to be in essence methodological. The failure to wait, the determination

to be determined is singularly prevalent in law. The rush to judgment is in many respects the jurist's *déformation professionelle*, the necessity that undermines its epistemic value while constituting its mundane worth. The lawyer has to offer opinions, just as the judge has to judge, and both these activities are scheduled in advance and subject to an arbitrary timetable. Law is victim to constraints that philology is not but these simply accentuate flaws that are less explicit and certainly less public in the domain of philology. Granted in any event that both disciplines are textually based it makes sense that the prime consequence of haste is rapid reading and its attendant failing, superficiality, or inadequate apprehension of the complexity and plurality, the tone and affect, of textual meaning.

Law teaches determination. In the case of civilian systems, this takes the form of determination by general rule, by the code, by the *universalia* of an extant and published system of norms. In common law, the method differs but is even more explicitly concerned to present determination as a function of prior determination, as the consequence of precedent decisions and their dry reiteration. In either case, the law is firmly placed "in the books," and the method of extrapolation, elaboration, and instant determination is that of recovery and interpretation. In both cases, and common law method is indicatively enough coded in Latin, the rules of interpretation have greatly diminished from the early days of textual discovery and transmission, the Renaissance and the early modern period. For the humanist lawyers, the books of the law were preceded by a manual of rhetoric and the general rules for the interpretation of texts. These might not be comprehensive, and they were certainly obsessed with returning *ad fontes* — to the original meaning — but they did allow to a limited extent for the plurality of meanings and for the conflict of interpretations.[17] Where the theologians recognized a fourfold meaning — literal, anagogic, figurative, and spiritual — the jurists at least distinguished the literal and the figurative and placed their discipline within the contours of hermeneutics.[18]

Whatever the origins of traditional legal method, and recourse to canon law or to earlier legal conceptions of *auctoritas* would undoubtedly render the history more complete, the text had to be given an economical meaning, it had to be coaxed into the tradition, garnered by the code. The lawyer already suffered, in Nietzsche's view, from two of the defects diagnosed in their siblings, the philologists within the later tradition. First, philologists fled the present and in law that flight occurred with a vengeance. The book was the source, the *vocabula artis*, the *logos* that was to be made present — *mirabile dictu* — in the instant case. The jurist, in Legendre's fine phrase, counted for nothing. In Nietzsche's diction he was an epigone, a follower,

a cipher, and little more. The jurist ran away from the present, from experience, from responsibility, so as to hide behind the text and to foreclose judgment. They were running away, in the abstract of course, they were going to Rome, to Byzantium, to Alexandria in their mind but never getting off their seats in the process. The sedentary technique of legal interpretation was concerned almost exclusively with the limitation of meaning, the restraint of interpretation rather than with its plenitude. The text should decide, the scriptural authority should govern, be it case or code or (ironically) customary norm. Second, and correlatively, the flight to the text, the return to the past, the privilege accorded by the moderns to the classics, their reverence, their solemnity and obeisance to the text took it out of the normal modes of reading.

There are few rules of legal hermeneutics left. The theory is that the text delivers and while a spattering of generic Latin tags are occasionally used they offer little by way of textual appreciation. Thus it is sometimes intoned of statutory interpretation, *expressio unius est exclusio alterius*, to express one thing is to exclude others, but the opposite also holds, namely the *eiusdem generis* rule, that things of the same kind are included. There are other doctrinal aids to construction that include literalism, search for the mischief to be cured, the golden rule, and a few others, but these are already semantic aids rather than linguistic devices for reading the text. Take an example. A case decided most recently by the English House of Lords. The question was one of statutory interpretation and specifically of whether it was possible to interpret an English Rent Act as being in Conformity with the European Convention on Human Rights. Here is what the Court said: "What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure which Parliament has enacted in those words."[19] It creates an interesting hermeneutic circle: what matters is not the words but the substance. Then, in peroration we learn that the substance lies in "those words." But that hermeneutic circle is quite missed by the Court. It rushed headlong to find the substance as if it existed outside of those words or the mere happenstance of phraseology.

It is not a new problem. Rapid reading serves political goals. As early as 1610, Sir Edward Coke was pronouncing that it was not the words but the truth that is to be loved — *non verba sed veritas est amanda* — and with that classic ploy he banished hermeneutics, the art of slow reading, in favor of esoteric and instantaneous judgment.[20] Lawyers became rapid readers, pragmatic interpreters, practitioners of an art that quickly preferred the exteriority of consequences to the interiority of texts. The door was opened to interpretative fiat, namely acts of "judicial vandalism,"[21] of extra-textual amendment, and implications of meaning that "would have

produced a comical tautology" or "a self-contradictory nonsense"[22] if introduced explicitly into the text. The significant point being that love of the truth in disregard of the words is not necessarily the best mode of interpretation. More than that, it is explicitly not a theory of reading, it depends rather upon an act of faith. The judge becomes a legislator, an expert in the quick fix, a lazy reader bent upon rapid outcomes. The treatises on rhetoric, on the painful labor of construing the various levels of textual meaning, the figures of speech, and their relation to the art of interpretation vanish from the curriculum.

It is ironic that a discipline wholly dependent upon texts should deny the significance of words, the value of language, the importance of remaining with the text itself. It is rapid reading par excellence, a rush to judgment, a determination to determine, a deciding in advance or outside of the language, the words actually employed. The source of the meaning here lies beyond the text, before the language, in the mind of the legislator (*mens legis*), in the heart of the judge (*verbum cordis*), in the intention of the lawmaker. No matter that the mind, heart, or intent only finds expression in words and transmission in texts. No matter that, as Nietzsche put it, *philosophia facta est quae philologia fuit*.[23] The jurist is innocent, the lawyer steps outside language so as to determine, to judge, to act in the mode of Jupiter. Whatever. He is in Derrida's fluid terms a bad reader, an impatient reader, a "reader in a hurry to be determined, decided upon deciding (in order to annul, in other words to bring back to oneself, one has to wish to know in advance what to expect [oneself]). Now, it is bad, and I know of no other definition of the bad, it is bad to predestine one's reading, it is always bad to foretell. It is bad, reader, no longer to like retracing one's steps."[24] It is a very Nietzschean passage both in its call to a leisurely pace and in its invocation of walking, of retracing one's steps. The text, legal or philosophical, it doesn't matter, is a terrain, a territory, the emblem of a world and it has to be walked, surveyed, and mapped before we can say it is known. Lawyers in the main have not been willing to do that and hence the true philologist's antagonism toward law.

The point remains that self-evidence and singularity are the desiderata of legal reading and these are best achieved by banishing ambiguity, by spending less rather than more time on the language of the text itself. In Christian fashion perhaps one might say that there is the beyond to be addressed and words are never wholly adequate to that. One needs a leap of faith, a jump into the darkness of origins, and abandon the text all ye who enter here. Whatever the precise causes, the diagnosis is admirably clear: "He who has no sense for the symbolical has none for antiquity."[25] That, for Nietzsche, is an essentially mundane matter. The text, as expres-

sion of terrain, territory, or world, is the key to what we will know of the past. It is a question then of reading, of attending, listening, walking, returning, and reading again. Here is what he says in a preface signed outside Genoa in 1886: "[W]e are friends of the *lento*, I and my book. I have not been a philologist in vain — perhaps I am one yet: a teacher of slow reading. … Philology … teaches how to read *well*: i.e. slowly, profoundly, attentively, prudently, with inner thoughts, with the mental doors ajar, with delicate fingers and eyes."[26] It is a constant theme, this concern not with celerity or juridical judgment in haste, the arbitrary *arbitrium*, but rather with the age of texts, their slowness, their language, and the world it symbolizes and conveys.

Why not get things done? Why not hurry up and judge already? Get it over, for in the end what difference does it make how the judge got there, what tells is the judgment itself? What, in other words, can the walker, the slow reader, add to or detract from the pain of juridical decision? Answer: You will have to wait, you will have to see. First off, who is this slow reader, this ideal type, this figure of the free thinker among her books and in the terrain of the suspension of law? The ideal reader, the calm, patient, attentive, unhurried reader appears under the sign of the wanderer. This is a nomad, a prelawyer, a nomic and naming figure. This is someone in process, someone walking who does not yet know but is about know. Someone who reads to learn. Someone who takes care over the text. Someone who looks rather than judges. Push it a bit, and he is the Christian before the birth of Christ, the opposite of a disciple, too late to be a prophet, a thinker walking, walking, walking. The Christian metaphor is not so far off the mark. You can figure out why. Piece it together from all of Nietzsche's references to Christ, his inversions of *logos* and of faith. And now, in the preface to his lectures on education "the reader from whom I expect something must possess three qualities," a trinity of virtues.[27] Not father, son, and holy ghost, but woman, veil, and the body, and now, hermeneutically, reader, walker, path walked, and the passion or affection for the new idea.[28] A new economy with each walk.

The slow reader, in legal idiom, translates as *amicus* or *patronus*, the earliest species of Roman lawyer, a scholar who would help with legal texts and arguments but would not generate causes, act for, or take the place of the client.[29] The Greek *logographers* were of a similar bent, maybe better even in that they would help with the writing of texts for presentation in law courts but they did not themselves appear. Whichever is the more apposite, *amicus* or *logographer*, the slow reader first off "still has time."[30] She still has time, she is not yet in confrontation with the end. She is not exit oriented, about to judge or to be judged. That would be one meaning

and it is fully consonant with the desiderata of the good reader who has not decided in advance, who is not determined to determine, but is still willing to retrace her steps, to find herself. In Christian terms, the slow reader is here to be placed among the quick rather than the dead, but that means simply that she is alive, sentient, willing to spend some time, in need of no other medications.

To still have time also means to be aware of one's difference, to take one's place, to act in the knowledge that each act will recur eternally, that there is a fate attached to interpretations. So be it, but there is also a less metaphysical meaning in which still having time means having a sense of time, a historian's sensibility, a philologist's apprehension of the temporality of text and interpretation. It is the text that should sit, that is at least closer to the sedentary, that has a more settled and discoverable place in time. That is after all the advantage of the philologist, maybe in some cases the only one, but he can get up, leave his place, walk. So he still has time, indeed he is temporal, defined by time and so with access to a sense of past and future, of fate and recurrence, and hence the possibility of being a philologist or latterly a lawyer. The slow reader can read and by dint of patience he can give time to the reading. Philology allows for time, imbues with time, places in time, and accounts for time. That is indeed the art of philological interpretation, it attends to texts and to their transmission, it watches them change, it witnesses them morph.

The philologist is a friend of the text, legally he is *amicus curiae*, and he brings not simply time but also affect, feeling, sensibility to the text being read. I will digress a bit and add that the slow reader, Derrida's good reader, is also a gay reader, a doctor of gay science, *sans culottes* in the Rabelaisian dictum. The slow reader is irreverent, not intimidated by law, both a free thinker and an invested reader, one who wants to read, to read again, to learn. According to Nietzsche in *The Gay Science*, one cannot know something without loving it. One learns to know over time, perhaps because one has time and has given of it. There is erudition *in eroticis*, and in this vein we know something only once "we are accustomed to it, when we expect it, when it dawns upon us that we would miss it if it were lacking."[31] It takes time and attention, the ability to listen and to process. The philologist is in that sense the therapist of the text, the book is on the couch and the analyst prompts it, elicits, listens, and reflects back. Nietzsche's view, however, is understandably less Freudian. By analogy with music, the slow reader engages in a dance with the text, he is seduced, drawn in, and slowly he comes to know the object of his affections. It is a common enough metaphor, and it is used to contest the dry and boring, the passive and narcissistic. As regards the slow reader it intimates that he

is the equal of the text, free to engage in dialogue, in seduction, in play: "he has not forgotten how to think while reading a book; he still understands the secret of reading between the lines, and is indeed so generous in what he himself brings to his study, that he continues to reflect upon what he has read, perhaps long after he has laid the book aside."[32]

The second quality of the slow reader is a specific facet of the first: "he must not be ever interposing his own personality and his own special culture."[33] Let's be quite blunt about this one. He should not be a lawyer, he should not interpose his purposes and manipulations upon texts quite exterior to his cause. The injunction is in a sense to be the equal of the text, not to pretend to be its superior. After all, the slow reader gives time so as to allow the text its own time. Homer, to use an example, should neither be overvalued nor derided. Homer should not be forced to observe modern conventions, nor should the modern immolate itself before Homer. The barbarisms of the present should be kept in the present, and so on. The philological lessons can wait. What is most intriguing is an unexplained legalism in the language used. The slow reader should not "interpose" himself when reading the text. Such interposition would be clamorous, digressive, and oppressive. It is also exactly what lawyers do.

Lawyers who endeavored to manipulate the text to their purposes, who "rectified" or "revised" or overinterpreted the text were thought for long to be overplaying their role and were termed *interpositae personae*, legislators who would falsely embody the meaning of the legislator for their own ends. The *intepositae personae* substituted themselves for the text and through their own mediations arrived at new laws as suited their instant purposes.[34] Interposition thus suggests a deflection of reading, an unseemly haste or instrumental craving that leads the interpreter to impose himself upon the text, to block it out, to prevent the meaning of the text from being transmitted to its present tense. The *interposita persona* brings her own message to the text and that is quite the contrary of slow reading, the opposite of sex. The point I wish to stress, however, is that the fault in reading, absence of which constitutes the second desideratum of the slow reader, is a legalism or flaw that derives from and is most marked in relation to the interpretation of laws. That leads to the last of the qualities desired of the slow reader: "he must not expect to be presented with a set of new *formulae*."[35]

Review the desiderata or protocols of philological propriety. The reader should be calm and unhurried. The opposite of an advocate, of whom it used to be said that they were in motion all day outside the courts but without a motion between them. They were in a rush or appeared to be so. They were forever making haste, advising action, proposing judgment.

In sum, they couldn't wait, they didn't have time, they carried within themselves their very own statute of limitations. The second desideratum is equally a corrective to law. Don't interpose, do not aggrandize yourself or some other present barbarism, do not seek to legislate the text that is being read. It is just bad reading, injustice in short, because it is not about you. And then finally, the third criterion: don't read in search of summary judgment, in search of outcomes or programs that can be lifted from the text and put immediately into practice. That is hardest of all for jurists to observe. They are forever giving advice, advocating changes, acting as normativos.[36]

Advocacy is a habit but it is not interpretation and it arguably distorts reading. But there is more to it than that. The *formulae* date back at least to the fourth book of the *Institutes of Gaius* and refer to the causes of action in law. The *formulae* constituted a code of procedure, the settled or at least established forms for achieving legal ends. In a later and broader usage, Quintilian, in a proleptically Nietzschean moment, refers to lawsuits being decided by "brutally rigid formulae" (*atrocitate formularum*).[37] A formula was the issue of a lawsuit, the record or pattern of legal process, and an equivalent usage is found in common law. In general legal parlance a formula was a writ, the common law equivalent of a cause of action, and a formulary was a book of writs and other precedents.[38] Legal writs were not the only subject matter of formularies, and the *ars dictaminis* produced numerous formularies of the differing kinds of correspondence, set forms, and protocols to govern the various kinds of letters.[39] In the more technical terms of the art of the notary, a formulary was a book of legal blueprints, of standard forms of transactions, sometimes also termed a symbolaeography or art of inscribing legal signs.[40] To all of which legal mysteries, the *arcana* of rule, Nietzsche enjoins suspension, the patience and attentiveness of intermission.

Slow eating, slow reading. The former extends the lifespan, the latter extends the lifespan of texts. And doubtless for similar reasons. One improves digestion and the other ingestion. In both cases the axiom is that you take time, you care for the self. Again inverting a Christian axiom, Nietzsche offers the philological aperçu that while the spirit kills, the letter gives life. But it is not the lawyer's letter, the writ, the blueprint, or some other atrocious formula that is being referred to in this aphorism. Nor is it the humanist conception of the text as a letter, *Deo* or *dike auctore*, sent if not by God then by a petty sovereign, a child, an author. The reference is to the characters, to the text, to the literal *literae* and not to a jurist's writ, a humanist's epistolary sentimentality, or some other formulaic representation decided long in advance. The reason is simple and it is that treating

the text as already being a writ or precedent or letter assumes too much by way of prior interpretation, it imposes a formula upon an inscription, it removes the text from the strata or layers of the past. The text should be allowed time.

Finally, the protocol of the slow reading. It is genealogical, ambulatory, anarchic. It is erudite, attentive, undecided. So many stays to decision, so many delays to deciding in the endeavor of doing justice to the text. To what end? So as to get to know the text, or even more simply so as to engage in the art of reading: "And he does this, not because he wishes to write a criticism about it or even another book; but simply because reflection is a pleasant pastime to him. Frivolous spendthrift!"[41] There is a start, and it lies in the suspension of prior forms and formulae. The philologist allows the text to speak. That requires attention to the letter, the text, and to the plurality of its levels and contexts. It requires a head for the symbolic, an ability to imagine, a retention of thought. In other words, the text is copious, full, plenary, and the slow reader alone has the time and the know-how, the *nous* to draw out that plenitude replete with all its quirks, its symptoms, its lapses, its errors, and its inspirations. That requires attentiveness to every aspect of inscription and transmission. It requires time, effort, patience, and persistence. Attention and breaks in attention. The frontal and the lateral. The obvious and the associative. It is the freedom of reading.

The slow reading juxtaposes the purposive and the higher purpose, the suspended purpose of Nietzsche's *meditatio generis futuri* or meditation upon the forms of the future.[42] Slow reading is not purposeless but plural and open in recognition that what was will recur. A double point. The true philologist who is the emblem of the slow reader is a *lector* aware of the necessarily multiple significances of signs. Jurists tend to flee from indexicality or simple multiplicity of the text. They tend to take the short route, the rapid interpretation, what they like to call the literal reading. But it is hardly a reading at all, it is a conversion, an act of faith, a rending of the text into an instrument or deed or obligation. The philologist, the good reader, is much slower than that. He is not afraid to sleep on the text, he is open to the reveries that reading brings. There are literal meanings, to be sure, but they are several and then one has to add the symbolic and the imagistic, the poetic, the cryptic, the chronic, and the chronological. In a word, there is then and now and the reader has to account for both. That means, ironically enough, that the task of the slow reader is to bring the text to life, to make it quick, to watch it walk. Slow down. It is not just a text. It is life. Reading is living. Do it well. Do it more.

The Blandishments of Time

We are never far from law. Indeed no one escapes the law. Even Nietzsche's account of slow reading, at least implicitly, is pitched against the interpositions and *formulae* of lawyers. He doesn't escape but he does resist, suspend, and open up a space of waiting. If the jurist is designated the rapid reader par excellence his sins are exemplary. They boil down to haste and forgetfulness. The text is reduced to a determination, the letter becomes a missive, the document an instrument, the script a deed, the record an obligation. In each case a reduction to a form, a conversion from dialogue to monologue, a shift from open text to case closed. This has its advantages but it entails some losses. Nowhere is this more evident than in the eradication of the slow reader, and specifically in the contraction of the time of reading and the space of thought. Luther famously announced that lawyers are not good Christians, Nietzsche adds that lawyers aren't good readers. They could be, for a while they were, back in the day of curricular rhetoric, of the lawyer as artist and artist as lawyer, so one might argue, but now they can't read, they have lost the art, forgotten how.

The Romans formulated the art of legal reading as *procedere ad similia*. The English lawyer Bracton adopted that same protocol for common law. The reductive reading aims at similitude, at unity, at the one God. It proceeds with the theoretical rapidity of the lectorially sedentary toward likeness, it seeks to render a reading that is in conformity with the settled patterns of law, it shifts from the letters of the text to the *formulae* and the formularies with untroubled celerity. Nietzsche, contrarian that he undoubtedly was, offers the opposite of similarity. He dictates that slow reading is necessary precisely so as to apprehend the difference of the text, its uniqueness, its time, its heart or living core. It takes art, vision even, and in Nietzsche's words it requires a head for the symbolic: an appreciation of the existence that the text symbolizes, a perception of the images that it incorporates, and an understanding that the text models, inveighs, or institutes, a *modus vivendi* or a form of life. Writs come later, first we need to read.

The juxtaposition of the reader and the jurist, the slow and the rapid, is itself far from determinative. The jurist can recover his link with true philology or good reading. It is not impossible. I, for instance, am a jurist, an *amicus curiae*, a reader. The older I get, the slower I become. Something like that. I read slower now. I am not afraid to sleep over a text. A good book can lead to reveries, it can cause dreams. Should that be discounted? I think not. I think the slow reader takes account of that propensity to sleep. A slow reader knows how to sleep, how to sleep read. Nietzsche was there first. He commented, in a segment on academics, on professorial

readers, no less: "It is no small art to sleep: it is necessary for that purpose to keep awake all day."[43] Indeed if you have heard of troubled sleep then you know about bad reading. The good reader, the slow reader, knows how to sleep, how to let time in.

To come to the text you have first to leave it. You have to walk away. You have to be in a position to view it, select it, pull it out, read it, return to it. A relationship develops. It comes to mean something. It takes on a value, generates affects, interrupts, entertains, informs, and confuses. If the text has an effect, if it is not entirely tiresome, then it prompts thought, it stirs activity as well as rest. The reading cannot be entirely sedentary. You have to get up. You have to walk. Perspective, distance, time, all are necessary. We still have a sense of it today. Talk the talk, but what really matters is whether you walk the walk. What do you bring, what do you do, and in conclusion, not where did you end up, but what path did you take?

Notes

1. The essential commentary on Nietzsche and walking is Frederick Dolan, "Nietzsche's Gnosis of Law" *Cardozo Law Review* 24 (2003):757.
2. Friedrich Nietzsche, *Ecce Homo* (1911), 32.
3. Flaubert indeed remarks that "anything of importance must be gained through efforts of sitting," as reported in Theodor Adorno, *Minima moralia* (1978). Many thanks to the inexhaustible Anton Schütz for this reference.
4. Friedrich Nietzsche, *We Philologists* (1911), 110.
5. *We Philologists*, 148.
6. John Selden, *Historie of Tithes* (1610), xix.
7. Guillaume Budé, *De philologia* (1587), 41.
8. Francoise Hotman, *Anti-Tribonian* (1587).
9. *Homer and Classical Philology*, 148.
10. See particularly Nietzsche, *The Dawn of Day* (1911), 84 ("The Philology of Christianity").
11. Gillian Rose, *The Dialectic of Nihilism. Post-Structuralism and Law* (1987), 209.
12. *We Philologists*, 140.
13. There is a fascinating recent replay of this antinomy in Pierre Legendre's analysis of the Roman concept of the function of law being that of instituting life — *vitam instituere*. This has been challenged in a classically dogmatic form by Yan Thomas. For an outline of the debate, which for obvious reasons I cannot go into here, see Pierre Legendre, *Sur la question dogmatique en Occident* (1999), 106–108.
14. *We Philologists*, 110.
15. *We Philologists*, 115.
16. *We Philologists*, 113.
17. The authoritative guide to these debates is Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (1992).
18. On the continent the exemplary text is Andreas Alciatus, *De Verborum significatione libri quatuor* (1530). Within the common-law tradition, the best example is probably Abraham Fraunce, *The Lawiers Logike* (1588) although it is more philosophically inclined than is usual in legal texts. Another useful illustration is John Doderidge, *The English Lawyer* (1631).
19. *Ghaidan v. Mendoza* [2004] 3 All ER 411 at para. 123 (Lord Rodger of Earlsferry).
20. Sir Edward Coke, *Reports* (1777 ed.). His sources were inevitably classical. D.1.3.17 (Celsus) *Scire leges non hoc est verba earum tenere, sed vim ac potestatem* (to know the law is not to know the text but its force and power).
21. *Ghaidan*, op. cit., para. 111 (Lord Rodger).

22. *Ghaidan*, op. cit., para. 82 (Lord Millett, dissenting).
23. *Homer and Classical Philology*, 170. (Philosophy builds upon what philology has done.)
24. Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (1979), 54. I address some of these points, inelegantly enough, in Goodrich, "Europe in America: Grammatology, Legal Studies, and the Politics of Transmission" *Columbia Law Review* 101 (2001):2033.
25. *We Philologists*, 118.
26. Friedrich Nietzsche, *The Dawn of Day*, 8–9.
27. Friedrich Nietzsche, *On the Future of our Education Institutions* (1911), 3.
28. To take this further there is the admirable if difficult Luce Irigaray, *Marine Lover: Of Friedrich Nietzsche* (1987).
29. On the etymology of lawyers, see the aptly named Crook, *Legal Advocacy in the Roman World* (1995).
30. *Educational Institutions*, 4.
31. Friedrich Nietzsche, *The Joyful Wisdom (Gaya Scienza)* (1910), 258.
32. *Educational Institutions*, 4–5.
33. *Educational Institutions*, 3.
34. On the *interposita persona*, see Jerome Sapcote, *Ad primas leges Digestorum de verborum et rerum signification* (Venice, 1575), 5. For expansion of this critique, see Cornelius Agrippa, *Of the Vanitie and Uncertaintie of Artes and Sciences* (1569), chapter 95 ("Of the knowledge of the Lawe").
35. *Educational Institutions*, 3 (emphasis added).
36. The latter term comes from Pierre Schlag, "Normative and Nowhere to Go," *Stanford Law Review* 43 (1990):167. The position elaborated in that article is expanded and reprised in Schlag, *The Enchantment of Reason* (2001).
37. F. de Zulueta, ed., *The Institutes of Gaius* (1946), book 4, 30–48; Quintilian, *Institutio Oratoria* (1921) vii.1.37–38.
38. See, for example, Thomas Blount, *Glossographia* (1586).
39. For discussion of the *ars dictaminis* and letter writing formulae, see James Murphy, *Rhetoric in the Middle Ages* (1974), 194–204. As Murphy also observes, the bulk of the forms were for contractual relationships and "were basically notarial in nature." (202)
40. The term is taken from William West, *The Symbolaeography, which may be termed the art, or description, of Instruments and Presidents, or the Notary or Scrivener* (1590/1603 ed.).
41. *Educational Institutions*, 5.
42. *Educational Institutions*, 4.
43. Friedrich Nietzsche, *Thus Spake Zarathustra: A Book for All and None* (1909), 28.

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