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# GAY SCIENCE AS LAW: AN OUTLINE FOR A NIETZSCHEAN JURISPRUDENCE

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*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*<sup>1</sup>

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<sup>1</sup> JONATHAN SWIFT, *GULLIVER'S TRAVELS* 295 (Peter Dixon & John Chalker eds., 1967) (1726).

*What are you really doing, erecting an ideal or knocking one down?*

-Friedrich Nietzsche, *On the Genealogy of Morals*<sup>2</sup>

ABSTRACT

The main question examined in this study is 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 “post-genealogy” or “pot-*ressentiment*” phase of the human condition, akin to the Marxist “post-revolutionary” 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? The study 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. An integral part of the Nietzschean program, it requires a radical reevaluation: not just law’s content is overcome, nor merely its bourgeois forms (in Pashukanis’ critical terms),<sup>3</sup> but its “internal” or “inherent” values of certitude and stability are overcome as well. The model I offer for play is not Zarathustra’s dicethrow but Borges’ *The Lottery in Babylon*. 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 her; 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 to ultimately encourage

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<sup>2</sup> FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS, *Second Essay* para. 24 (Walter Kaufmann trans., 1989) (1887) [hereinafter NIETZSCHE, GENEALOGY OF MORALS]. References to Nietzsche’s works follow the standard citation to aphorism or paragraph number, not to page number.

<sup>3</sup> See EVGENY B. PASHUKANIS, LAW AND MARXISM: A GENERAL THEORY (Chris Arthur ed., Barbara Einhorn trans., 1978).

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the pupil into coming into her own will, shedding *ressentiment* and bad conscience in an active, i.e. non-conscious way; in its relation to consciousness it is the opposite 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 all 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 mix up power with representations of power; to realize that *the case is not the will that desires power* (as an object of desire, this would necessarily involve a representation of power) but *power that wills becoming*. In dealing with this metaphysical question I expound on a similar crucial interpretation, originally offered by Deleuze; however, I break off from 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 can not hold. Finally, I use this interpretation of the will to power to solve Kafka's riddle in *The Trial*: a necessary move once one realizes that, in the ethical history of western culture, Kafka's parable of the seeker of the law before its closed gates continues a sequence that began with Plato's fable of the cave and continued with Zarathustra's cave parable.

I add three points that may be termed methodological or contextual. The first is positioning Nietzsche's limited discussion of law and politics as a derivative of his metaphysics of the will and treatment of moral psychology, not as an independent topic to be searched and indexed in some textual corpus. The second is to understand the question of normativity in its particularly Nietzschean sense, i.e. "what is X to me/to the overman?", and not in the Kantian sense of uncovering the conditions that entail any synthetic, a-priori sentence (such as normative ones). The last comment places the Nietzschean project in a larger pattern that defined radical thought in the late nineteenth and early twentieth centuries, and whose other cases are Marx and Freud: a new metaphysics (will to power/materialism/id) that uncovers a state of bondage, psychological and material, in which law plays a pivotal role in its function of reinforcer and supplier of a legitimizing language (respectively, of *ressentiment*, of the relations of production, of Oedipus and the bourgeois family); and finally radical, yet partial ways of overcoming bondage that are not mutually translatable—genealogy, revolution, psychoanalysis.

## I. PREFACE AND METHODOLOGICAL REMARKS

At the outset of his study “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 à la folie? [What becomes of the overman once he has killed law? Is he condemned to madness?]”<sup>4</sup> What Girard has in mind, I think, 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 small nothing as yet of the legal decomposition? Law is dead, and we have killed it.<sup>5</sup>

From somewhere high above the agora we may hear the echo of Nietzsche’s own prophetic voice when, like Carlyle, he prophesizes in the “Destiny” section of *Ecce Homo*: “all power structures of the old society will have been exploded.”<sup>6</sup> Nietzsche’s prophecies, we must keep in mind, are *untimely* meditations. He is “pregnant with future.”<sup>7</sup> 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

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<sup>4</sup> René Girard, *Le Surhomme dans le Souterrain: Les Stratégies de la Folie: Nietzsche, Wagner et Dostoievski*, 212 (SPRIT 5-28 (1995)).

<sup>5</sup> See FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* Book Three, para. 125 (Walter Kaufmann trans., 1974) [hereinafter NIETZSCHE, *GAY SCIENCE*].

<sup>6</sup> FRIEDRICH NIETZSCHE, *ECCE HOMO, Why I am A Destiny*, para. 1 in *BASIC WRITINGS OF NIETZSCHE* (Walter Kaufmann ed. & 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, in TWILIGHT OF THE IDOLS AND THE ANTI-CHRIST* (R.J. Hollingdale trans., 1968). For a touch of “proto-Nietzschean” rhythm and grammar of transformation-through-destruction see 3 THOMAS CARLYLE, *THE FRENCH REVOLUTION* 318-19 (Standard Classics, (n.d.)) (1837).

<sup>7</sup> NIETZSCHE, *GENEALOGY OF MORALS*, *supra* note 3, Second Essay, para.. 16

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Bad Conscience? What is law to them?<sup>8</sup> 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*”?<sup>9</sup> And how are we to understand Nietzsche’s amazing dictum, in *Beyond Good and Evil*, that “[g]enuine philosophers . . . are commanders and legislators,”<sup>10</sup> once we realize that it must be interpreted in an opposite way to Kant’s—that it is not reason that legislates but the *will*, and that legislation must be understood as something other than merely coordinated collective action governed by the shadow of universality? And finally, what other 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 the power-struggles of humanity, look them squarely in the eye, and affirm them?<sup>11</sup>

There are two preliminary matters that must be cleared before we move on to cast the question in its various aspects and ask “How can law be the case?” First, the question “How is normativity possible?” that underlines the argument in this article (and served as its initial working title) must be understood in 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. In Nietzsche’s strategy the question is turned on its head: it is not the modality—i.e., the possibility—of the case that the inquiry revolves around, but *how* such things as knowledge, perception, action, and law are molded by 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

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<sup>8</sup> For one, it features a distinctly political principle for the distribution of burdens, in which economists will identify the concept of marginal utility: under the heading *My Utopia* 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. & trans., 1968)

<sup>9</sup> See *Why I am a Destiny* para. 1, in NIETZSCHE, *Ecce Homo*, *supra* note 7.

<sup>10</sup> FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* para. 211 (Walter Kaufmann trans., 1989).

<sup>11</sup> The notion of *übermensch*—the “overman” in Kaufmannese (and here “overperson”)—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*, *supra* note 7, or “forefathers and creators of the overman.” See FRIEDRICH NIETZSCHE, *The Blissful Isles* para. 110, in *THUS SPOKE ZARATHUSTRA* (Walter Kaufmann trans., 1978) [hereinafter NIETZSCHE, ZARATHUSTRA].

or individual contexts, for persons whom genealogy and *amor fati* freed from *ressentiment* in all its manifestations?<sup>12</sup> Nietzsche never follows Socrates in asking, “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 is reevaluating its value in the new, post-*ressentiment* life. It is paramount to this discussion to realize that this is how Nietzsche deals with language, cognition, religion, and freedom. Owing to his monistic metaphysics of the will to power, Nietzsche was the first human who could conceive such a radical form of freedom, such a break between any psychological constituent’s *origin*—discovered through the radical new critique he termed “genealogy”—and its reconstructed *purpose* in terms of the will (this is also Nietzsche’s final emancipation from Schopenhauer). This involved manner, emancipated from *ressentiment*, is also how we must think of normativity, in general, and of law, in particular. Kafka’s parable about the gate of the law is uninteresting to anyone not realizing that *she* is the person stranded at law’s gate; it is truly alarming for all who realize they are. How will the Person of Power act in such a situation? In the ethical history of Western thought this is not an arbitrary question—indeed it is a necessary one, for Kafka’s parable is non other than the third ring in the lineage of cave-parables that begins with Plato’s slaves,<sup>13</sup> continues with Nietzsche’s Zarathustra who emerges from his cave to bestow his gift on a reluctant humanity, and either culminates or deteriorates to Kafka’s seeker of the law in *The Trial*.<sup>14</sup> At philosophy’s inception in the polis, truth was to be found outside the cave, 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).<sup>15</sup> In a completely reversed direction to the movement of Plato’s slave, who must escape the cave to experience truth, Zarathustra must withdraw from humanity to the solitude of his cave to “hear” of God’s death. Like Plato’s slave who returns to the cave to recount his discoveries,

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<sup>12</sup> By analogy to bourgeois society, we may think of psychoanalysis that would seek to free the subjects from neurosis and allow them to face and accept Oedipus. For discussion see section IV below.

<sup>13</sup> See PLATO, *THE REPUBLIC*, Book 7 (H. D. P. Lee, trans., 1955).

<sup>14</sup> FRANZ KAFKA, *THE TRIAL* (Breon Mitchell trans, 1999) (1925).

<sup>15</sup> See Jonathan Yovel, *In the Beginning was the Word: Paradigms of Language and Normativity in Law, Philosophy, and Theology*, 5(1) MOUNTBATTEN J. LEGAL STUD. 5 (Dec. 2001).

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so must Zarathustra eventually go and preach among people; although rather than being killed like the slave, Zarathustra is threatened by the jester who brutally murders not Zarathustra but a tight-rope walker, who briefly serves as a symbol both of Zarathustra and of the futility of his endeavor, during his very first encounter with humanity.<sup>16</sup> The jester executes even as he proclaims judgment, and Zarathustra is the next in line. Here, already in Zarathustra's Prologue, is Law: for the jester is none less than its herald, representing "the good and the just . . . the believers in the true faith."<sup>17</sup> Finally, with Kafka's parable of the law, the cave is as unreachable as the Castle or America/Amerika, and we learn two new, urgent things about the cave and its evolving reoccurrence: inside the cave there is the law, and we are barred from entering it. If the central question of this discussion of Nietzsche, the will, and law is solved, then we must also be able to solve Kafka's riddle.

A second matter that can be termed "methodological" goes against a streak of thought represented by several commentators, most recently Martha Nussbaum, that centers on figuring out Nietzsche's philosophy's position on law as based on the Nietzschean textual corpus and finds very little of it.<sup>18</sup> 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 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 even transcendental truths about justice. Barring morality, Nietzsche's analysis of the public sphere was rarely of institutions, and for collective action—including at times language itself—he held little more than contempt.<sup>19</sup> Barring a few

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<sup>16</sup> See *Zarathustra's Prologue* para. 6, in NIETZSCHE, ZARATHUSTRA, *supra* note 12. By that time Zarathustra claims to have "awakened" and in an ironic twist on Christ claims to "love man"—thus unheeding the saint—Plato's, or perhaps Christ's disappointed shadow—who entreats him: "Give them nothing! . . . Do not go to man." *Id.* para 2.

<sup>17</sup> *Id.* para. 8.

<sup>18</sup> See Martha Nussbaum, *Is Nietzsche a Political Thinker?*, 5(1) INT'L J. PHIL. STUD. 1 (March 1997).

<sup>19</sup> In this I implicitly reject a prevalent view according to which language is an institution, on

observations,<sup>20</sup> 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 it to law as a social institution or a principle of order.<sup>21</sup>

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 catalogue 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 a non-political thinker and an anti-political one and Nietzsche, who dreamt of “great politics” and was vehemently opposed to German nationalism, was more the latter. 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. But Nietzsche *was* a monist. 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 and material dialectics, as well. Monism almost stumble into the obvious pretense to treat anything that is the case. 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.

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. But the worthy person, whether a

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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).

<sup>20</sup> Notably in FRIEDRICH NIETZSCHE, *HUMAN, ALL-TOO-HUMAN* para. 459 (R.J. Hollingdale trans., 1996) (1886). A few other scattered discussions and metaphors are discussed below.

<sup>21</sup> See NIETZSCHE, *GENEALOGY OF MORALS*, *supra* note 3, Second Essay para. 5-12.



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veritable *übermensch* or not, will also live in society. It will be among and against others that her will to power must be exercised, that she must measure and challenge and overcome herself. She is no solipsist nor hermit, unless by choice. Zarathustra had to emerge from his cave in order “to be more” and exert power over his listeners. 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 goes the other way around, 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 have ripened, but he is not yet ripe for his fruit.<sup>22</sup>

## II. 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. There is an overarching concern that we must keep in mind as we follow these models, namely 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: 1) play; 2) resistance; and 3) 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.<sup>23</sup>

### A. Play

In *The Lottery in Babylon*,<sup>24</sup> a radical story by Jorge Luis Borges – who, like

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<sup>22</sup> See *The Stillest Hour*, para. 44, in NIETZSCHE, ZARATHUSTRA, *supra* note 12, (Walter Kaufmann trans., 1978) (1883-5).

<sup>23</sup> 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, Catholicism, and psychoanalysis, it is quite beyond the scope of the present article.

<sup>24</sup> Jorge Luis Borges, *The Lottery in Babylon*, PRAIRIE SCHOONER (John M. Fein trans., Fall, 1959), *reprinted in* LABYRINTHS: SELECTED STORIES AND OTHER WRITINGS 30 (Donald A. Yates & James E. Irby eds., 1962) . [WE COULD ONLY FIND/ONLY RECEIVED A DIFFERENT

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 the chance conditions of hereditary birth or, in play allowed by the semantic ambiguity of Bruce Ackerman’s terminology, “constitutional moments” along a person’s life.<sup>25</sup> The lottery 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, slave. I have known omnipotence, ignominy, imprisonment. Look here—through this gash in my cape you can see on my stomach a crimson vermillion 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 not—*uncertainty*.<sup>26</sup>

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 all about defying arbitrariness in the form of private insurance that allows parties to perform in certain ways with some guarantees of the future—that reliance and expectation will not be left to arbitrariness.<sup>27</sup> 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—e.g., the efficiency of exchange—allows agents to destabilize an otherwise entrenched

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TRANSLATION—I HAVE THEREFORE CHANGED THE QUOTE: IF THIS IS UNACCEPTABLE PLEASE REJECT THE CHANGES AND PROVIDE THE SOURCE IF POSSIBLE] AUTHOR: I CHECKED THE SPANISH ORIGINAL, AND THE TRANS. I PROVIDED IS MORE ACCURATE TO A DEGREE THAT JUSTIFIES GOING WITH IT. THANKS FOR THE EFFORT, THOUGH. I AM ENCLOSING THE SOURCE FOR THIS PARAGRAPH.

<sup>25</sup> BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998)[NEED PAGE # ] Ackerman propounds a non-originalist theory of constitutional law and interpretation, attempting to identify “constitutional moments” that are historical instances in which the basic terms of the social contract—represented by a constitution—are reformed. Ackerman argues that Reconstruction and the New Deal were such events. *See id.*, chapter 3 and *passim*.

<sup>26</sup> Borges, *supra* note 25, at 30 (emphasis added).

<sup>27</sup> *See* WOLFGANG FRIEDMAN, LAW IN A CHANGING SOCIETY 90-91 (abridged ed., 1964).

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situation (e.g., “efficient” breach of contract or “taking” of property interests).<sup>28</sup> 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”—namely, its contingencies: those aspects of it that regulate justice, distribution, procedure, etcetera. 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.<sup>29</sup> Stability and predictability—not merely security—are the opposite of danger.

Conversely, in Borges’ *Babylon*, the lottery is an interpolation of chance into the order of the 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”?<sup>30</sup> 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. The overperson will gaily embrace a chance to measure her will, to become more, to perpetually keep becoming being, without any guaranties

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<sup>28</sup> 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 & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). See also Ian Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a “Rich” Classificatory Apparatus*, 75 Nw. L. Rev. 1018 (1981); Macneil, *Relational Contract as Sociology: A Reply to Professors Lindberg and de Vos*, 143 Zeitschrift für die gesamte Staatswissenschaft (Journal of Institutional and Theoretical Economics) 272-290 (1987) (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).

<sup>29</sup> 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 NIETZSCHE, GENEALOGY OF MORALS, *supra* note 3, Second 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.

<sup>30</sup> See JOHN RAWLS, A THEORY OF JUSTICE 136-150 (1971).

of certainty. Cast in every possible social contingency, the lottery as law is the will's ultimate opportunity for perpetual reinvention.<sup>31</sup> In its truly radical form, Gay Science can become law if and only if it sheds, not just law's bourgeois content and forms—property, contract, family—but reverse 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.<sup>32</sup> 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.”<sup>33</sup> 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.”<sup>34</sup> 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 dicethrow, but only once the dicethrower 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,

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<sup>31</sup> 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 effects not merely a person's status within a normative system but the system.

<sup>32</sup> 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) [SOURCE MISSING: Title page of edition provided reads Henri Albert as trans I have therefore changed the citation. AUTHOR: CORRECT, THANKS]. 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 FRIEDRICH NIETZSCHE, *THE WILL TO POWER* (Walter Kaufmann & R.J. Hollingdale trans., 1987).

<sup>33</sup> DELEUZE, *supra* note 33, at 25.

<sup>34</sup> “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 métamorphose.” GILLES DELEUZE, *NIETZSCHE ET LA PHILOSOPHIE* 59 (Deuxième ed., 1967) (trans. by author).

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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!<sup>35</sup>

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.

B. *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.]”<sup>36</sup> 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*. Where the model of law as resistance, dealt with next, breaks from Deleuze is on his unequivocal pronouncement that the Nietzschean notion of will to power has nothing to do with the notion of struggle.<sup>37</sup> 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.”<sup>38</sup> 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

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<sup>35</sup> *On the Higher Man* para. 14, in NIETZSCHE, *ZARATHUSTRA*, *supra* note 12, (Walter Kaufmann trans., 1978) (1883-5).

<sup>36</sup> DELEUZE, *supra* note 35, at 81. [PAGE 81 NOT PROVIDED: PLEASE VERIFY QUOTE AND PAGE #S OF THE FOLLOWING TWO FOOTNOTES]

<sup>37</sup> *Id.* at 81-82.

<sup>38</sup> *Id.* at 82 (translation by the author).

the above—or even violence in sublimated and non-sublimated 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, and related models or metaphors for law: first, resistance, and then education.

### C. *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 “post-revolutionary” 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, the primarily existential and ethical, and derivatively social emancipation of the will to power from resentment 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 active 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.”<sup>39</sup> 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

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<sup>39</sup> NIETZSCHE, THE WILL TO POWER, *supra* note 33, para. 657.

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given circumstances, and thus avoids being dominated by them.<sup>40</sup>

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, grow, and 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.*<sup>41</sup>

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 her 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."<sup>42</sup> In society, the law that best serves the Person of Power is that which empowers the other to best prepare him for such "war".<sup>43</sup> 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 her would be power-constraining rather than a horizon for development). The Person of Power will not rely on social norms to serve her in overcoming or in dominating: that is

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<sup>40</sup> More than anything else, I think this distinction explains Nietzsche's necessary rejection of the Darwinian model of evolution, that he regards as wholly reactive, even if some sections feign evolutionary explanations. See NIETZSCHE, *GAY SCIENCE*, *supra* note 6, para. 110.

<sup>41</sup> *Why I am So Wise* para. 7, in NIETZSCHE, *ECCE HOMO*, *supra* note 7 (emphasis added).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* 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...". *Id.*

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 mean for the will to become more, for the power to will.<sup>44</sup> Law does not empower the other as a subject, although through empowerment the other might discover her 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.

#### D. Education

The third model for law I wish to discuss is a social interaction to which Nietzsche devoted as systematic a study to as any, namely education.<sup>45</sup> 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

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<sup>44</sup> For a short elaboration on the relation between *will* and *power*, see *supra* Part 3.

<sup>45</sup> See FRIEDRICH NIETZSCHE, *SCHOPENHAUER AS EDUCATOR* (James W. Hillesheim & Malcolm R. Simpson trans., 1965). No less significant is 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 & Mazzino Montinari eds., 1973) (note that "Bildung" means "education" as much as it means "formation"). For various perspectives on Nietzsche's writings on education see NIETZSCHE'S LEGACY FOR EDUCATION: PAST AND PRESENT VALUES (Michael Peters, James Marshall & Paul Smeyers eds., 2001). I am not aware of an English language collection of all of Nietzsche's scattered writings about education, although such will be very welcome. A useful collection in Hebrew is FRIEDRICH NIETZSCHE, MASOT AL HINUKH LE-TARBUT [ESSAYS ON EDUCATION] (Jacob Golomb ed. & trans., 1988), which also includes the editor's introduction.



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socialization—which produces only “herd animals”—and certainly not about knowledge. Instead, the goal of education is to encourage the development, embracing, carving, etcetera—of authenticity (*Wahrhaftigkeit*). 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.”<sup>46</sup> 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.”<sup>47</sup> Yet, all while revolting against technocratic schooling, nor is Nietzsche’s program 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 towards 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 which, by definition, is a form of conformity.

In a perforce cursory nutshell, there is a sense in which the Nietzschean process of education 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—i.e. 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

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<sup>46</sup> FRANCIS BACON, *NOVUM ORGANUM* 31 (Joseph Devey ed., P. F. Collier & Son 1902) (1620).

<sup>47</sup> NIETZSCHE, *WILL TO POWER*, *supra* note 33, para. 888.

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.<sup>48</sup>

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: justifying her subjugated position and ascribing it to some normative reason other than a realization of power relations. She thinks it's 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 free-spiritedness.

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. . .<sup>49</sup>

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

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<sup>48</sup> *Id.* para. 980.

<sup>49</sup> SCHOPENHAUER AS EDUCATOR, *supra* note 46, at 6.

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pretense for legitimization be the main challenge for every member of society? Can the whole of society, to paraphrase Shakespeare into unrecognisability, 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, interdependent. Yet in their applications they seem to go in almost opposite directions, and no wonder: while the former concentrates on the *other*, in an attempt to nurture her to growth and power, the latter concentrates on the Person of Power. Which way, then? To Nietzsche, the empowerment model will smell of liberal inclinations. Is that such a detriment for all readers?

### III. A GENEALOGY OF PARABLES: ZARATHUSTRA'S ANSWER TO KAFKA'S RIDDLE

Finally: how would the Person of Power act in Kafka's version of the cave parable? Recall that the seeker of the law is never allowed into law's "cave," wasting his wretched days in futile attempts to gain admittance through begging, bribery, 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 immediately 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 reactivity, Bad Conscience, *ressentiment*—he himself must have been the one who summoned the awkward executioners who eventually butchered him. Recall that, in the last chapter of *The Trial*,<sup>50</sup> on his

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<sup>50</sup> 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

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—like the seeker at law’s gate—accepts law’s purported rationality (i.e., procedural justice), attempts to gain admittance and touch his trial, even struggle with it on its own social and institutional terms, from within and from without. That act of rationalization is—in Nietzschean terms much before it became a source for complexes in Freudian senses—a sin. K, through experience rather than deliberation, frees himself once law’s true and absurd nature is revealed to him, its guise of normativity unveiled. K’s will then is able, for the first time, to actively act rather than react, even at the price of his own destruction. He becomes 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.<sup>51</sup>

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.

#### IV. LAW AS *RESSENTIMENT*, IDEOLOGY, NEUROSIS: BONDAGE AND EMANCIPATION IN

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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.

<sup>51</sup> YUKIO MISHIMA, *SUN AND STEEL* 65 (John Bester trans., 1970).

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NIETZSCHE, MARX, AND FREUD

*Although I can at least confine  
Your vanity and mine  
To stating timidly  
A timid similarity*<sup>52</sup>

Before concluding, I wish to 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’ 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 kinds of emancipation.<sup>53</sup> 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 Rouseauistic language—in terms of chains, bonds, or similar metaphors.<sup>54</sup> All three offer complex (and mutually-exclusive)

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<sup>52</sup> W.H. AUDEN, *Law Like Love*, SELECTED POEMS 89, 91 (1979).

<sup>53</sup> “Emancipation” and “liberation” are used here interchangeably, in their most technical senses, detached from the laden senses they hold in standard historiography of modernity.

<sup>54</sup> Curiously and tellingly, this loose family of metaphors of bondage, that originates with Plato and emerges in Rousseau, Kant, Marx and Engels—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).

conceptions of freedom, liberation and authenticity, that they attempt to support with the distinct manner in which these conceptions of freedom are attainable, even as they diverge on essential questions of human subjectivity and agency, as well as on the metaphysics that push their respective critiques (for an obvious divergence of agency, 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).<sup>55</sup>

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.<sup>56</sup> 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—procedural justice—will cease to function as a socially legitimizing language, once the substructure will no longer require it. The critique of law is emancipating: it helps reveal the true nature of the relations of production and act on that realization.

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<sup>55</sup> 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 MARX AND FRIEDRICH ENGLES, *THE GERMAN IDEOLOGY* (1998) (1846), as well as PASHUKANIS, *supra* note 4.

<sup>56</sup> The main reason is that legal concepts, argued Pashukanis, validly express the economic relations of the sub-structure; 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 two of, KARL MARX, *1 CAPITAL* (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.” See *SOVIET LEGAL PHILOSOPHY* 287 (John N. Hazard ed., Hugh W. Babb trans., 1951). The question is of supreme significance for socialist jurisprudence, its conception of the state, and especially for the Trotskyite notion of perpetual revolution. Pashukanis was accordingly liquidated in 1937.

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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 to 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 it overcomes the shadows of the dead god and comes into its own power. Anything collective belongs to the herd: again we encounter Nietzsche as an anti-political thinker rather than an a-political one (although he is, to an extent, both).

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. Here are the respective legitimizing languages that allow and reinforce the bonds: the language 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, here are the respective liberating process, the new languages leading to emancipation (each case in its idiosyncratic, and partial sense): revolution; genealogy; psychoanalysis. All three structures are widely disparate; as metaphysical approaches they are mutually untranslatable, they rely on and are constituted by different linguistic apparati, metaphors, imagery; Marx's sphere is the social, while Nietzsche held only contempt towards 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),<sup>57</sup> yet that is the direction the argument takes. This level also underlines the relation to law, as expressed in all three Nietzschean models discussed above: 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 puny, slave-morality dominance: all three are reflected in Kafka’s riddle which, read this way, also obeys the same basic grammar. We have looked at law in possible Nietzschean terms only to find there the emancipation of authenticity.

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 towards 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.”<sup>58</sup> For the overperson 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 fixed *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 not Nietzsche nor Zarathustra, with all their phraseology of legislators, teachers, preachers, ever quite tell us how the overperson 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

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<sup>57</sup> 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*, 13 INT’L J. FOR THE SEMIOTICS OF LAW 1 (2000). 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.*

<sup>58</sup> *Zarathustra’s Prologue*, in NIETZSCHE, *ZARATHUSTRA*, *supra* note 12, para. 3.



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constructed or crossed. Nevertheless, for the Person of Power to become a free spirit, whether a full-fledged übermensch or not—or not yet—she requires genealogy to emancipate her psyche from *ressentiment* and its manifestations: morality, religion, cowardice, and science in its reactive forms, namely representational science regarding linguistically-formable “truths” about the world.

Indubitably, there are grounds to object to this “unifying” perspective, partially satisfied by further refinements. While starting from imagery, metaphor and language, it also partially overlooks those, invoking some “deep structure” around which those revolve: but the notion that there is such a structure besides the imagery and vocabulary is one of the things that Nietzsche, for one, sought to critique. The main defense I can offer is twofold: first, my observation is not reductionist: there is no vocabulary into which those that are the case are translated. 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 understand through it not only modernity’s complex, fragmented, incomplete, yet on the whole distinct project, but also the relations between that and critiques of both modernity and 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.

Under risk of repetition, 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.<sup>59</sup> 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

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<sup>59</sup> 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”* 94 NW. U. L. REV. 937 (2000) (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).

are action), and up for the will to form rather than fool itself into notions of “discovery.” “Gay-scientific” activity is acknowledged creation.<sup>60</sup>

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 counter-example 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.<sup>61</sup> The analogous problem in Nietzsche sometimes creates the notion that the overperson 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”<sup>62</sup> 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.<sup>63</sup> Nevertheless, both Marx and Nietzsche show us, to employ the Rouseauistic 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.<sup>64</sup> Like Marx and Nietzsche, Freud offers action—psychoanalysis—to emancipate from neurosis and psychosis. Of course, 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,<sup>65</sup> not—like

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<sup>60</sup> See NIETZSCHE, *GAY SCIENCE*, *supra* note 6, para. 110, 111.

<sup>61</sup> VLADIMIR ILICH LENIN, *STATE AND REVOLUTION* (1978) (1918).

<sup>62</sup> *Zarathustra’s Prologue*, in NIETZSCHE, *ZARATHUSTRA*, *supra* note 12, para. 3 and *passim*.

<sup>63</sup> For the uses of temptation and rhetoric in Zarathustra’s quest, see JACOB GOLOMB, *NIETZSCHE’S ENTICING PSYCHOLOGY OF POWER* (1989).

<sup>64</sup> See NIETZSCHE, *THE WILL TO POWER*, *supra* note 33 at 524; NIETZSCHE, *GAY SCIENCE*, *supra* note 6 at 357.

<sup>65</sup> This does not mean that the basic tension between egotistical psychology and culture—the producer of guilt—is “fixable.”

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Marx—to destroy it, or—like Nietzsche—to transform and elevate, not society but persons (how this “smells of dialectics”!)<sup>66</sup> Yet next to Freud the medical doctor there is the critic of culture, the liberator from religion and cultural social 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 overperson. Yet for all of its originality in matters psychological, Freud’s work shares with Nietzsche the derivative structure of the social and the political. Like Marx and Nietzsche, he offers a metaphysical vocabulary and a menacing truth hidden under layers of defense mechanisms. Nietzschean *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”.<sup>67</sup> 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” fell: gay science and genealogy, and psychoanalysis, leading to a “post-revolutionary” stage on their own terms. For Marx, that eventually leads to the abolition of law and the state. For Freud, on the contrary, 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. As for Nietzsche, whatever his philosophy has to tell us about law must be kept to its own critical, conceptual, and even spiritual space, as a matter not of politics or of the state in any Hegelian sense, but truly as Gay Science.

While Nietzsche had little use for law in any traditional, or modern, and at any account “pre-revolutionary” sense, a Nietzschean form 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, law should not be thought of as merely an aspect or a shadow of the dead god, as in René Girard’s parable.<sup>68</sup> An interpretation of Nietzsche that disregards the necessity and potential for derivative treatments of social

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<sup>66</sup> See *The Improvers of Mankind* para. 3, in NIETZSCHE, *TWILIGHT OF THE IDOLS*, *supra* note 7.

<sup>67</sup> 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.

<sup>68</sup> See Girard, *supra* note 5.

institutions is at best partial, at worst dogmatic. We should not expect to hear Zarathustra join those who, in Auden's words,

*Others say, others say  
Law is no more,  
Law has gone away.*<sup>69</sup>

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<sup>69</sup> AUDEN, *supra* note 53, at 90.