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## Nietzsche

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## NIETZSCHE\*\*

THOMAS A. COWAN\*

I find that the attempt to assess Nietzsche's value to contemporary jurisprudence is fraught with extreme difficulty. Not only was Nietzsche perhaps the most controversial figure in the history of ideas:<sup>1</sup> this might have happened to one whose message was simple. But in Nietzsche's case the ideas themselves are highly controversial, paradoxical and even "immoral." Like every great thinker Nietzsche was more provocative to his enemies than to his friends. His enemies took their revenge by burying him under a deluge of refutation and abuse. Apparently Nietzsche was guilty of what might be called the crime of "universal treason." He gave aid and comfort to *all* warring factions of mankind. The result is that he who writes about Nietzsche is likely to do nothing but add to the confusion.

For Nietzsche himself did nothing to stave off misunderstanding. He wrote, so he thought, only for those who could understand him. But in point of fact it appears that it was his detractors who made the most of him. And what monstrous uses his name and his ideas have been put to. Nietzsche himself lived in terror of what his readers might make of his doctrines and well he might have, had he lived to see Hitler posing in front of the Nietzsche monument in an attempt to gain for Nazism a connection with the most truly revolutionary character of modern times.

On the other hand, the Jews whom Nietzsche blames as the perpetrators of the most awful moral catastrophe in history, that is to say, Christianity, can take him as one of their own. The gentle Oscar Levy indeed claims him as the contemporary Jewish prophet—the man whose thunderous denunciations of the Jews for inventing the "slave morality of Christianity" and for their acceptance of the moral values of the "Gentiles" places him in the right line of descent of the prophets of the Old Testament.<sup>2</sup>

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\*\* All references to Nietzsche are to the latest edition of his complete works, FRIEDRICH NIETZSCHE: WERKE (3 vols., Schlechta ed. 1956) [hereinafter cited WERKE]. The quotations were translated by Marianne Cowan. There is appended to each reference to the Schlechta edition the common English title and section number of the work in question.

1. See the spirited defense of Nietzsche in KAUFMANN, NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST (1950).

2. "I must not forget that in every Anarchist, and therefore in every Christian, there is also, or may be, an aristocrat—a man who, just like the anarchist, but with a perfectly holy right, wishes to obey no laws but those of his own conscience; a man who thinks too highly of his own faith and persuasion to convert other people to it; a man who, therefore, would never carry it to Caffres and Coolis; a man, in short, with whom even the noblest and exclusive

Consider this extraordinary paragraph from *Dawn of Day*:

*About the People of Israel.* \* \* \* And where else could this abundance of accumulated great impressions that Jewish history holds for every Jewish family—this fullness of passions, virtues, decisions, renunciations, battles, and victories of all sorts—where could it flow except in the end into great minds and great works! And in that day, when the Jews will be able to point to such gems and such golden vessels as their work—which the European nations with their shorter and less profound experience never could and never will produce—when Israel shall have transformed its everlasting vengeance into an everlasting blessing of Europe, then that seventh day will once more have come, on which the old God of the Jews may rejoice in Himself, in His creation, and in His chosen people—and all, all of us shall rejoice with him!<sup>3</sup>

Can we conclude with Levy that in addition to everything else Nietzsche was a Jewish prophet?

What then of the law?—for surely the Law and the Prophets go together. Nietzsche takes almost no notice of the civil law. On the other hand, that branch of the law, the criminal law, which the legal community most disdains was for him the only part of it worth

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Hebrew could shake hands. In Friedrich Nietzsche this aristocratic element which may be hidden in a Christian has been brought to light, in him the Christian's eternal claim for freedom of conscience, for his own priesthood, for justification by his own faith, is no longer used for purposes of destruction and rebellion, but for those of command and creation; in him—and this is the key to the character of this extraordinary man, who both on his father's and mother's side was the descendant of a long line of Protestant Parsons—the Christian and Protestant spirit of anarchy became so strong that he rebelled even against his own fellow-Anarchists, and told them that Anarchy was a low and contemptible thing, and that Revolution was an occupation fit only for superior slaves. But with this event the circle of Christianity has become closed, and the exclusive House of Israel is now under the delightful obligation to make its peace with its once lost and now reforming son.

"The venerable Owner of this old house is still standing on its threshold: his face is pale, his expression careworn, his eyes apparently scanning something far in the distance. The wind—for there is a terrible wind blowing just now—is playing havoc with his long white Jew-beard, but this white Jew-beard of his is growing black again at the end, and even the sad eyes are still capable of quite youthful flashes, as may be noticed at this very moment. For the eyes of the old Jew, apparently so dreamy and so far away, have suddenly become fixed upon something in the distance yonder. The old Jew looks and looks—and then he rubs his eyes—and then he eagerly looks again. And now he is sure of himself. His old and haggard face is lighting up, his stooped figure suddenly becomes more erect, and a tear of Job is seen running over his pale cheek into that long beard of his. For the old Jew has recognized some one coming from afar—some one whom he had missed, but never mentioned, for his Law forbade him to do this—some one, however, for whom he had secretly always mourned, as only the race of the psalmists and the prophets can mourn—and he rushes toward him, and he falls on his neck and he kisses him, and he says to his servants: 'Bring forth the best robe and put it on him, and put a ring on his hand and shoes on his feet. And bring hither the fatted calf and kill it and let us eat and be merry!' AMEN." Levy, Nietzsche in England: an Introductory Essay, in *Thoughts Out of Season*, Part I, pp. XXVI-XXVIII (Vol. 4. THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE, Levy ed., 1924).

3. 1 WERKE 1154 (*Dawn of Day* § 205).

attention. And Nietzsche has certain things to say of the criminal,<sup>4</sup> the administration of criminal justice,<sup>5</sup> and the mutual relations between the criminal and his judges<sup>6</sup> that those with commitments to the subject should not ignore. Nietzsche's business was morality and for him the criminal law is the door to it: moral reformers are successful criminals. Only the great criminal,<sup>7</sup> himself personally worthy of his crime, creates the conditions for moral reform. The very greatest criminals cause the greatest moral upheavals and gain the most far-reaching moral victories.

What do our greatest criminals teach us? Is it not the lesson that our moralities are outmoded?<sup>8</sup> That we must honor the criminal by taking his crime seriously, that is, by ending the conditions which call it into being? Nietzsche insists that our moralities wear out, but do not for that reason become discarded. On the contrary, the

4. "What are we capable of? A man was so tormented all day long by his spoiled and spiteful son that he killed him in the evening and, sighing with relief, said to the rest of the family, 'Now we can sleep in peace.' How do we know what circumstances could drive us to?" 1 WERKE 1200. (*Dawn of Day*, § 336). See also 1 WERKE 885 *et seq.* (*Wanderer and his Shadow*, §§ 22, 28); 1 WERKE 1152, 1207 (*Dawn of Day* §§ 204, 366); 3 WERKE 618 *et seq.* (unpublished fragments of the eighties).

5. 2 WERKE 811-23 (*Genealogy of Morals*, Essay II, §§ 8-14); 2 WERKE 6 *et seq.* (*Joyful Wisdom*, § 43); 3 WERKE 505; 3 WERKE 701 (unpublished fragments of the eighties).

6. "About the Pale Law-breaker  
"You do not want to kill, you judges and sacrificers, unless the animal nods its assent? Look, the pale law-breaker has nodded his assent; his eyes express his great contempt.

"My ego is something which must be mastered; my ego to me is the great contempt of man"—that is what his eyes express.

That he judged himself: that was his highest moment. Do not let the exalted one relapse.

There is no release for him who suffers so much from himself, unless it be speedy death.

Your killing, you judges, should be compassion, not vengefulness. And see to it that as you kill you yourselves justify life.

It is not enough that you become reconciled with him whom you kill. Let your sorrow be love for the Superman: thus you can justify the fact that you are still living.

'Enemy,' you may say, but not 'evil-doer'; 'sick man,' you may say, but not 'scoundrel'; 'fool,' you may say, but not 'sinner.'

And you, you crimson judge, if you were to say aloud everything you had committed in thought, everyone would cry: Away with this excrement, this vermin!" 2 WERKE 303 *et seq.* (*Zarathustra* § I); see also 1 WERKE 888 *et seq.* (*Wanderer and his Shadow* § 24); 1 WERKE 756 *et seq.* (*Human All Too Human*, pt. II § 33).

7. "In our civilized world we become acquainted almost solely with the stunted criminal, the one who is crushed beneath the curse and the contempt of society, distrusting himself, often disparaging and libelling his own deed—a failure-type of criminal. We resist the notion that *all great men were criminals* (in the grand, not the wretched style), that crime is a part of greatness . . ." 3 WERKE 531 (unpublished fragments of the eighties).

8. "Moral changes: Alteration and fermentation are constantly working on morality—the result of those *crimes that have happy endings* (to which, for example, belong all innovations in moral thinking.)" 1 WERKE 1075 (*Dawn of Day* § 98).

longer persisted in, the tougher and coarser they become. The harder do they cling to life.

Nietzsche dares to raise the question whether our moralities must not be experimented with in the same way that we experiment with the physical universe.<sup>9</sup> The methods of science, he thought, must be applied to morality if we are truly to know what we are to do when we confront a moral problem.<sup>10</sup> Science is not morality, to be sure.<sup>11</sup> Science is the study of the *means* to a desired result. Morality is the ensemble of human preferences in action. But surely we cannot afford to neglect the study of the means for achieving a desired moral result. More than this, we must experiment with ends.<sup>12</sup>

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9. "Philosophy, as I have up to this point understood it and lived it, is the voluntary undertaking to search out the abominated and infamous aspects of existence. From the long experience which such a journey through ice and desert gave me, I learned to look differently upon everything that up to now has philosophized; the *hidden* history of philosophy, the psychology of its great names, came to light for me. This became my crucial standard: How much truth can a mind *endure*? How much does he *dare* look at? Error is a form of cowardice; every achievement of insight (*Erkennen*) follows from courage, from hardness toward oneself, from cleanliness toward oneself. An *experimental philosophy* such as I live assumes experimentally even the potentialities of the most rigorous nihilism, which is not to say that it stops with a negation, with a No, with a Will toward No. On the contrary, it wants to come through to its opposite, to a *Dionysian affirmation* of the world as it is, without subtraction, exception or selection—it wants the everlasting circularity, forever the same things, the same logic, the same illogic of entanglement. The highest condition a philosopher can reach: a Dionysian view of existence. My formula for this is *amor fati*." 3 WERKE 834 (unpublished fragments of the eighties).

10. "*Folk-morality and folk-medicine*. The morals which prevail in a community are constantly being worked on by everyone: the majority keep heaping instances for the alleged relation between *cause and consequence*, guilt and punishment, asserting its sound foundation with missionary zeal. A few make fresh observations of actions and consequences, afterward drawing inferences and rules from them; a very few occasionally take offence and hence cause the general faith in a given moral belief to weaken. But all are alike in their totally rough and *unscientific* manner, whether on the question of instances, observations, or objections, whether on demonstration, confirmation, enunciation or confutation of a rule—the substance and the form are both worthless, just as the substance and form of folk-medicine are. Folk-medicine and folk-morality belong in the same category and should no longer be so differently evaluated; both are *extremely dangerous* pseudo-sciences." 1 WERKE 1021 *et seq.* (*Dawn of Day* § 11).

11. "Our physiological and medical sciences, our social and solitude theories, are not yet sufficiently sure of themselves for the task of re-establishing the laws of life and action; yet it is only from them that we may take the foundation stones for new ideals (though not the new ideals themselves)." 1 WERKE 1231 (*Dawn of Day* § 453).

12. "Whoever wants to make moral questions a subject of study just now sees an enormous field of labor open out before him. . . . Supposing all these labors to be accomplished, the most ticklish and critical of all questions would then appear in the foreground: whether science is capable of *providing* the goals for human action after it has proved that it can take them away and annihilate them. And here would be the opportunity for a kind of experimentation which should satisfy every imaginable sort of heroism, centuries of experimentation which might easily place into the shade all the great labors and sacrifices of previous history. Science has not yet built its cyclopean structures; but for this too the time will come." 2 WERKE 41 *et seq.* (*Joyful Wisdom* § 7).

The agonized burden of Nietzsche's thought is precisely the realization of what it means to the moralist to experiment with morality.<sup>13</sup>

13. "About the Way of the Creator

"Would you go into solitude, my brother? Would you seek the way to yourself? Hesitate a little longer and listen to me.

'Whoever searches, easily gets lost himself. All loneliness is guilt'—so speaks the herd. For a long time you were part of the herd.

The voice of the herd will echo in you, too. When you say, 'I no longer have a share in your undivided conscience,' it will sound plaintive and pained.

You see, the undivided conscience gave birth to that pain, and the afterglow of that conscience still illuminates your misery.

But you want to walk the way of your misery because it is the way to yourself? Then show me your authority to do it and your energy!

Are you a new energy and a new authority? A prime motion? A self-starting wheel? Can you compel even stars to swing around you?

Oh, there is much lusting for elevation! There are so many paroxysms of the ambitious! Show me that you are not one of the lustful or the ambitious sort!

Oh, there are so many great thoughts which have no greater effect than bellows—first they blow you up and then make you emptier than before.

You call yourself free? I want to hear your sovereign thought, not that you have escaped from a yoke.

Are you one of those who are entitled to escape from a yoke? There are some who cast off their servitude.

Free from something? What does Zarathustra care? But let your clear eyes show me you are free for something!

Can you give yourself your own evil and your own good? Can you suspend your own will over yourself as if it were law? Can you be your own judge and avenger of your own law?

It is terrible to be alone with the judge and the avenger of one's own law. Thus is a star cast out into the void, into the icy breath of solitude.

Today you are still suffering from the many, you individual. Today you still have all your courage and your hopes.

But someday solitude will weary you, someday your pride will cringe and your courage will set your teeth on edge. Someday you will scream, 'I am alone!'

Someday you will no longer see your elevation but your baseness all too clearly; your sublimity will frighten you like a ghost. Someday you will cry, 'All things are false!'

There are feelings which try to kill the solitary man; if they do not succeed, well then, they must die themselves. But are you capable of being a murderer?

Do you know the word 'contempt,' my brother? Or the torment of your fairmindedness to be fair to those who have contempt for you?

You will compel many to change their opinion of you: for that they will hold you to account. You came close to them and yet you did not stop. They'll never forgive you for that.

You pass them on your way up, but the higher you climb, the smaller you look to envious eyes. And the man who can fly is hated the most.

'How could you be fair to me,' you will have to say, 'I am choosing your unfairness as my lot.'

They'll throw unfairness and filth at the solitary man; but, my brother, if you would be a star, you cannot stop shining for them on that account.

And beware of the good and the just! They like to crucify those who invent their own virtues—they hate the solitary man.

Beware also of those who are innocently simple-minded! Everything which is not simple-minded, to them is sacrilegious. Also they like to play with fire—with witch-burning, for example.

And beware, moreover, of the assaults your own love will make on you. The solitary man too quickly extends his hand when he meets someone.

There are some to whom you may not extend your hand—at most your paw. And I would that your paw had claws as well.

But the worst enemy you can meet will always be you; you lie in wait for

In law, we have lately become accustomed to the position that since law is a means of social control, it can be made a better or a worse means; that law must justify itself by its results. The teleological or purposive character of law is one that was recognized in antiquity. Greek philosophy took the question of the nature of law as a central problem. For the Sophists, law is a convention and not a lofty one at that. It is a conspiracy of the weak against the strong. Note however that to regard law as conventional was the degraded view of the nature of law. Beginning with Socrates and lasting until modern times a contrary view of the nature of law always enjoyed the support of the most distinguished moralists. This view held that law is one throughout the physical and moral universe; that the law of nature is eternal and perfect; that that part of law which changes (the positive law) is law in a lesser or meaner sense. Indeed, positive law derives its authority (what little authority it has) from the higher law of nature.

Theories of natural law being based on moralities have amazing pertinacity. This is precisely Nietzsche's point: they do not know when they are dead.<sup>14</sup> They have the protection of collective authority which itself endures for eons. Indeed until relatively recently it was possible to believe that the law of nature endured forever and bound equally all mankind.<sup>15</sup> It is still customary for us to assume that all

yourself in caves and woods.

You solitary one, you are on the way to yourself. And your way lies past yourself, and past your seven devils!

You will be a heretic in your own eyes and a witch and a sooth-sayer and a fool and a doubter and unholy and a scoundrel.

You must want to burn in your own flame: how else would you be renewed, if you have not first turned to ashes.

You solitary one, you go the way of the creator: you would create a god for yourself out of your seven devils.

You solitary one, you go the way of the lover: you love yourself and have contempt for yourself as only a lover can feel contempt.

Out of his contempt, the lover must create! What do you know about love if you never had contempt for the thing you loved.

Go to your solitude with your love and your creativity, my brother; much later only will justice limp after you.

Go to your solitude, accompanied by my tears, my brother. I love him who would create something beyond himself and thus is engulfed.—

Thus spoke Zarathustra." 2 WERKE 325 *et seq.*

14. "It is a new *justice*, however, that is necessary! And a new war cry! And new philosophers! The moral earth, too, is round! The moral earth too has its antipodes! The antipodes too have their right to exist! There is still another world to discover—and more than one! Aboard ship, ye philosophers!" 2 WERKE 168 (*Joyful Wisdom* § 289).

15. "*Law of Nature: A Phrase of Superstition.* When you speak so rapturously of lawfulness in nature, you must either assume that all natural things follow their law in free, voluntary obedience—in which case you are admiring the morality of nature—or the thing that enchants you is the notion of a creative mechanic who has made the most cunning imaginable clockwork, ornamented with living things. Necessity in nature is humanized by the concept of 'lawfulness' and becomes a last refuge for mythological reveries." 1 WERKE 747 (*Human All Too Human*, pt. II, § 9).

peoples who do not subscribe to the common moral opinions of Western man should be taught to do so. It is supposed that all moralities have a common base and that that base is the forms of Western culture. Indeed as machine civilization and the political institutions of democracy and socialism penetrate the whole world, it is assumed that these systems have at least a common moral base and that this common base is the universal essence of morality.

In contrast with this attitude is the assumption of teleological jurisprudence that all law is purposive and provisional: a means to an end. It follows that none of it has an absolute character. This assumption is in fact challenged by two contrasting theories. One purports to seek factual elements in juridical situations common throughout the world. The common elements are then taken as an empirical base for a uniform system of world law. Such is the assumption made by empirical investigators in international law. They are looking for a modern *jus gentium*. The doctrine is opposed by those who seek rather a common *moral* basis for a universal law of nature, a modern *jus naturae*. Nietzsche would have been opposed to each of them,<sup>16</sup> the empirical as well as the natural law investigator, for each seeks to discover a common enduring morality to govern mankind. The first, presumably, if they were to find common elements of juridical practice throughout the world would insist that these *ought* to govern mankind. The others come to their eternal moral principles direct.

For each of them and for all of us Nietzsche had bad news: that God is dead, and that our moralities are dying too. Hence it behooves us to find a new morality to live by. Although Nietzsche disclaimed any intention to tell us what the new morality should consist of, almost every page of his writings belies the disclaimer. He does indeed tell us, again and again, what the new order of morality should look like. But he repeats just as often: do not take it on his say-so. There is no escaping the obligation to experiment with morality. Our only choice is to experiment blindly, that is to say, to let morality happen to us, or to act with what intelligence we have.

The implications for experimental jurisprudence are critical. If you would experiment to discover how law may best serve its ends, you must first (or last) experiment to find out what these ends are. How should we go about making our moral-legal experiments? Nietzsche's writings abound in hints on how to begin to ascertain what morals suit the kind of man we hope to produce.

Take the criminal law as an example. The criminal has made a sacrifice (it may have been his life) to tell us that a certain legal or

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16. ". . . legal conditions are temporary *means* counselled by good judgment, not ends." 1 WERKE 889 (*Wanderer and his Shadow* § 26).

moral rule is wrong. Do we take him seriously? Do we admit in Nietzsche's words that the criminal is worthy of his crime? That he is a moral experimenter under the most appalling odds? No, we do not. Customarily, we condemn his action as wrong and seek for means to counteract it and to prevent its repetition. In other words we try to teach the criminal something through his crime instead of learning something ourselves. Is this not perverse? There was a time (not very long ago) when we treated the medical investigator in precisely the same manner. To the extent that he experimented, he was taken to be a criminal. Suppose however that we shift our view of morality—it is certainly as important as our health—and say that we will heartily accept the best moral conditions and the loftiest moral rules that investigation can disclose. Would not our criminals then become heroes; pioneers in the realm of the human spirit? We have already seen criminals (the fathers of the Constitution) become the beloved heroes of their country. We have seen loathsome heretics become great scientists by no action of their own but by a change in the moral standards of their time. As illness teaches the way to health, crime points out the path to justice. In this view not the accused but his judges are the criminal—the judge who cuts off moral inquiry by announcing the moral rule without scientific investigation. But with the judge stand condemned all of us. Do we not all think we know which moral rules are not only right but even inevitable? And do we not all succumb to the "herd instinct" to preserve these ancient sentiments at all costs?<sup>17</sup> Certainly, if we do, we may reasonably expect the "moral approbation" of the multitude. If on the other hand we do not, we are criminals and woe unto us if we are not successful criminals.

We need not accept Nietzsche's values in order to accept his value. We need not accept his belief that of all human goods morality is nearest to the ideal of health. We need not accept his ideal of individual solitude, his personal crochets, his outrageous consciously contrived megalomania, nor his insistence on teaching by every hook or crook available. We may forgive him for these idiosyncrasies but can we forgive him for announcing the death of God? Yes, I think

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17. "The light that finally dawns upon philosophers: they must not only cease receiving their concepts as though they were gifts; they must not merely clean them up and clarify them; instead they must first of all *make* them, *create* them, pose them and persuade men to them. Up to now, on the whole, philosophers have trusted their concepts as though they were a wonderful *dowry* from some kind of wonder-world, but they've turned out to be the heritage of our most remote ancestors, the stupidest as well as the most competent. This *piety toward whatever we find in ourselves* is probably part of the moral element of cognition (Erkennen). Just at present we need absolute scepticism toward all inherited concepts (as was *possibly* possessed once by a certain philosopher—who else but Plato—who of course *taught* the exact opposite!)." 3 WERKE 844 (unpublished fragments of the eighties).

we can, however steadfast our faith may be in a Divine Being. For in Nietzsche we witness not only the most awful tragedy that can happen to a sensitive soul, the loss of faith, but at the same time a surmounting of that tragedy<sup>18</sup> by a sublime courage which accepts the worst possible aspects of a Godless universe and the meanest qualities of a degraded species of being, man, who somehow realizes that he is only a depraved caricature of his potential self. Could anyone who did not recognize such a fate as already his possibly ask for it? Does anyone ever ask for a loss of faith? More often than he announces the death of old gods, Nietzsche heralds the birth of new ones.<sup>19</sup> And is this not precisely what many of us mean by God? At any rate no devout Christian for whom God has died and risen again will treat lightly the plight of an anguished soul whose God is dead forever. After all, as Carl G. Jung has said, it was not Wagner but Nietzsche himself who broke before the Cross.<sup>20</sup>

We need not accept Nietzsche's strictures against democracy; in fact, as it seems to me, we cannot. And yet do we not have the obligation to examine democracy and its workings with the same cold scrutiny that Nietzsche gave it? Who is there today to carry criticism to the limit of challenging the very foundations of democracy? Who can be trusted, who can trust himself to do this job? Is it not the ultimate triumph of Fascism, its "revenge" Nietzsche would call it, that democracy must not be challenged by those who would live by it? This conspiracy of silence is precisely what its most dangerous enemies could wish for it most heartily. Only thus could they be assured of its ultimate destruction.

Can one safely criticize both Pro- and Anti-Semites<sup>20a</sup> today? Can one look with Nietzsche's awful "seeing eye" upon the most portentous issue dividing the human race today, namely, the biological differences of *color* in the world's peoples? Since the dawn of history

18. "Natural view of the pious and impious: A truly pious man must be to us an object of veneration, but likewise a wholly sincere, resolute impious man. In the presence of the latter we are as though near high mountains where the mightiest rivers have their source; with the pious as though under vigorous, broad-shading unmoving trees." 1 WERKE 772 (*Human All Too Human*, pt. II, § 93).

19. "And how many new gods are still possible! Even to me alone, me in whom the religious, i.e., the god-creating instinct often gets lively at the least opportune time—how different, how variously the divine has revealed itself to me each separate time. So many strange things have come into my ken in those timeless moments which fall into one's life as though they fell from the moon, when one simply no longer knows how old one is already or how young one will yet be. I should never doubt that there are many sorts of gods." 3 WERKE 838 (unpublished fragments of the eighties).

20. JUNG, *TWO ESSAYS ON ANALYTICAL PSYCHOLOGY* 34 (Bollingen Series No. 20, 1953).

20a. I do not mean to intimate that Nietzsche was ever "fair-minded" about what he thought to be evil. On the contrary, he was most passionately partisan, particularly against Anti-Semites. See KAUFMANN, *op. cit. supra*, note 1, at 40, 256.

white men have used religion and morality as the surest weapons in their fight to maintain color supremacy. The Bible is an account of the origin of a white race; the question of the origin or even the existence of the colored races is largely ignored. White Aryans used the Hindu religion to maintain the caste system; and caste means color. I believe Nietzsche would be inclined to think that the present dispute between the North and the South on the color question is merely one of degree. Granted that this difference is a serious one—all *color* differences in the world of contemporary politics are serious differences. Still, Negroes in the North occupy only inferior positions in government and industry. Social equality does not exist even as an ideal. These speculations in the Nietzschean vein and others more to the point are what might be expected to emerge from a realistic jurisprudence that could unearth out of our prevailing moralities the manifold color prejudices hidden in them.

Can we refuse to admit with Nietzsche that modern morality must become individual rather than collective?<sup>21</sup> This is but a continuation and intensification of the central moral message of Christianity: the responsibility of the individual for his own salvation. The real question here is this: can we go beyond Christianity and permit, nay, insist upon, moral experimentation by the individual? Can we lift or try to lift from the individual the heavy burden of guilt which

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21. "The individual shall sacrifice himself—such is the commandment of the morality of mores. These moralists, on the other hand, who, following in the footsteps of Socrates, urge the morality of self-control and abstinence upon the *individual*, as being to the greatest *advantage to himself*, his most personal key to happiness, are *exceptions*. If they seem otherwise to us, it is because we have been educated under their influence. They all are walking a new road, accompanied by complete condemnation of all the representatives of the morality of mores; they have detached themselves from the community; they are the immoral ones, evil in the deepest sense of the word. Thus to a virtuous Roman of the old school every Christian whose 'foremost goal is his *own* salvation' must have appeared evil. Wherever there is a community and consequently a morality of mores, there is found the idea that the punishment for every offence against mores falls, above all, on the community itself. I mean that supernatural punishment, the visitations and limits of which are so difficult to comprehend and which form the subject of so much anxious investigation and superstitious fear. The community can insist that each individual make amends to another individual or to the community itself for an immediate injury which may have followed upon an action of his. It can also wreak a kind of vengeance on the individual for having caused the clouds and storm of divine wrath, as supposed effects of his action, to gather over the heads of the community. But it nonetheless feels the guilt of the individual chiefly as its *own* guilt and bears his punishment as its own. 'Our morality has grown slack if such deeds are possible'—such is the plaintive cry in the soul of each member. Each individual action, each individual mode of thinking moves us to shudder. It is incalculable how much suffering just the rarer, choicer, and more original minds must have undergone in the course of history because they were ever being looked upon as the evil and dangerous ones, worse—because they felt *themselves* as such. Originality of every kind has acquired a bad conscience under the supreme rule of the morality of mores. Up to this very moment the heaven of the best is far gloomier than it need be." I WERKE 1020 *et seq.* (*Dawn of Day* § 9).

Christianity imposes on every moral experimenter? Is it not the function of law to take responsibility for organizing this revolution in the meaning and effect of moral experiment? Can we not risk extending legal protection to cover the moral right and the duty of the individual to experiment with morality? Presently our law protects from governmental oppression experimental thought and even experimental speech, including thoughts and words aiming at moral revolution. Can we envisage a legal system so advanced that it can find a place for moral experiments in *action*?<sup>22</sup> The inference then would be that we must labor to make the kind of world in which the moral agent is as free to experiment with morality as is the scientist in the realm of nature.

#### THE INTELLECTUALS

Nietzsche, the great existentialist, the great acceptor of life in all its bitterness, suffering and woe—the man whose test of a yea-sayer to life was this: suppose you knew that in all eternity you would be doomed to relive just this horrible life over again and again, would you still say “yes” to it?—says to us intellectuals: Do you now accept the evils, the wretchednesses, the hatreds, the mistakes of life as challenges to test your mettle? Even if you knew that you would have to repeat them for ever and ever?

Nietzsche's challenge is issued to the intellectual. The intellectual now has his turn to rule the earth. How well can he do it? This much is certain: he must do it intellectually. The aristocratic warrior had his turn and passed on. It would be well to conserve his virtues. If not, the intellectual may have to repeat the hard lessons which the warrior learned in a school whose curriculum was by no means idyllic. But however attractive the aristocratic virtues may appear to the intellectual, they must remain for him no more than an inspiration. His real work is with the intellect; he must think. Nietzsche announces that the countless millenia during which man did his work unconscious of his motives and his goals are over. Contemporary

22. “*Free-doers and free-thinkers*. Free-doers are at a disadvantage as compared with free-thinkers, because mankind suffers more visibly from the consequences of actions than of ideas. Yet if we consider that they, like the others, seek their satisfaction, and that the mere contemplation and utterance of forbidden matters afford such satisfaction to free-thinkers, then we must say that as to motives there is no difference between them. And as to consequences, the case—provided we do not judge, as the world generally does, from the most immediate outside appearance only—will actually go against the free-thinker. We have to take back a great deal of the disparagement which mankind has allotted to all those who with a *deed* have broken through the bondage of some moral custom. Our very word for them is *Verbrecher*” [i.e., ‘criminal.’ The German word means, of course, simply ‘breaker,’ ‘demolisher.’ There is none of the etymological implication of the Anglo-French-Latin ‘crime.’ Tr.] 1 WERKE 1028 (*Dawn of Day* § 20).

students of human nature concur in this judgment. Not alone psychoanalysis in the realm of the mind, and socialism in the sphere of economic and political action, but the law as well agree. We in law no longer believe that the blind instinctive forces of the unconscious can be trusted to guide us in the pursuit of justice. We must take thought; we must investigate, question and test even our most fundamental beliefs. In brief, we must admit science to our enterprise and thus intellectualize the whole process of law-making and the administration of justice.

It is quite hard for us to realize how highly intellectualized the legal process has become in the last century. It is equally difficult to perceive how sophisticated the law has gotten, how self-conscious, how self-critical. As compared with legal processes for example, the business of science is still based on naive faith and unconscious motivations that would do credit to a Renaissance adventurer in search of new worlds. Even scientists of note hardly question the collective sentiment of the craft that all "scientificating" is an unqualified good. So far has this naive faith progressed that scientists feel exempt from responsibility for the harm they produce. Characteristically human as they are, however, they do like to receive credit for the good that is thought to follow from their work and they prefer not to question whether the effects of scientific knowledge of a certain sort may be harmful. But lawyers find it natural to have the question raised whether law is or is not the appropriate means by which a given social problem should be attacked. Roscoe Pound long ago spoke of the "Limits of Effective Legal Action."<sup>23</sup> Can one possibly imagine a great scientist raising in routine fashion the problem of the Effective Limits of Scientific Truth?<sup>24</sup> There was a time when it was regarded as impious to question whether a given law should be or not be. The matter was decided on high; it was sacred, or as we might say today, it issued from the unconscious. But for law, that day is long past. Our intellectuals see the whole panorama of law as a means to an end, a device for social control. Only the age-old instinctive distrust of the dangers of intellectualism and of the limitations of the conscious mind remain over to guard us from intellectual *hybris*. The natural law is always with us as a warning against intellectual arrogance. Indeed, no one is more aware than Nietzsche of the harm which results when we are cut loose from our instinctive roots. So real and pressing did the danger loom to Nietzsche and so urgent were his messages to this end, that there is abroad

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23. 27 INT'L J. ETHICS 150 (1917).

24. "Few in truth serve truth, because only a few have the pure will to be just, and of these again only a very few have the strength to perform justly." I WERKE 244 (*Thoughts Out of Season*, pt. II, § 6).

a popular notion that Nietzsche advocated unbridled reliance upon and enjoyment of the instincts. Just the reverse is the case. Still the caveat is so exigent that it does seem to override the rule.

Our intellectuals, and especially our legal intellectuals, find that Nietzsche's thinking is more and more to the point as legal consciousness becomes more highly self-conscious. Legal practice in a world become politically conscious inevitably drives law toward consciousness also. When men consciously set out to make governments, law must necessarily rise to the level of consciousness to meet the new tasks. Judicial decision, which can still pretend at times to be guided by the immemorial oracles, gives way in large part to conscious legislation. Finally, the question of whether judges do or do not legislate is seen to be an anachronism, and is quietly dropped (as Cardozo so deftly did) as a matter which is no longer even a problem.

We all admit that law-making is a conscious intellectual process. Do we also admit that morality should become a matter of intellectual choice? I cannot speak for the legal community in this respect. No one has authorized me to do so and I recognize that the question is a delicate one. Still I believe I can say that of all the intellectual groups in the culture the legal community is the least likely to be shocked by the proposal. Considering our stake in the outcome and what is apt to happen to law if morality becomes truly experimental, I think that of all the intellectuals attracted by Nietzsche's proposal to experimentalize morality the legal intellectual has the most to gain.

#### THE WILL TO POWER

This philosophical term is the tag by which Nietzsche is best known to American readers. The volume entitled *The Will to Power* is the collection of his writings that is best remembered by those who love Nietzsche not. Even today it is the most heavily thumbed of the series of English translations of Nietzsche's work. *The Will to Power* was of course not a book by Nietzsche at all. After his madness had set in, his wretched sister, Elisabeth Förster, herself the wife of a pre-Hitlerian anti-semitic who tried to found a Fascist state in South America, concocted the book out of fragments of Nietzsche's writings. She distorted and falsified the actual Nietzschean documents. The result was the proto-fascist diatribe which she herself called *The Will to Power*. The "book" has lately been dissolved back into the bits and pieces which Nietzsche left.<sup>25</sup>

The term "will to power" is to Nietzsche what "water" was to Thales, "flux" to Heraclitus, "idea" to Plato, "id" to Freud, or "libido"

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25. See Schlechta's philological appendix to the above-used Nietzsche edition, 3 WERKE 1393.

to Jung. It is for him the most extensive category conceivable. I do not mean that one philosopher's basic conception is the same as another's. On the contrary, each conceives his basic term as solely his (at least his treatment of it is thought of as unique). So too Nietzsche. Nietzsche was passionately insistent that the fundamental basis of all action was the will to gain more power. But this is almost a physical conception—like saying that all things strive to gain more energy.<sup>26</sup> It is not a moral principle. Since all things inevitably strive for power and more and more power it would be fatuous to say that they *ought* to exert their wills to gain greater power. The term is a term of description, not exhortation. It carries with it moral implications to be sure. One of these is a denial of freedom of the will. The will is not at the service of anyone's whim, choice or resolve.

For myself, I think of Nietzsche's treatment of the will to power in connection with Adlerian individual psychology.<sup>27</sup> Whole sections of the writings of Alfred Adler can be illustrated in the writings of Nietzsche and vice versa. Another analogue in analytical psychology is the "introverted character" as outlined in the typology of C. G. Jung.<sup>28</sup> Nietzsche was well aware that the twentieth century was to be the century of psychology, that its ills were destined to be mental, and that the chief concern of contemporary culture was to be human nature itself. Although he was deeply sympathetic with science as the generalized pursuit of truth, he foresaw clearly that its methods were wholly inadequate to deal with the complex character of human nature and that an immense amount of free speculation on the psychic nature of man must precede any methodical scientific investigation into this "ultimate confusion." He therefore spent much of his substance in a long series of aphorisms on the nature of human nature, flashing insights into the springs of human action. He knew that he had only a short time in which to bequeath to the world the store of wisdom which had been vouchsafed him and he worked constantly within the shadow of death.

There are many jurisprudential lessons to be learned from Nietz-

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26. "My theory would be: that *Will to Power* is the primitive affect-form, that all other affects are only manifestations or developments of it; that considerable light is shed if in place of individual 'happiness' (the pursuit of which is said to be dear to all living creatures) we say 'power'—the pursuit of power, of *more* power. (Pleasure is only a symptom of the feeling that power has been attained—a consciousness of difference—pleasure is not pursued but pleasure occurs when the pursuit has attained its end; pleasure accompanies; it does not motivate); that all motivating energy is will to power, that there is no physical, dynamic or psychic energy other than this." 3 WERKE 750 (unpublished fragments of the eighties).

27. See particularly ANSPACHER, *THE INDIVIDUAL PSYCHOLOGY OF ALFRED ADLER*, (1956) which contains an Adler Bibliography. See also ADLER & DEUTSCH, *ESSAYS IN INDIVIDUAL PSYCHOLOGY: CONTEMPORARY APPLICATIONS OF ALFRED ADLER'S THEORIES*, (1959).

28. JUNG, *TWO ESSAYS ON ANALYTICAL PSYCHOLOGY* 29 *et seq.* (1953).

sche's conception of the will to power. Foremost is the inference to be drawn from it that the will is not free. Modern Western jurisprudence of course is based on the opposite assumption. So much so, that it would be difficult for us to conceive of a system of law resting on moral determinism. Not alone the whole of our criminal law but much of civil law as well would have to be fundamentally re-cast. Yet there are many indications that the civil law at least could get along without the notion of freedom of the will. I mention only the theory of objective assent in contracts, liability without fault in torts, the growing tendency of legislation to ignore motivation and to concentrate on action, the manifestly objective character of social welfare law which is based essentially on need rather than on merit, worth, guilt, intention, moral responsibility or other states of mind ordinarily associated with freedom of the will. Finally, the growing law of status infers legal conclusions not from the exercise of the agent's freedom of action but from the kind of person he is, or the nature of the group to which he belongs. Here again law in practice is ahead of law in theory and Nietzsche, as was customary with him, was ahead of both. In his lifetime, jurisprudential theories based on freedom of the will were at their zenith. And it cannot yet be said that any thorough-going repudiation of the hypothesis of freedom of the will has been worked out in the philosophy of law. One who proceeds from the hypothesis of the non-freedom of the human will would discover that the whole corpus of the law would have to be re-worked. In keeping with the Nietzschean philosophy, it is quite evident that this "transvaluation of all legal values" would itself not be a matter of free choice. Stern necessity forces the task upon us in the course of time. Our choice, as Spinoza would say, lies in our decision to recognize the inevitable and to conform to its precepts. Kant said that freedom of the will could neither be proved nor disproved. This left the matter open so far as human cognition was concerned. But man's moral nature forced him to postulate freedom as an inescapable condition of the moral life. Without freedom, Kant felt, morality would have no meaning. Nietzsche chose the other postulate, namely, determinism and challenged the world to remake its morals in accordance with this view. That tradition in Western culture is at least as old as Democritus. It is the immemorial moral base of the Eastern religions. Perhaps the West is doomed to accept this along with numerous other aspects of Oriental psychology and religion in exchange for extending to the Oriental and African peoples the doubtful blessings of machine culture, together with the political systems of democracy and communism.

## NIETZSCHE AS AUTHOR

I should not like to rest the matter of Nietzsche's importance for contemporary jurisprudence on the value to it of his revolutionary ideas alone. There are more questions of vital importance to jurisprudence than any of us can possibly attend to. Anthropology, economics, psychology, sociology, statistics, psychoanalysis, philosophy all press on some part or other of the law. We are haunted by the number of things left undone at the end of the day, not merely things unsaid or untaught, but even unthought. Why should we crowd into the dilapidated, overpopulated and understaffed mansions we call our minds so unruly a tenant as Nietzsche? I answer that we should let him in because he is both absolutely honest and also highly talented. This combination is rare today. Our hideous money culture buys up talent and turns it loose in the form of propaganda. Where can one get unbought, unbiased, wholly honest and profound criticism of the delicate weak points of our age: its moralities and its religions? Gifted people stay away from these subjects; those who do handle them are safe. I do not mean to intimate that Nietzsche was unbiased. He was fearfully biased—but his bias was his own. Moreover he remains the only high-class myth-shatterer and culture-deflater who is also good fun. The one form of nourishment the modern intellectual lacks more than anything else is entertainment. Nietzsche is sparkling good fun at a very high intellectual level. The keenest, the subtlest, and most honest psychologist in modern times is ready to tickle us with the foibles and vanities of our friends, our enemies, our entourage generally (could it possibly be even ourselves?). Nietzsche was a psychoanalyst before psychoanalysis. His probing lacks the heavy-handed seriousness of the head-shrinkers; it is not for that reason any the less profound. Above all things else, Nietzsche was never dull. He regarded dullness as the worst conceivable offense against good taste. When dullness was combined with ponderous learning or academic pretension Nietzsche was particularly outraged. He labored to perfect a concise and dramatic way of getting his thought across in aphorisms. Where connected discourse was in order, he kept it short and to the point. Elsewhere he used the prose poem. *Zarathustra* is the best example.

I am told that the early English translations of Nietzsche's writings are quite untrustworthy. Certainly they can hardly sustain his reputation as a modern literary figure of first importance. Fortunately, newer translations are appearing. Those I know of are mentioned in a note.<sup>29</sup> In the meantime, we can hope that the general estimate

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29. Translations of Nietzsche into English, 1950-1960: PORTABLE NIETZSCHE, (Viking ed., Kaufmann, transl. 1954); BEYOND GOOD AND EVIL, (M. Cowan, transl. 1955); BIRTH OF TRAGEDY and THE GENEALOGY OF MORALS, (F. Golffing

of Nietzsche as a ranting atheist and a revolutionary madman will slowly be corrected, though the pioneering efforts of James G. Huneker and Henry L. Mencken in this direction are already spent. Nietzsche himself predicted that he would not be appreciated for a hundred years. Perhaps we in America shall have the honor of making that prophecy come true. The intellectuals of the rest of the world seem to have anticipated us by half a century.

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transl. 1956); *THUS SPOKE ZARATHUSTRA*, (M. Cowan transl. 1957); *UNPUBLISHED LETTERS*, (Leidecker transl. 1959). There is a revision of A. Tille's translation of *Thus Spoke Zarathustra* by M. M. Bozman, issued as part of the Everyman's Library series in 1958 and a new translation of *The Use and Abuse of History* by Adrian Collins, published in 1957. I have seen neither of these two translations.

