

NIETZSCHE AND THE LAW OF THE “THE OTHER”: THE JEW IN
REFRACTION

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ABSTRACT

This article asks what Nietzsche might tell us about the possibility and conditions of having knowledge of the legal other or “the Other” in law.^{††} Although not a familiar formulation, this line of inquiry must be permitted to take shape because it goes directly to the most basic theoretical conundrum of comparative law. This conundrum lies well beyond the moribund debate over the purported “commensurability” or “incommensurability” of differing legal “systems” or “traditions.” Instead it takes comparative lawyers to task by asking them to explain how they might know, or hope to have knowledge of legal otherness. In this article, I will attempt to furnish a preliminary and wholly tentative answer to this conundrum by mapping Nietzsche’s comparison of the Jewish and Christian legal interpretive traditions.

The notion of “the law,” will be invoked in two overlapping, albeit distinct, senses. First, I will draw on Thus Spoke Zarathustra (1885) (“TSZ”) and Zarathustra’s breaking of the tables of law as a representation of the generative quality of legal re-inscription.¹ Specifically, I will argue that the early Zionist drive toward a new cultural, linguistic, and political way of being was demonstrative of particular ethos of joyful destruction. Second, I will argue that the narrative developed in the Genealogy of Morals (1887) (hereinafter, “GM”) fuses the archetypal Gentile “Self” and Jewish “Other” in the annals of European history. Both lines of analysis consider how

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¹ Peter Goodrich & Mariana Valverde, *Introduction*, in NIETZSCHE AND LEGAL THEORY: HALF-WRITTEN LAWS 1, 10-16 (P. Goodrich & M. Valverde eds., 2005).

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legality and the law is engaged in the discernment of truth and the epistemological conditions of knowing or having knowledge. The article will conclude by considering the possibility that knowledge of “the Legal Other,” at least as understood via the Nietzschean ocular, might be obfuscated rather than elucidated by the juridical and social sciences.

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I. OVERCOMING OBJECTIONS: WHAT CAN NIETZSCHE TELL US ABOUT “THE LAW”?

Prior to entering a substantive analysis of Nietzsche’s potential contribution to the field of comparative legal theory, I am going to address the concerns of the skeptical reader (or at minimum, render him or her skeptical at a higher level!). Such a skeptical reader might be anticipated to ask: what can Nietzsche tell us about the law? Nietzsche’s name is admittedly not among the favorites of jurisprudence textbooks. It could even be said that with the notable exception of GM II, he rarely engages, directly or explicitly, with questions immediately discernable as “*legal*.” Nietzsche does not inquire into the idea of juridical authority—at least not in the manner in which it is usually conceived. The analytical jurist will surely remark that Nietzsche’s polemical style and iconoclastic resistance to the logical formalism make him an unlikely candidate for promotion to the jurisprudential canon. Such a visceral response, would, quite naturally, stem from the belief that Nietzsche was, at best, an *extra-legal* thinker, or at worst, a pronouncedly *anti-legal* thinker.

An immediate conceptual problem presents itself in the skeptic’s query. Namely, that we can neither consider, nor even think, what is meant by the quality of *extra*, or *anti*-legality, unless we first clarify what is meant by “*legality*,” and more generally by “*law*.” This intellectual thicket cannot be avoided, because it is precisely the thicket into which Nietzsche plunged. For Nietzsche, the law is both that which destroys and posits anew: “If a temple is to be erected *a temple must be destroyed*: that is the law—let anyone who can show me a case in which it is not fulfilled!”²

Nietzsche cannot be said to be anti-legal, provided that *law* is understood in its proper value-positing sense. Nietzsche elevates the value-positing character of law to the pinnacle of the western inheritance. Nietzsche’s typology depends completely on the Dionysian energy released in the cycle of destroying and positing

² Friedrich Nietzsche, *On the Genealogy of Morals*, in BASIC WRITINGS OF NIETZSCHE 531 (Walter Kaufmann trans. & ed., 2000) [hereinafter GM] (N.B.: *Genealogy of Morals* citations throughout are to this volume unless otherwise stated); see also FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 75 (D. Smith trans., 1996) (I am consciously preferring Walter Kaufmann’s awkward translation here over Douglas Smith’s even more awkwardly less Jewish and more Pagan: “In order for a shrine to be set up, *another shrine must be broken into pieces*: that is the law—show me the cases where it is not so!”).

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anew—a process which is embodied in the will to power. This is what Nietzsche takes to be *law* in a meaningful sense.³

Even when understood in this sense, liberal jurists, in particular, might maintain the charge of anti-legalism against Nietzsche. Such vehemence would be in keeping with the liberal tendency to conflate conditions of legality with the conditions of liberalism itself.⁴ Nietzsche hated nothing more than the liberal triumvirate of rationalism, commerce, and scientism.⁵ Despite our reflexive tendency to think of law in the precise spaces between naturalism, rationalism, and commerce—the locus of liberal legalism—we must imagine, when reading Nietzsche, a different character of law and legality. For Nietzsche, “*the Law*” and “*the State*,” in their formalistic and juristic senses are life-destroying forces,⁶ both of which are embodied and sustained by the logic of universalism and the imposition of the particularized subject-object relation which is inherent to scientism.⁷ Understood in this way, Nietzsche is definitively both *extra* and *anti*-legal.

Despite his diametrical opposition to liberal legalism and scientism, Nietzsche cannot be said to oppose positive law outright. In fact, he treats all textual artifacts—legal or otherwise, provided they embody a noble and active impulse—with reverence.⁸ In the course of this dissertation, it will be argued that the question of textual artifacts, legal or otherwise, and the status of their treatment and interpretation is the critical fault line upon which the distinction between the European “*Self*” and the European “*Other*” is consistently laid bare. With the reader’s patience, therefore, I prefer not to answer the

³ Friedrich Nietzsche, *Thus Spoke Zarathustra*, in THE PORTABLE NIETZSCHE 175 (Walter Kaufmann trans., Viking Penguin 1982) [hereinafter TSZ] (N.B.: *Thus Spoke Zarathustra* citations throughout are to this volume unless otherwise stated); see also *id.* at 308-27.

⁴ Friedrich Nietzsche, *Beyond Good and Evil*, in BASIC WRITINGS OF NIETZSCHE 239 (Walter Kaufmann trans. & ed., 2000) [hereinafter BGE] (N.B.: *Beyond Good and Evil* citations throughout are to this volume unless otherwise stated).

⁵ GM II, 1, *supra* note 2, at 493; GM III, 24-25, *supra* note 2, at 588-89.

⁶ TSZ I, “On the New Idol,” *supra* note 3, at 160 (famously describing “*the State*” as the “coldest of all cold monsters”); see also TSZ II, “On Great Events,” *supra* note 3, at 244.

⁷ See, e.g., BGE I, 2, *supra* note 4, at 200; BGE I, 6, *supra* note 4, at 204; BGE II, 24, *supra* note 4, at 225; BGE II, 30, *supra* note 4, at 232; BGE III, 54, *supra* note 4, at 256; see also BGE II, 41, *supra* note 4, at 242 n.25; (Kaufmann’s notation on Nietzsche’s anti-science polemic reminds us that Nietzsche gave up his own beloved science, classical philology, to be free and to write).

⁸ I am, of course, thinking of the Old Testament here. See, e.g., BGE III, 52, *supra* note 4, at 255-56.

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question of what Nietzsche can tell us about the law in a perfunctory manner. Instead, I will probe the conditions, potentialities, and hidden corners of this question throughout and alongside the broader query: “how can we know the legal other?”

II. A QUESTION OF LAW (COMPARATIVE OR OTHERWISE)

Above all, Nietzsche must be appreciated for his capacity to uncover and evoke the “*mise- en-scène* of man” and “*Truth*.”⁹ The difficulty of conceiving of “*Truth*,” in its natural or primordial sense, lies immediately in the limits and conditions of rational discourse—a set of limits and conditions, which ape almost exactly those of the theocratic discourse which rationalism so boisterously purported to replace.¹⁰ Martin Heidegger describes Nietzsche as *the* culminating metaphysician, precisely because he afforded scientific truth no greater deference than theocratic truth.¹¹

A. *Law and Truth: Against Legal Scientism*

Jurists, like scientists and theologians, are interested in the idea of truth. This is because law, like science and religion, understands itself as a discourse of truth. Discourses of truth are inherently metaphysical because they delineate the particular conditions and parameters according to which truth may be recognized and attributed value.¹² The metaphysical character of both legal practice and functionalist comparison are clear. In each case, the jurist may recognize value or the character truthfulness only in accordance with preexisting and established rules. All legal scientism, regardless of methodological pretensions, is symptomatic of a nihilistic will to truth.¹³ Heidegger understood this aspect of Nietzsche’s thought better than anyone and summarizes it in a tripartite schema of nihilism marked by: (1) the immediate post-Enlightenment dissolution of the certitude of truth; (2) a modern reflexive and fantastical desire to reconstitute the certainty of the lost past by adopting a scientific proxy

⁹ See, e.g., TSZ IV, “On Science,” *supra* note 3, at 413 (“And beware when such as you start making speeches and fuss about *truth!*”); see also MARTIN HEIDEGGER, NIETZSCHE: THE WILL TO POWER AS KNOWLEDGE AND AS METAPHYSICS 4 (David Farrell Krell ed., Joan Stambaugh, David Farrell Krell & Frank A. Capuzzi trans., 1987) [hereinafter HEIDEGGER III].

¹⁰ HEIDEGGER III, *supra* note 9, at 6.

¹¹ *Id.* at 7-9, 220-25.

¹² *Id.* at 200.

¹³ *Id.* at 205-07; see also TSZ IV, “On Science,” *supra* note 3, at 413.

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in the place of the defunct God; and (3) the eventual emergence of a new value-positing strength,¹⁴ strength which, in Nietzsche's terms, constitutes the will to power¹⁵ and the bridge to the *Übermensch*.¹⁶ In Heidegger's understanding of the progression of nihilism, the objectivist certitude of legalism and scientism is exposed as farcical.

Nietzsche's oft-quoted and oft-misunderstood concept of the death of God¹⁷ is operative at the first stage of nihilism. Our interest, however, is in the second or transitional phase of scientific nihilism. This is the stage prevailing during both Nietzsche's *and* Heidegger's time¹⁸—and perhaps in our own time as well. As noted, the hallmark of second stage or transitional nihilism lies in the modernist fantasy that rationalism and scientism might provide suitable proxies for the lost certitude of the past.¹⁹ Heidegger's reading of Nietzsche's intervention in western metaphysics suggests that the particular danger of second stage nihilism lies in its desperate clinging to metaphysical "truth"—a form of truth, which can neither approximate nor capture, the primordial truth of being.²⁰

Zarathustra's drive to overcome nihilism by building a bridge to the *Übermensch* expresses the condition which, for Heidegger, characterizes the third stage of nihilism. Only when the bridge to the *Übermensch* is crossed—or at least the journey is begun—can a new kind of man and a new kind of truth emerge.²¹ This new, more precise, meaning of truth, a "truth of Being" which asks after "the relationship of the essence of Being with the essence of man,"²² can only emerge where the will to power succeeds in effectuating the devaluation of the highest values hitherto (whether theistic or scientific). Such devaluation is the proper means of positing new values and, with them, a new post-metaphysical truth: that all beings can posit themselves differently "*as a whole*."²³

¹⁴ HEIDEGGER III, *supra* note 9, at 204-08.

¹⁵ *Id.* at 207.

¹⁶ TSZ III, "On Old and New Tables," *supra* note 3, at 310.

¹⁷ TSZ III, *Prologue*, *supra* note 3, at 124.

¹⁸ HEIDEGGER III, *supra* note 9, at 203-04.

¹⁹ *Id.* at 205-06.

²⁰ *Id.*

²¹ *Id.* at 217.

²² *Id.*

²³ *Id.* at 205.

III. A NEW LEGAL TRUTH: POSITING VALUES ANEW

Heidegger, inspired by Nietzsche, came to understand truthfulness as an ontological condition obscured by the veil of western metaphysics. I shall attempt to remove this veil in order to reveal the materiality of legal truth in the law-making capacity of the will to power. I will call upon Jacob Golomb's relatively recent monograph, *Nietzsche and Zion*, to assist me in this task. In it, Golomb addresses the acute absorption of Nietzsche's writings by leading Jewish intellectuals during the five decades separating Nietzsche's death and the founding of the state of Israel.²⁴ Focusing on this interval, Golomb documents the manner in which Zionist luminaries, such as Micha Josef Berdichevski and Martin Buber, engaged Nietzsche's thought and redirected their energy toward establishing a new law, a new truth, and a new way of being.

It may be unorthodox to place Heidegger and Golomb together, particularly in the context of the law. Hoping not to be cowed by orthodoxies, however, it shall be my contention that Heidegger is uniquely well suited to guide us toward the properly *legal* meaning of Golomb's research. Only in the Heideggerian eye can we glimpse, in Golomb, the contours of a post-metaphysical truth (or truthful legality) expressed in the drive to posit values anew.²⁵ Similarly, only in the same Heideggerian eye can we understand the will to power in its Zionist particularities. Although Golomb's research interests, methodology, ideological posture, and virtually everything else is distant from Heidegger's,²⁶ Golomb's analysis is undeniably evocative of a Heideggerian ideation of the law and truth-positing quality of the will to power. This is nowhere more crystalline than where Golomb says of Hillel Zeitlin, a great Polish Nietzschean spiritualist who died in Treblinka: "Zeitlin claims that this 'will to power' (his Hebrew translation is literally the 'will to govern and control') is the essence of life and its existential truth. It is far from the brutal physical 'strength' that '*shallow Nietzsche commentators love to stress*' [internal citations omitted]."²⁷

Golomb's research canvasses Nietzschean and anti-Nietzschean members of the Eastern and Central European Jewish intelligentsia

²⁴ JACOB GOLOMB, *NIETZSCHE AND ZION* (2004).

²⁵ HEIDEGGER III, *supra* note 9, at 199-205.

²⁶ GOLOMB, *supra* note 24, at 210 (in his lone reference to Heidegger, Golomb describes him as "amazingly relevant" to the understanding of Hillel Zeitlin's theory of authenticity and creating one's self anew).

²⁷ *Id.* at 199.

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writing in the generation after Nietzsche’s death. It goes without saying that these thinkers varied greatly amongst and between themselves. What may be more important, however, is the manner in which they resembled one another. Like Zeitlin, many Jewish thinkers, grasped in Nietzsche a particular sense of the will to power in the triangulation of truth, truthfulness, and authenticity:

Nietzsche did not use the term “authenticity” explicitly, but it is possible to detect its presence in the recurrent distinctions he makes between *Warheit* (truth) and *Wahraftigkeit* (truthfulness) [internal citations omitted]. . . . After the “Death of God” one must adopt for oneself the God-like role of originator of truth and of one’s own self.²⁸

What Golomb describes as the Nietzschean impulse to posit (or better, to *re-posit*) one’s self, one’s people, *and* the entirety of one’s being and relationship to Being anew,²⁹ is precisely the same impulse which Heidegger detected in Nietzsche’s discovery of the “*untruth*” of truth. A discovery, marked by discernment of the fact that *homoiōsis*, or mere approximation, is not in the nature of primordial truth.³⁰ The properly *untruthful* character of *homoiōsis*, is, in fact, more akin to what we recognize as “*Legal Truth*” or the “*Truth*” of social scientism and functionalism. Capitalization is, of course, everything, and that is why both “*Legal Truth*” and “*Truth*” are capitalized—they are important lies.³¹ Both “*Legal Truth*” and “*Truth*” are species of metaphysical truth. Metaphysical thought grounds us in the collective delusion that *truth-proper* is discernable in the confused collapse of correspondence, mediation and representation. Unlike the “*Legal Truth*,” which I have pointedly capitalized, *truth-proper*, *legal truth*, or *the truth of the law* does not aspire to represent, mediate, or otherwise posit correlations between objects. Instead, *truth-proper*, *legal truth*, and *the truth of the law*, are in the nature of revealing, or what Heidegger calls *alētheia*.³²

Legal truth, in the non-metaphysical sense of *truth-proper*, is *alētheia*. The idea of *truth-proper* is immediately detectable in the will

²⁸ *Id.* at 6-7.

²⁹ HEIDEGGER III, *supra* note 9, at 219-23.

³⁰ *Id.* at 237-38 (describing art as having a greater character of truthfulness than scientific “*truth*”).

³¹ Throughout, I shall endeavor to codify all such important lies in the same manner.

³² HEIDEGGER III, *supra* note 9, at 238.

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to power.³³ For Heidegger, a forward-looking posture is required to express the will to power. This future-oriented posture of the will to power is emboldened wherever beings become restless in the law of Being.³⁴ By choosing the Jewish Nietzschean as an object of study, Golomb places his reading of Nietzsche at precisely such a moment of restlessness. Again, I am thinking here of the interval between Nietzsche’s death and the establishment of the State of Israel.³⁵ For Heidegger explicitly, and for Golomb tacitly, one must look ahead to the time of “*the decision*” in order to determine the future in accordance with the will to power—a determination which is, by its very nature, revelatory of truth and the law of truth. This operation is almost impossible to capture in hindsight, but it is essential to consider if we are to understand the idea of law and truth beyond metaphysics:

Each thinker who thinks ahead to the decision is moved and consumed by care with respect to a need that cannot yet be felt and experienced during his lifetime, a need not yet visible in the scope of his historically ascertainable yet irrelevant influence. . . . To go the length of Nietzsche’s path of thought to the will to power means to catch sight of his historical decision³⁶

The capacity to think ahead, or be ahead, is required wherever one is to posit anew. To posit anew or revalue is the will to power.³⁷ Golomb’s research is useful precisely because it is in the posture of “*thinking ahead*.” Thinking ahead is, for both Nietzsche and Heidegger, an essential character of the will to power.³⁸ In order to

³³ *Id.* at 236.

³⁴ *Id.* at 212, 241.

³⁵ What is properly determinative here, is how one conceives of that which I have so casually denominated “*the event*”—we could easily have substituted *another* event—the Holocaust comes to mind.

³⁶ HEIDEGGER III, *supra* note 9, at 8.

³⁷ *Id.* at 196-98 (will is the command and “disposition over effective possibilities” and power is bound to the essence of will as command); *id.* at 200 (“will to power manifests itself as the subjectivity that is characterized by value thinking”). See also TSZ I, “On the Way of the Creator,” *supra* note 3, at 175; TSZ II, “On Self-Overcoming,” *supra* note 3, at 225-28; TSZ III, “On Old and New Tablets” 1-2, *supra* note 3, at 308-09; TSZ III, “On Old and New Tablets” 7-12, *supra* note 3, at 312-16; GM II, 1-3, *supra* note 2, at 493-97 (making the critical distinction between “valuation” in the positive sense of positing values and “valuation” in the negative legal formalist sense of calculation or assignation of worth).

³⁸ HEIDEGGER III, *supra* note 9, at 196-98, 200; see also BGE II, 30, *supra* note 4, at 232 (refuting the “exoteric” approach of scientism which “sees, estimates, measures, and judges from outside, not the inside.”).

comprehend law as a value-positing phenomenon, we must situate ourselves before the decision (both Nietzsche's and our own), or, as Jacques Derrida would understand it, "*before the law*."³⁹ To know the truth of law, we must, like Golomb, observe from the interstitial spaces *before* value is posited, and *before* judgment is articulable. It is only from within these spaces that we might know the truthful quality of law as expressed in the will to power.

IV. MACHT AND KRAFT: NIETZSCHE, HEIDEGGER, AND THE HOLOCAUST

Law is always before the legal decision itself. The decision is premised on an interpretive question about the law which requires decisive and clear resolution for certainty. The law then, is that which transcends, or more precisely, *goes over* the human, *all too human*, quality of being. Such a going over must be distinguished from brute power, pure violence, or *kraft*. Creative force, or *macht*, is the positive posture of the will to power. As such, it implies a reinvention of man's relation to being, and is, in this manner, singularly law and truth-positing.⁴⁰ Thinking for a moment about Heidegger *the man*, or Heidegger the historical personality, our minds wander immediately to his own historical *decision*—the decision to join the Nazi party.⁴¹ Did Heidegger misconstrue *kraft* as a legitimate vehicle for the will to power? If this question were answerable, it would be some way of knowing both Heidegger, *the Man*, and Heidegger, *the Nazi*. However, because this question is likely unknowable and because Heidegger's reading of Nietzsche is, along with Derrida's, among the most acute, we cannot ignore his thought—even where it comes closest to what is ultimately unknowable. What we must, nevertheless, be mindful of is that Nazism represents the precise moment at which the historical personalities of Nietzsche (unwillingly and posthumously) and Heidegger's (willingly and *viva voce*) came most directly into contact with the historical personality of European Jewry.

³⁹ Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 920, 963 (1990).

⁴⁰ GOLOMB, *supra* note 24, at 14.

⁴¹ MIGUEL DE BEISTEGUI, *Politically Adrift: The Affair with National Socialism,* in THE NEW HEIDEGGER 155, 155-76 (2005) (an even-handed, fact-intensive documentation of Heidegger's enthusiastic conversion to Nazism).

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Nietzsche hated Prussian anti-Semitism. Much of what is most passionate in his oeuvre⁴² and his personal correspondence⁴³ testifies eloquently to this fact. Heidegger, on the other hand, famously embraced Nazism.⁴⁴ Whether Heidegger did or did not see the Hitlerite regime as the bridge to the *Übermensch* is well beyond the scope of this article (again, if knowable at all). What is knowable, however, is that the principle of temporality and the idea of Nietzsche’s “*decision*,” represent the most properly observable manifestations of the will to power. Wherever a decision to deploy *macht* or *kraft* is taken, the will to power is afoot. This moment of decision is the operation of the will to power and determines whether its outcome shall be truth-creating or truth-destroying. However, caution is merited here—I am not suggesting that *macht* is inherently non-violent or pacifistic. We must never lose sight of the fact that the capacity to build is necessarily dependent on the capacity to destroy.⁴⁵ But, because the destructive force which explicitly presages a building anew differs from the brute force of genocide, I shall reject the Holocaust, as a privileged point of reference, and will instead orient my analysis toward Golomb’s Zionist perspective. From this perspective, it is hoped that we might “*think ahead*” of law, toward new values and new conditions of truth.⁴⁶

⁴² GM III, 26, *supra* note 2, at 594-95 (describing bourgeois “Christian-Aryan” anti-Semitism as “connected with the undeniable and palpable stagnation of the German spirit . . .”).

⁴³ See, e.g., Friedrich Nietzsche, *Letter to Elizabeth Nietzsche, Christmas 1887*, in THE PORTABLE NIETZSCHE, *supra* note 3, at 456-57 (vociferously opposing his sister’s association with anti-Semitic chieftains, including her husband of two years, the detested Bernhard Förster).

⁴⁴ DE BEISTEGUI, *supra* note 41, at 158 (citing one of Heidegger’s political interventions in which he urged students to give, ex post, support to Hitler’s withdrawal from the League of Nations: “Let not propositions and ‘ideas’ be the rules of your being The Führer alone is the it the present and future German reality and its law . . . Heil Hitler!”). See also *id.* at 160-61 (describing Heidegger’s endorsement of Nazism as “unreserved” while leaving open whether or not Heidegger harbored “personal” animosity toward Jews—is there any other sort of animosity?).

⁴⁵ See GM II, 24, *supra* note 2, at 531.

⁴⁶ I am thinking especially of the Herculean re-articulation of Being expressed in the resurrection and reinvention of the ancient the Hebrew language. See, e.g., GOLOMB, *supra* note 24, at 66 (describing the building of a “new Hebrew secular culture.”).

V. LAW ON THE MARGIN: WESTERN GRENZJUDEN

The will to power effectuates a bringing forth of events in which the Nietzschean quality of law is made apparent. The bringing forth of events is the means by which beings re-determine their relation to the law of Being.⁴⁷ This is captured by Golomb in his analysis of early cultural and spiritual Zionism: an analysis which bridges a critical gap between Heidegger’s Nietzsche, the Nietzsche of the will to power, and Derrida’s Nietzsche, the Nietzsche of the text. Before etching the contours of the latter Nietzsche in the second half of this dissertation, I shall briefly unpack certain aspects of Golomb’s descriptive terminology in the hopes of sharpening our understanding of the will to power and preparing the ground for an intensive analysis of legal textualism.

Golomb terms *fin de siècle* German-speaking Jewish intellectuals as *Grenzjuden*. Sigmund Freud and Franz Kafka, along with Theodor Herzl, the founder of political Zionism, are among the most well-known *Grenzjuden*.⁴⁸ For these men of letters, like most Jews living in the autocratic, albeit religiously free environs of Germany and Austria, their status as *Juden* was officially *irrelevant*—politically and otherwise. But the promise of irrelevance never materialized.⁴⁹ The constant and inescapable fact of being a central European Jew, both during Nietzsche’s time and in the heady years after his death, was felt in both aristocratic and beer hall anti-Semitism (both of which Nietzsche despised⁵⁰). Equally, however, Golomb emphasizes that it was their internal malaise and existential suffering which brought the *Grenzjuden* to Nietzsche.⁵¹ Taken together, the external and internal marginalization of the *Grenzjuden* awakened in them the will to power, which, by its very nature, cannot tolerate confinement to the margins or a marginal experience of existence.

A. *Exploding the Margins: Thinking Law Differently—Beyond*

⁴⁷ See HEIDEGGER III, *supra* note 9, at 6 (crediting Nietzsche with being the first thinker to affirm “the predominance of beings over against Being” while emphasizing that Nietzsche was himself a metaphysician, albeit the final one, to the extent that he did not understand the implications of this insight).

⁴⁸ See GOLOMB, *supra* note 24, at 4. See also Jacob Golomb, *Nietzsche and the Marginal Jews*, in NIETZSCHE AND JEWISH CULTURE 158, 159 (Jacob Golomb ed., 1997).

⁴⁹ See GOLOMB, *supra* note 24, at 47-48, 88-89, 119-20.

⁵⁰ See *supra* notes 39-40, 44-45 and accompanying text.

⁵¹ GOLOMB, *supra* note 24, at 4, 6; see also Golomb, *Nietzsche and the Marginal Jews*, *supra* note 48, at 159.

Binaries and Metaphysics

The will to power is restless within metaphysics.⁵² This restlessness is directly traceable to the manner in which both theocratic and scientific worldviews construe (or misconstrue) the law of Being.⁵³ Within the characteristically metaphysical apparatus of the juristic and social sciences, "*the Law*" and "*the Truth*" are understood in singular terms. The attribution of singularity lies in the fact that metaphysical thought allows no possible conception of value or truth without recourse to a filtering apparatus. The quality of "*Legality*," like the quality of "*Truthfulness*," is made cognizable exclusively through the lenses of mediation, representation, and calculation.⁵⁴ In each case the basic motion is toward a "*setting against*" of the Self and "*The Other*." The character of *setting against* is precisely expressed in the triangulation of mediation, representation, and calculation. In this triangulation, the human subject is constituted and thought possible. Mediation, representation, and calculation share an intermediary character—much like "*the Law*" itself. If we hope to understand the implications of this mediating character, we must first be mindful of its hegemonic relation to the question of value. This is because "*having value*" is distinguishable from the active "*positing of value*." The distinction lies in the fact that "*having value*," bears upon preservation, while "*positing value*" bears upon creation.⁵⁵ What is striking and distinctively non-metaphysical about creation, however, is that the active *positing of value*, unlike the passive quality of *having value*, cannot be easily understood in binary terms. Therefore, the binary, *value/non-value*, is immediately cognizable, and the binary *positing value/not positing value* is nonsensical. "*Value*," unlike "*valuation*," is cognizable in divisionary and binary thinking only.⁵⁶

Therefore, metaphysical thinking adheres to the idea of value—it permits binaries. In Heidegger's reading of Nietzsche, the possibility of thought beyond binaries is finally contemplated, and it is precisely in the value-positing quality of the will to power and the conditions of true legality where the metaphysical structure of binaries is most completely undermined.⁵⁷

⁵² HEIDEGGER III, *supra* note 9, at 7-9.

⁵³ *Id.* at 219.

⁵⁴ *Id.* at 219-21.

⁵⁵ *Id.* at 197.

⁵⁶ *Id.* at 236.

⁵⁷ *Id.* at 198-200.

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The western *Grenzjuden* and their Eastern European brethren found in Nietzsche a source of inspiration, which propelled them toward an active laying hold of forces on the ontological horizon.⁵⁸ Such an intervention is characteristic of the will to power and its radical openness to “the still untraveled regions of future decisions.”⁵⁹ This idea is expressed most perfectly by cultural Zionists, who spontaneously conceived of the resurrection and reanimation of their own ancient language—a language which had been neither spoken, nor reproduced in non-religious texts for two thousand years.⁶⁰ The desire to bring about a renaissance of the Hebrew language and to develop it alongside a project of building a distinctly non-religious and secular, albeit Jewish, culture⁶¹ constituted a stirring toward the future, and the future law of truth. The consequences of this stirring, and its eventual inscription in mature political Zionism, are well known today.

The will to power is most precisely understood in the drive to overstep existing boundaries and to posit value anew—it is binary destroying.⁶² The will to power is characterized by the taking of an anticipatory posture toward a coming decision. The decision toward which the anticipatory posture orients itself relates to the needfulness of interrogating the existing law of Being.⁶³ This particular aspect of the will to power can be discerned in the Zionist revisiting, reinvention, and re-articulation of the Hebrew language. Like all movements toward reevaluating and positing anew, it cannot be appreciated unless we first uncover a pre-existing binary, which was impossible to address or reformulate without Herculean effort. In this case, it is the distinction between Gentile and Jew—our operational rendering of the “*legal Self*” and “*legal Other*”—a distinction which has been largely unshakable in its representative quality despite almost two millennia of cohabitation in Europe.⁶⁴ This fact brings us to a

⁵⁸ See, e.g., GOLOMB, *supra* note 24, at 7, 38, 101-02, 156.

⁵⁹ HEIDEGGER III, *supra* note 9, at 4.

⁶⁰ GOLOMB, *supra* note 24, at 67-68.

⁶¹ *Id.* at 7-8.

⁶² HEIDEGGER III, *supra* note 9, at 7.

⁶³ *Id.* at 5-8.

⁶⁴ Yirmiyahu Yovel, *Nietzsche and the Jews: The Structure of an Ambivalence*, in NIETZSCHE AND JEWISH CULTURE, *supra* note 48, at 117, 118 (noting that Nietzsche shattered this binary in his separate treatments of ancient Judaism, priestly/pre-Christian Judaism and contemporary German Jewry). See also Paul Mendes-Flohr, *Zarathustra's Apostle: Martin Buber and the Jewish Renaissance*, in NIETZSCHE AND JEWISH CULTURE, *supra* note 48, at 233, 235 (addressing the

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critical bridgehead in our analysis. Only in the return to “*the Text*,”⁶⁵ does the abandonment of, or *going over* of, the Jew/Gentile binary become thinkable.

Early Zionism’s movement away from Europe—and toward a language and land of the ancient past—was a means of contesting the existing quality of beingness and positing a new law of Being. This was precisely what Berdichevski, the most ardent of Nietzsche’s Zionist disciples,⁶⁶ termed the transition from the “last Jews to the first Hebrews.”⁶⁷ Before turning our attention to the question of textual return and its relation to becoming, we must yet spill a little more ink on the question of binaries—not simply because they are among the most persistent qualities of the metaphysical condition⁶⁸ (a condition pressed to its outer limits by Nietzsche⁶⁹ and ultimately exploded by Heidegger⁷⁰), but because binaries are worthy of decimation wherever they hinder our capacity to understand legal truth in the will to power as the positing of value. Golomb’s study of Berdichevski, a Russian Jew, takes us some way in the direction of undoing the distorting character of the Jew/Gentile binary.⁷¹ This is because Berdichevski, like Buber and Zeitlin, hailed from the *shtetls* of Poland and Russia, and unlike the *Grenzjuden*, he was not accustomed to the salons and universities of Austria and Germany. In this manner, the very intellectual presence of Berdichevski effectuates a destabilization and a *de-centering* of the Jewish side of the Jew/Gentile binary.

“desiccation attendant on two thousand years of exile, in which Israel was denied the normal conditions of healthy, life-affirming existence . . .”).

⁶⁵ I am explicitly leaving the meaning of “*the Text*” ambiguous—although not overly ambiguous. Remember, my capitalization aims to denote the slipperiness of “*the Text*” and its potential to tell lies. However, for Nietzsche and the Nietzschean Zionists, “*the Text*” denotes the Old Testament or the Torah, the combined repository of the Jewish legal, linguistic, and alphabetic inheritance. It is not to be conflated with the Talmud, the reified body of rabbinic learning and interpretation emerging from, and conditioned upon, the two thousand year Jewish exile in the Diaspora.

⁶⁶ See, e.g., GOLOMB, *supra* note 24, at 112 (describing Berdichevski as “the first ‘Hebrew Nietzschean’”); see also *id.* at 160 (describing Buber as “most Nietzschean on his way to Zionism”).

⁶⁷ GOLOMB, *supra* note 24, at 2 (citing Berdichevski).

⁶⁸ JACQUES DERRIDA, SPURS: NIETZSCHE’S STYLES 99, 117–19 (Barbara Harlow trans., 1978) [hereinafter DERRIDA, SPURS].

⁶⁹ See, e.g., BGE I, 2, *supra* note 4, at 200; BGE II, 24, *supra* note 4, at 225; BGE II, 34, *supra* note 4, at 236–37.

⁷⁰ HEIDEGGER III, *supra* note 9, at 236.

⁷¹ GOLOMB, *supra* note 24, at 2 (this distinction can be said to be unconscious to the extent that Golomb regards his narrative as “reconstructive” rather than “deconstructive.”).

VI. THINKING THE OTHER WITHIN THE OTHER: BINARIES WITHIN BINARIES

Golomb describes a pre-Holocaust European Jewish topography in which German-speaking, Western European *Grenzjuden* found themselves divided from their unassimilated, primarily Yiddish-speaking Russian and Polish brethren.⁷² Russian and Polish Jewish intellectuals, for their part, tended toward an unabashed embrace of Nietzsche and cultural Zionism. Both their attraction to Nietzsche and their drive to reawaken the cultural dynamism of Hebraic antiquity were due, in no small part, to the fact that Eastern European Jews were more explicitly and completely marginalized than the westernized *Grenzjuden*.⁷³ *Grenzjuden* political Zionists, such as Theodor Herzl, tended to be less wholehearted in their embrace of Nietzsche and frequently adopted a selective reading of his oeuvre,⁷⁴ while others, like Max Nordau, wrote explicitly anti-Nietzschean polemics.⁷⁵ *Grenzjuden* political Zionists were not Hebrew Nietzscheans in the strictest sense (even where, like Herzl, they were inspired or emboldened by Nietzsche) because their attachment to liberalism and Enlightenment precluded them from accepting the more radical implications of Nietzsche’s thought.⁷⁶

Unlike the secularized western *Grenzjuden*, Eastern European Jewry was conditioned by the immediacy of *shtetl* life and yeshiva study. Russian and Polish universities and secular society was completely off limits to men such as Berdichevski and Buber, both of whom went west to study Nietzsche. While the *Grenzjuden* aspired to be, like Nietzsche, “good Europeans,”⁷⁷ and were frustrated when their aspirations were thwarted, their Eastern European counterparts were more ambivalent to gentile culture and European Christendom.⁷⁸ Rather than dreaming of the promise of enlightenment or assimilation, they endeavored to reawaken in themselves a return to their ancient past and a different way of being—a way of being traceable to the time before the Torah had become “*the Text*.”⁷⁹ What is essential to decipher in the space between Western and Eastern Jewry is the

⁷² *Id.* at 65-66, 160 (describing the potential for even further distinctions or forms of “multimarginality” within individual Jewish subjectivities).

⁷³ *Id.*

⁷⁴ *Id.* at 32, 41, 45.

⁷⁵ *Id.* at 47.

⁷⁶ *Id.* at 13, 47-48.

⁷⁷ GM III, 27, *supra* note 2, at 597.

⁷⁸ GOLOMB, *supra* note 24, at 88-89, 119-20.

⁷⁹ *Id.* at 8, 41, 43, 66-67, 98-103, 141-42, 147-48, 191.

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ultimate impossibility of sustaining the controlling Jew/Gentile binary. Once “*the Jew*” or “*the legal Other*” is examined in his own right, his quality as both legal object and legal subject is itself bifurcated. This difficulty demarcates the limits of metaphysics and its peculiar tendency to present an infinite succession of binaries.⁸⁰ From the Jew/Gentile binary, Golomb takes us directly to the Western/Eastern distinction. I cannot deny that this is useful to my own analysis. However, it also presents a certain quality of metaphysics which must be acknowledged and contended with, particularly where it shapes our way of thinking or knowing “*the legal Other*.”

Heidegger might say that to *know*, in a truthful sense, that which has the quality of “*the Law of the Other*,” we must first position ourselves before the “*decision*.”⁸¹ In Golomb’s analysis, we are permitted to occupy this position in the rumblings of early Zionism, particularly as expressed in the resurrection of the Hebrew language—here, the will to power was manifest in a fluid historiological moment of becoming. A becoming which unveils the truthful quality and properly legal character of positing anew and requires us to consider the possibility of an infinite breaking and subdivision of binaries. It should also not be surprising, however, that such a possibility might further confound our capacity to have knowledge of “*the Law*”—at least in the recognizable metaphysical manner to which we are accustomed.

Prior to the decision, surrounded by the broken tables of the past and in the midst of “half-written laws,”⁸² we have only just begun the task of rebuilding.⁸³ In this posture, not only does positing anew remain incomplete, but we are still far away from the cognizable intervention of metaphysics and its symptomatic tendency toward calculation, mediation, and representation—all of which, rely exclusively on binary distinctions.⁸⁴ However, if we can abandon the search for metaphysical truth, Golomb’s uniquely interstitial vantage point may help us toward a sense of the more properly truthful and non-metaphysical character of law. It also permits us to “*know*” the “*the Jew as legal Other*” in the intellectual milieu of the post-Nietzsche and pre-Holocaust European landscape—a landscape in

⁸⁰ See, e.g., TSZ III, “The Convalescent,” *supra* note 3, at 2, 329; HEIDEGGER III, *supra* note 9, at 236; DERRIDA, SPURS, *supra* note 68, at 99, 117-19.

⁸¹ HEIDEGGER III, *supra* note 9, at 8.

⁸² Goodrich & Valverde, *supra* note 1, at 11.

⁸³ See TSZ III, “On Old and New Tables,” *supra* note 3, at 316.

⁸⁴ See HEIDEGGER III, *supra* note 9, at 205-06, 219.

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which all that was written, and all that was posited, was being actively revisited and posited anew.

For Eastern European Jews, such as Berdichevski and Buber, every decision was radically to come. The decision to abandon the *shtetl* life, like the decision to abandon the language of their fathers, to move from the yeshiva to the university and from religion to culture—all of these decisions partook of a unique quality of anticipation, a quality which belongs to contemplation of a new law of Being.⁸⁵ For the *Grenzjuden*, unlike their Eastern European brethren, the decision was long completed; for them, the “Judeo-Christian” tradition had inescapably fused the fate of the Jews with that of Europe.⁸⁶ The Jew was in this way indissolubly linked to the Gentile, the precise metaphysical binary which conditioned all thought. What the *Grenzjuden* did not fully appreciate or grasp was the quality of the decision on the horizon—a decision to reconsider and re-write the law of Being. This is where political Zionism felt its limits. Its leading figures, like Herzl, could not see beyond the Jewish condition as part of the European-Christian trajectory. Even their imaginings of Zion took shape in the ideation of a European outpost in the Orient.⁸⁷ This was the reflexive metaphysical orientation of those who refused, resisted, or ignored a critical part of Nietzsche’s teaching—that wherever we speak of “*the State*” or “*the Law*,” we have already arrived too late, or, in Heidegger’s terms, “after the decision.” Wherever “*the State*” and “*the Law*” can be discerned, the decision has passed and law has been posited.⁸⁸ To conceive of the truthful quality of law, we must look to the cultural and spiritual Zionists of the radically unassimilated East, many of whom gravitated toward Nietzsche’s accent on the heroic qualities of ancient Judaism.⁸⁹ A heroic quality which placed the Jew as “*legal Other*” in a favorable metaphysical position relative to the Gentile as “*legal Self*,” or perhaps more accurately made it possible, for the first time, to think of a law of Being finally freed from the tethers of the Jew/Gentile binary.⁹⁰

⁸⁵ GOLOMB, *supra* note 24, at 74 (comparing this moment of indecision as the Zarathustrian movement from camel to lion).

⁸⁶ *Id.* at 47, 65-69.

⁸⁷ *Id.* at 68 (describing Herzl’s dream of a Viennese-style opera house in Haifa).

⁸⁸ TSZ I, “On the New Idol,” *supra* note 3, at 160; TSZ II, “On Great Events,” *supra* note 3, at 244. *See also* GOLOMB, *supra* note 24, at 13.

⁸⁹ GOLOMB, *supra* note 24, at 8, 43-44, 64, 82, 103-09, 123, 196, 208.

⁹⁰ *See, e.g.*, TSZ I, “On Free Death,” *supra* note 3, at 185 (Zarathustra’s treatment of Christ emphasizes his noble Hebrew qualities over his more base priestly qualities); TSZ IV, “Retired,” *supra* note 3, at 373 (the Old Pope describing his preference to for the youthful Oriental God of the ancient Hebrews); BGE III, 52,

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Toward the end of his career, Nietzsche’s mind turned toward distinctly Jewish questions with a particular energy and forcefulness. Could the Jewish people *overcome* the degradation of “*priestly*” or rabbinic Judaism?⁹¹ Could the Jewish people overcome their Christianization or Pauline feminization?⁹² How could the historical greatness and creative power of the Jewish people be turned into the legacy of all Europeans?⁹³ All these questions bore upon the continuing stability and believability of the Jew/Gentile binary. These questions, as Heidegger would understand them, were poised toward a coming decision on the tenability of the existing law of Being.⁹⁴ Golomb’s research brings us to precisely this terrain. Both Nietzsche and early Zionism’s understanding of Jewish subjectivity⁹⁵ revolved around the destruction of the second temple and the expulsion of the Jewish people into the Diaspora. In the critical movement from their ancestral homeland to Europe, the Jewish people went from being Israelites or Hebrews to being “*the Jews*.” Nietzsche captured the quality of this transition and described it in distinctly negative terms. In the movement from Israelite to European Jew, the Jewish people became unnatural and Christianized, particularly as expressed in their newly rabbinic and ascetic ways of being.⁹⁶ Once the ancient Hebrews had become European Jews, the binary Jew/Gentile was reconstituted and reread in a more toxic formulation: interloper Gentile/legitimate Gentile.⁹⁷ It was this type of Nietzschean insight into the oppressive defects of metaphysics which radically awakened Eastern cultural and spiritual Zionists such as Berdichevski, Buber, and Zeitlin, all of

supra note 4, at 255-56 (association of European Jewry with Asian and Oriental origins of pre-Christian greatness). *See also* Friedrich Nietzsche, *The Dawn*, in THE PORTABLE NIETZSCHE, *supra* note 3, 205 at 88 (addressing the indecency of the treatment of the “*Of the people of Israel*” in the European Diaspora); Friedrich Nietzsche, *The Antichrist*, in THE PORTABLE NIETZSCHE, *supra* note 3, 17 at 584 (the best God is the “God of Israel”); Nietzsche, *The Antichrist*, *supra* note 90, 25 at 594-95 (describing the ancient Hebrew God and the early kings of Israel as having stood in the “the right, that is, the natural relation to all things”) (N.B.: *The Antichrist* citations throughout cite to this volume).

⁹¹ *See, e.g.*, Nietzsche, *The Antichrist*, *supra* note 90, 24 at 592-95, 26 at 595-98.

⁹² *Id.* 44 at 622.

⁹³ GOLOMB, *supra* note 24, at 13.

⁹⁴ HEIDEGGER III, *supra* note 9, at 8.

⁹⁵ *Id.* at 216-17 (noting that subjectivity or the possibility of subjective identity is itself a function of metaphysics and reflective of the extent to which, even Nietzsche, remained a metaphysician—albeit one who was cognizant of his yoke).

⁹⁶ GOLOMB, *supra* note 24, at 8, 43, 107-09, 141-42, 166-67, 172. *See also* GM I, 9, *supra* note 2, at 472 (“everything is visibly Judaized, Christianized, mob-ized (what to the words matter!)”).

⁹⁷ GOLOMB, *supra* note 24, at 8, 43, 107-09, 141-42, 166-67, 172.

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whom found in Nietzsche the strength to escape the priestly, ascetic qualities of yeshiva study and *shtetl* life. And it was only in this movement away from their antiquarian and Talmudic attachment to “*the Text*,” that they would eventually find themselves returning to the “*the Text*” with a new and creative impulse. However, first, like Zarathustra, the Hebrew Nietzscheans would learn to dance amidst the broken tables and dream a new half-written law.⁹⁸

What should by now be apparent is that the genuinely truthful and legal quality of half-written law, like the properly lawful stance of one who is properly before *the decision*, is resistant to being fixed in the posited quality of a textual artifact. Wherever we address “*the Law*” as a textual artifact or as a reified object of study, we risk falling back into purely metaphysical, theological, or scientific modes of thought. This is not to say that “*the Text*” has no relation to the character of law and truth. It is rather to emphasize that these qualities are present only in three distinct stages: *before* the writing, *during* the writing, and in the *return* to the writing. It is to this final quality which I will now turn. A return is only properly lawful or truthful where it is characterized by a creative rather than purely preservative impulse.⁹⁹ At the decisional moment, both before the writing and at the moment of writing, a preemptory functionalist methodology cannot capture the law-positing quality of the return.

VII. INTERMEZZO: A LOOK BEHIND, A LOOK AHEAD

Before entering into an analysis Derrida’s reading of Nietzsche and the manner in which he develops the concept of textual return, we ought briefly to recap the highlights of the road traveled thus far. We took up Golomb’s study of the Hebrew Nietzscheans because it permits us to abandon the usual vantage point of historicism. It is hoped that this abandonment made it possible to consider the generative posture of the lawmaker. The abandonment of historicism is required for us to know the legal, or more precisely, the law-positing “*Other*.” This is because the scientific or exoteric perspective of historicism (like any social science) cannot conceive of the pregnant

⁹⁸ *Id.* at 8, 74, 99.

⁹⁹ See HEIDEGGER III, *supra* note 9, at 210–11 (explaining that for Heidegger it is necessary to think of a taut balance between the legitimately preservative impulse and the need for enhancement or creativity); *id.* at 228 (expressing that the *Übermensch* is himself characterized by a surpassing of the will to preservation or “meek expression” in the direction of affirmative value-positing); *id.* at 236–37 (explaining that preservation is necessary but not sufficient without enhancement).

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moments before the decision.¹⁰⁰ The events surrounding the re-awakening of the Hebrew language and the eventual establishment of the state of Israel are, like the Holocaust, critical to the textual and material renderings of the European Jew as “*legal Other*.” Heidegger permits us to conceive of the law beyond metaphysics.¹⁰¹ For Nietzsche, the particularities of reading and interpretation which adhered to “*the Bible*”¹⁰²—that singular fusion of old and new, Jewish and Christian—is itself the primary ocular from which to view both the “*legal Self*” and the “*legal Other*.” This brings us directly to the question of “*the Text*” which is, because of its relation to both value-positing and binary-breaking, uniquely *legal*.

VIII. PART II: QUESTION OF COMPARISON (LEGAL OR OTHERWISE)

Jacques Derrida, one of Nietzsche’s most well-known intellectual heirs and twentieth century interlocutors, has come closer to penetrating the institutional consciousness of the legal academy than has Nietzsche (or Heidegger for that matter). There are many potential explanations for this, among them, the lingering reflexive association of Nietzsche with Nazism—an association which Derrida himself exploded and radically deconstructed on multiple occasions.¹⁰³ Such a ghost might also explain Heidegger’s similar, albeit perhaps more well deserved, shunning. An even more obvious explanation, however, lies in Derrida’s explicit engagement with the legal academic establishment in the latter half of his career.¹⁰⁴ Regardless of the reason, however, the surge in interest in Derrida necessarily opens questions about legal texts and legal interpretation. This critical

¹⁰⁰ BGE II, 30, *supra* note 4, at 232 (refuting the “exoteric” approach of “viewing, estimating, measuring, and judging from outside, and not the inside,” arguing it is an external approach which fails to capture the quality of the will to power before the decision).

¹⁰¹ HEIDEGGER III, *supra* note 9, at 5-6.

¹⁰² See GM III, 23, *supra* note 2, at 580.

¹⁰³ See, e.g., STEVEN E. ASCHHEIM, THE NIETZSCHE LEGACY IN GERMANY: 1890-1990, 316 (1992) (quoting JACQUES DERRIDA, THE EAR OF THE OTHER 23-24 (1988)) (“One may wonder how and why what is so naively called a falsification was possible (one can’t falsify just anything.”). See also DERRIDA, SPURS, *supra* note 68, at 123-27 (describing the fragmentary nature of any posthumous textual inheritances (unpublished or otherwise) and raising a series of playful, albeit serious, questions: “What if Nietzsche himself meant to say nothing, or least not much of anything, or anything whenever? Then again, what if Nietzsche was only pretending to say something?”).

¹⁰⁴ See, e.g., Derrida, *supra* note 39; JACQUES DERRIDA, DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA (John Caputo ed., 1997) [hereinafter DERRIDA, DECONSTRUCTION IN A NUTSHELL].

aperture in the legal academy is traceable, in large part to Derrida's reading of Nietzsche.

IX. LAW AND TEXT: THE ETERNAL RETURN

Much is revealed in Zarathustra's dramatic pronouncement: "Of all that is written, I love only what a person hath written with his blood."¹⁰⁵ Zarathustra's cry is no mere hyperbole. Blood has a peculiar reliability which must be taken into account. This peculiarity lies in its capacity to condition a return. Texts, like blood, and most especially *texts written in blood*, project around themselves a dynastic character which triggers an intense set of impulses toward preservation or reevaluation. This is not to say that the text (in its broadest sense, beyond the privileged denomination of "*The Text*"), *sanguine* or otherwise, is a *thing in itself* (whether knowable or unknowable). Instead, the point is only to regard the text as point of reference or as a marker.¹⁰⁶ The text is precisely that which mandates an interpretive return. The text permits of no finality or metaphysical pivots.¹⁰⁷ The return is eternal in the sense that textual exigencies arise endlessly. Both secular and sacred legal texts are interpreted in the eternal return. Nietzsche's treatment of the "*Old Testament*" or "*Hebrew Bible*" denotes a particularly acute point of textual return in the western tradition.

For Derrida, the return to the text can be isolated as an immediate locus of deconstruction, particularly in Nietzsche's "cryptic and parodying" corpus.¹⁰⁸ Cryptic and parodying texts, like all great texts, Derrida teaches, deconstruct themselves.¹⁰⁹ In this process of textual *auto-deconstruction* there is both law and justice. "*The Law*" is, in absolute terms, that which must be deconstructed.¹¹⁰ Law is expressed at its most maximal level of abstraction in western metaphysics and its pathological "faith in opposites." This is likely as close as we shall come to providing an impossibly *definitive answer* to the skeptic's initial query: "what can Nietzsche tell us about the law?" However, we must be mindful—justice is not to be conflated with law. Justice is

¹⁰⁵ TSZI, "On the Tree on the Mountainside," *supra* note 3, at 154.

¹⁰⁶ Michel Foucault, *What is an Author?*, in *CRITICAL THEORY SINCE 1965* (Hazard Adams & Leroy Searle eds., 1986) (Foucault was surely on the same terrain as Derrida when he described the great discursive promise which surround particular authors and particular texts).

¹⁰⁷ DERRIDA, SPURS, *supra* note 68, at 131-33.

¹⁰⁸ *Id.* at 137.

¹⁰⁹ DERRIDA, DECONSTRUCTION IN A NUTSHELL, *supra* note 104, at 9.

¹¹⁰ DERRIDA, SPURS, *supra* note 68, at 16-17.

that which cannot be deconstructed because it is will to power. Will to power is the spiritual “*macht*,”¹¹¹ or strength expressed in the drive to posit life-affirming, rather than “life-inimical,” conditions of being.¹¹² For Derrida, law and justice are analytically distinct while sharing the messianic quality of deferred promises and deferred arrivals. This aspect of Derrida’s thought is rooted in Nietzsche’s insight into the distinctive memory and guilt-producing operations of promising, bargaining, and covenanting—all which function to make the legal subject cognizable.¹¹³

The legal subject is a negative legal subject insofar as he is marked by the capacity to remember and feel guilt. Guilt may be directed inwardly, or it may be sublimated and projected outwardly. In either case, the capacity to remember and the possibility of being reminded is what makes the legal subject cognizable. The legal subject may become value-positing and life-affirming, or he may collapse inwardly under the weight of *ressentiment*. This is the familiar Nietzschean typology.¹¹⁴ Where justice is concerned however, both Nietzsche and Derrida direct us toward interpretation. Interpretation is itself embodied by the eternal return to the text.¹¹⁵ So much so that the legal subject is interrogated in the same manner as a text.¹¹⁶ Following this line of thought, I shall endeavor to take the question of interpretation as seriously as the question of “*the Law*” and “*the Legal Subject*,” per se.

Having taken the liberty of addressing a skeptical response to the relevance of Nietzsche’s thought to the field of comparative law, I

¹¹¹ GOLOMB, *supra* note 24, at 14-15.

¹¹² GM III, 11, *supra* note 2, at 553.

¹¹³ DERRIDA, DECONSTRUCTION IN A NUTSHELL, *supra* note 104, at 16-18, 20-22.

¹¹⁴ See, e.g., TSZ I, “On the Pale Criminal,” *supra* note 3, at 150; TSZ II, “On the Pitying,” *supra* note 3, at 201; TSZ II, “On the Virtuous,” *supra* note 3, at 206; TSZ II, “On Redemption,” *supra* note 3, at 252-53; TSZ III, “On Old and New Tables,” *supra* note 3, at 321; GM I, 10, *supra* note 2, at 472-73; GM I, 16, *supra* note 2, at 490-91; GM II, 4, *supra* note 2, at 498; GM II, 8, *supra* note 2, at 506-08; GM II, 10, *supra* note 2, at 508-09; GM II, 20, *supra* note 2, at 526; GM II, 23, *supra* note 2, at 529; GM III, 9, *supra* note 2, at 550; Nietzsche, *The Antichrist*, *supra* note 90, 25 at 594-95.

¹¹⁵ TSZ III, “The Convalescent,” *supra* note 3, 2 at 329-30; GM III, 8, *supra* note 2, at 546; BGE I, 16, *supra* note 4, at 213; BGE I, 20, *supra* note 4, at 217; Nietzsche, *The Antichrist*, *supra* note 90, 26 at 595-97, 42 at 617. See also DERRIDA, SPURS, *supra* note 68, at 95, 107, 123-27, 137; DERRIDA, DECONSTRUCTION IN A NUTSHELL, *supra* note 104, at 9-10, 20-22, 27-28.

¹¹⁶ See also HEIDEGGER III, *supra* note 9, at 216 (thinking the human subject is itself a metaphysical trap rooted in the subject-object relation; seen in this way, the legal subject can be interrogated in the same manner as an object text).

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might also emphasize the difficulties which inhere to any *a priori* understanding of what Nietzsche, as an author, might tell us about “the Law” or “law generally.” As I sought to establish in the first part of my dissertation, this type of question reeks of the scientism which Nietzsche despised.¹¹⁷ I must however, perhaps belatedly, admit that I am guilty of my own authorial scientism. In the act of interrogating “the legal Other,” as *represented* in the approximated form of Nietzsche’s depiction of European Jewry, I am assuming a particular subject-object relationship which can no longer be meaningfully taken for granted.¹¹⁸ As Derrida would say, it would be impossible to do justice to either the reader or Nietzsche without at least acknowledging this fact.¹¹⁹

In what follows, however, I shall attempt to open up the possibility of a new set of questions. This search for new questions is less abandonment of the old than a return to a time before the old. Proceeding in this way, it is hoped that we might finally think of ourselves in a distinct mode of readiness for decision—a mode which stands in the interstitial spaces where law, truth, and text are gathered in the will to power.

X. EQUALITY AND COMPARISON: ENEMIES AND IRRELEVANCIES

In the *Antichrist*, Nietzsche deftly articulates the conceptual and intellectual dangers associated with the transposition of Christian morality into secular rationality—an especially irksome phenomenon, which Nietzsche finds expressed in “[t]he poison of the doctrine of ‘equal rights for all.’”¹²⁰ Here, we ought to be reminded of Heidegger’s transitional or intermediate stage of nihilism—a stage which arises at the uniquely modern interval where the collapse of

¹¹⁷ TSZ III, “On Old and New Tablets,” *supra* note 3, 12 at 315; TSZ IV, “On Science,” *supra* note 3, at 413-15; GM II, 11, *supra* note 2, at 509-12; GM II, 17, *supra* note 2, at 522-23; GM III, 24, *supra* note 2, at 586-89; GM III, 25, *supra* note 2, at 590-91; GM III, 26, *supra* note 2, at 594; BGE I, 2, *supra* note 4, at 200; BGE I, 3, *supra* note 4, at 201; BGE I, 4, *supra* note 4, at 201-02; BGE I, 6, *supra* note 4, at 204; BGE I, 19, *supra* note 4, at 215; BGE II, 24, *supra* note 4, at 225; BGE II, 26, *supra* note 4, at 228; BGE II, 34, *supra* note 4, at 236-37; BGE II, 36, *supra* note 4, at 328; BGE II, 41, *supra* note 4, at 242. *See also* Friedrich Nietzsche, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE, *supra* note 3, 26 at 470 (“I mistrust all systematizers and I avoid them. The will to system is lack of integrity.”) (N.B.: *Twilight of the Idols* citations throughout cite to this volume).

¹¹⁸ GM III, 25, *supra* note 2, at 589; *see also* HEIDEGGER III, *supra* note 9, at 216-17.

¹¹⁹ *See, e.g.*, Derrida, *supra* note 39, at 923.

¹²⁰ Nietzsche, *The Antichrist*, *supra* note 90, 43 at 619.

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theocratic certitude gives way to a frantic search for rationalist proxies.¹²¹ At this juncture, we must remain resolute in avoiding the conflation of the metaphysical reasoning underlying “*the Law*” with the non-metaphysical quality of truth-proper or *alētheia*.¹²² “*The Law*” and its characteristically life-inimical drive toward formulaic modes of existence is what underpins Nietzsche’s attack on both “*Judeo-Christian Morality*” and liberal legalism:

The *inequality* of rights is the first condition for the existence of any rights at all A man’s state of being is his privilege. Let us not underestimate the privileges of the *mediocre* Handicraft, trade, agriculture, *science*, the greatest part of art, the whole quintessence of *professional activity*, to sum it up, is compatible only with a mediocre amount of ability and ambition *Whom* do I hate most among the rabble of today? The socialist rabble, the chandala apostles, who undermine the instinct, the pleasure, the worker’s sense of satisfaction with his small existence—who make him envious, who teach him revenge. The source of wrong is never unequal rights but the claim of “equal” rights.¹²³

For the *Grenzjuden*, this mode of thought triggered either immediate fascination or revulsion. An ambiguous response was impossible because Nietzsche laid bare the broken promise of Enlightenment equality.¹²⁴ A promise whose brokenness was equally felt in the continuing inability to transcend or otherwise overcome the vexing Jew/Gentile binary—a problematic which brings us unexpectedly face to face with legal theory’s most acute blind spot. This blind spot confronts every juridical thinker, regardless of his critical orientation. Liberalism, feminism, Marxism, anthropologism, and comparativism alike—all are scientisms. Scientisms partake of the hegemony of metaphysics. In every case, the only means of overcoming the scientistic blind spot is to ask: what is the impact of accepting the equality of persons, systems, and legal phenomenon as absolute analytical departure points?

Beyond comparative legal theory’s myopic focus on the question of incommensurability or commensurability of differing legal

¹²¹ HEIDEGGER III, *supra* note 9, at 206-07.

¹²² *Id.* at 238.

¹²³ Nietzsche, *The Antichrist*, *supra* note 90, 57 at 646-47.

¹²⁴ GOLOMB, *supra* note 24, at 47-48. See also Golomb, *Nietzsche and the Marginal Jews*, *supra* note 48, at 159.

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traditions¹²⁵ lies a deeper question: what is implied by comparison? All liberal legalism assumes the existence of equal persons before “*the Law*,”—this is undoubtedly the foundation stone of the Enlightenment. Just as modern constitutional jurists assume the equality of legal subjects, modern comparative lawyers assume equal legal subjects as the object of study—whether or not comparison is possible, or indeed fruitful, is another question. However, few dare to question the possibility, or indeed desirability, of abandoning that form of thinking, which can imagine exclusively equally discernable and equally representable forms. Nietzsche, however, teaches that the assumed metaphysical pivots and centralized points of reference are themselves to be questioned. We cannot assume equality any more than we can assume comparability. The mania of equality blinds us to the very conditions of both difference and *constructive inequality*. Citing Alain Badiou, Goodrich and Valverde make this point with extraordinary precision:

To assume the universality of liberalism and to assert the vacuity of Nietzsche’s thought on the strength of his failure to address the liberal’s problematic, is to legislate the necessity of a specific identity and to accept only those differences which conform to that identity. It is, as Alain Badiou puts it, “the final imperative of a conquering civilization: ‘Become like me and I will respect your differences.’”¹²⁶

Nietzsche’s thought is most illuminating and relevant where it opens a line of sight into what has been made invisible by the sediment of our own tradition. Nietzsche’s unique reading of the familial relationship between European Christendom and Jewry may offer a needed escape from the dominant discourse of comparative legal theory—a discourse which assumes equal (whether commensurable or incommensurable) and self-contained legal phenomenon as its assumed objects of inquiry.

XI. THE OTHER: NIETZSCHE’S JEW (THE RISKS OF COMPARISON)

Nietzsche’s locates “*the Jew*” in the interstitial space between the breaking and the re-inscription of the tables of law, and thereby binds the Jew inextricably to the formation of values and the laws of men. Nietzsche’s Jew is many things at once. He is simultaneously high and

¹²⁵ See, e.g., H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 44-48 (2d ed. 2004).

¹²⁶ Goodrich & Valverde, *supra* note 1, at 8-9.

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low, progenitor and cultural competitor, noble father and manipulative priest, friend and enemy, master and slave, European and Semite.¹²⁷ Yet, for all his contradictions, Nietzsche’s Jew is richer than the Jew of his contemporaries. Nietzsche’s Jew is not the Jew of Wagner, the Jew of bourgeois Prussian anti-Semitism, or the Judas of Christianity. Nietzsche’s Jew is bound to the core of Nietzsche’s Europe; he is the expression of all that is. Nietzsche’s Jew is in the racially-mixed polity of Greek antiquity and in the firmament upon which Christ stood. The Jew is both self and other in the truest sense. The significance of the Jew within Nietzsche’s typology cannot be overstated. As prototypical self and other, Nietzsche’s Jew is the refracted image of western culture.

In this section, I will develop the idea that the other is linked to a constant and reflexive return to the self. This claim is founded on a close reading of GM and its construction of the shared origins of Gentile and Jew. Nietzsche’s rhetorical lionization of classical Jewish civilization, as embodied in the Old Testament, in contra-distinction to his debasement of the priestly and proto-Christian Judaism of the New Testament, is representative of the manner in which knowledge of the legal other is carved out of knowledge of the legal self. Following Richard Weisberg’s argument that the phraseology of the hyphenated “*Judeo-Christian*” tradition is misleading and inconsistent with Nietzsche’s actual typology,¹²⁸ I shall explore the more complex arc spanning the transition from Hellenic to Semitic Europe. In so doing, I will argue that Nietzsche’s genealogy is expository of an extraordinarily important, albeit radically constructed, transition from a “*Judeo*” to “*Christian*” normative worlds. In this manner, Nietzsche can again be read to provide insight into the means by which rhetorical dissimilation artificially or symbolically demarcates self and other, for organizational, discursive and rhetorical purposes.

Thinking of Nietzsche’s Jew as a matrix of self and other, we must be mindful of Gilles Deleuze’s pointed observation that the active and reactive forces of *ressentiment* “are inseparable from the

¹²⁷ Hubert Cancik, “Mongols, Semites and the Pure-Bred Greeks”: Nietzsche’s Handling of the Racial Doctrines of his Time, in NIETZSCHE AND JEWISH CULTURE, *supra* note 48, at 55, 57.

¹²⁸ Richard Weisberg, *Nietzsche’s Hermeneutics: Good and Bad Interpreters of Texts*, in NIETZSCHE AND LEGAL THEORY: HALF-WRITTEN LAWS, *supra* note 1, at 149, 162 (arguing that “we must learn from Nietzsche the still-difficult and often-overlooked lesson that the hyphenated phrase ‘Judeo-Christian’ is grotesque given the hermeneutic and moral differences separating these sets of belief”).

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differential element from which their quality derives.”¹²⁹ Deleuze opens up a useful line of sight into the value-positing and truthful character of law. Driving always toward the abandonment of metaphysical centers, we might finally consider a de-centered essence of legal being in the inscriptive and interpretive quality of reactive and active forces—a quality which is radically *before* textual congealment and the corresponding cementing and augmentation of *ressentiment*.¹³⁰

XII. THE SELF: NIETZSCHE’S JEW (MORE RISKS OF COMPARISON)

The frequency with which Nietzsche deploys terms such as “Jew,” “Judaic,” “Semite,” and “Hebrew” is striking. This thematic preoccupation is at the core of my dissertation and is inexorably tied to Nietzsche’s conception of legality and legalism. However, prior to continuing our analysis, we ought first to unpack what Sander Gilman describes as “the ‘meaning’ of the Jew for the formation of Nietzsche’s sense of self.”¹³¹ No author can or should be read outside of their socio-historical environ. The marker of an author’s greatness lies in his *bricolage* or his dismemberment and reconstitution of his own cultural and temporal milieu. Writing from within the parameters of *fin-de-siècle* Prussian bourgeois society, Nietzsche undoubtedly saw the Jew as a “central marker of difference.”¹³² This demarcation of difference or *alternerity* became the obvious departure point from which Nietzsche could conceive of his own cultural and spiritual inheritance:

[T]he Jew as the prophet of the Old Testament, serving the angry and holy Jehovah; the Jew as the archetypal wanderer Christian (Saul/Paul), weak and destructive; and the Jew as contemporary, the antithesis of all decadence, self-sufficient and incorruptible.¹³³

This typology simultaneously represents Nietzsche’s greatest critical insight and his most risky endeavor. The greatness lies in Nietzsche’s acute perception of what Anton Schütz describes as “the

¹²⁹ GILLES DELEUZE, NIETZSCHE AND PHILOSOPHY 54-59 (Hugh Tomlinson trans., 2005).

¹³⁰ *Id.*

¹³¹ Sander L. Gilman, *Heine, Nietzsche and the Idea of the Jew*, in NIETZSCHE AND JEWISH CULTURE, *supra* note 48, at 76.

¹³² *Id.*

¹³³ *Id.*

crucial *sedes materiae* of the Western approach to law and legality—the Christian-Jewish divorce in matters of interpretation.”¹³⁴ The risk of this typology, argues Gilman, is its tendency to “separate the ‘good’ Jew (with whom Nietzsche identifies) from the ‘bad’ Jew, against whom Nietzsche (still his pastor father’s son) defines himself.”¹³⁵ It follows, Gilman argues, that despite its descriptive acuity, Nietzsche’s typology reduces “the perception of a group of single individuals to the generalities of a class” and risks an image of “Otherness” based on “stereotypes of difference.”¹³⁶ Although this reading is possible, I cannot follow Schütz or any other commentator to the extreme conclusion that “Nietzsche’s work has, under the cover of his anti-anti-Semitic protestations, substantially enriched the potential of anti-Semitism.”¹³⁷ Nietzsche is in no way responsible for the crude revisionism and perversions of his work. At most, he is guilty of the crime committed by all comparatists, who, by virtue of the expressive limits of language and the absolute cultural and historical embeddedness of authorship, essentialize the object of comparison to a greater or lesser degree. This is perhaps the greatest lesson of Nietzsche’s life and legacy, but Nietzsche’s writing is itself reflective of a degree of nuance and irony unmatched by virtually any of his predecessors, contemporaries, or successors.

Rather than dwelling on the well-documented misinterpretations and opportunistic hijackings of Nietzsche’s oeuvre, our objective, as we move toward the conclusion of this analysis, ought instead be toward unpacking the nuance and irony which animates Nietzsche’s formulation of the genealogical relationship between Europe and its ancient Oriental past. Or, perhaps more precisely, our objective ought to be a closer focus on Nietzsche’s depiction of the Jewish people and the Jewish tradition as illustrative of the best and worst formulation of the broader European self. From this analytical posture, we can utilize both Gilman’s three-part typology and Schütz’s pairing of “*the Jewish*” and “*the legal*,” as a means of considering both the law of the self and the law of the other.

XIII. NIETZSCHE’S JEW AND THE LAW: TAKING THE LAW OUT OF

¹³⁴ Anton Schütz, *Nietzsche Between Jews and Jurists*, in NIETZSCHE AND LEGAL THEORY: HALF-WRITTEN LAWS, *supra* note 1, at 125.

¹³⁵ Gilman, *supra* note 131, at 76.

¹³⁶ *Id.*

¹³⁷ Schütz, *supra* note 134, at 139-40.

COMPARISON

Taking Gilman’s typology as a relatively uncontroversial, albeit very general, rendering of Nietzsche’s treatment of the Jewish people, it remains necessary to consider the legal nexus between this typology and Nietzsche’s specific treatment of the Jew as “*Other*.” Without adopting Schütz’s assertion that Nietzsche may have “substantially enriched the potential of anti-Semitism,”¹³⁸ the related argument that Nietzsche failed, despite his best efforts, to disassociate himself from the “Western-Christian legal heritage” must be taken seriously. This argument is crucial because it hints at the absolute impossibility of any author or thinker, no matter how radical, to render an image of “*the Other*” which is completely freed from any trace of “*the Self*”—an argument not without parallels in Heidegger’s insistence that Nietzsche was the *last* metaphysician, albeit still a metaphysician.¹³⁹ Schütz’s argument is also not without resonance in Derrida’s notation that if Nietzsche indeed transgressed metaphysical boundaries, such a transgression could be imagined to perforate the hegemony of binaries.¹⁴⁰ To this end, I shall examine Schütz’s description of Nietzsche as “a son of Christianity”¹⁴¹ in some depth.

In an innovative argument which places the questions of law and legal interpretation in the immediate foreground of the “Jewish-Christian divorce in the Western *longue durée*,”¹⁴² Schütz locates a potentially serious conceptual fault line between Nietzsche’s philo-Semitic tendencies (as expressed by lionization of the Old Testament and contemporary Jewry)¹⁴³ and his equally vociferous anti-legalism (what I have described as anti-liberal legalism and anti-legal scientism).¹⁴⁴ The fault line revolves around the “irreconcilably divergent voices” of the Christian and Jewish interpretive traditions *viz* the Old Testament—a text which is emblematic of “*The Law*” in its most acute (and precisely metaphysical) sense.¹⁴⁵ Schütz explains the interpretive divergence in terms of Christianity’s faith-based or non-literal reading of the Old Testament—a reading which generates

¹³⁸ *Id.*

¹³⁹ HEIDEGGER III, *supra* note 9, at 5-6.

¹⁴⁰ DERRIDA, SPURS, *supra* note 68, at 117-19.

¹⁴¹ Schütz, *supra* note 134, at 129.

¹⁴² *Id.* at 134.

¹⁴³ In keeping with Gilman’s typology and Nietzsche’s high regard for those aspects of Judaism which are not perceived to be proto-Christian.

¹⁴⁴ See, e.g., TSZ, *Prologue*, *supra* note 3, 9 at 135; TSZ I, *supra* note 3, 5-6 at 148-52; TSZ I, *supra* note 3, 15-17 at 170-77.

¹⁴⁵ Schütz, *supra* note 134, at 134.

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and unbreakable bond between “law and truth” in contradistinction to the unmediated Jewish relationship to the text and its literal adherence to Talmudic strictures—an interpretive posture which necessarily demands a return to the text and refuses any automatic contraction of *law* and *truth*.¹⁴⁶ These differing interpretive traditions are an obvious outgrowth of the Christian need to re-read and reinterpret the Jewish Bible in a manner consistent with Christ’s reception as the messiah.¹⁴⁷ What is emphasized by Schütz, however, is the manner in which the differing exegetical approaches provided a critical foundation for Christian anti-Semitism and its view of Jews as “residual depositories or hostages of law,” or as a people afflicted by an archaic and petty legal literalism.¹⁴⁸ The distinction which Schütz fails to make precise, however, is that the apparent archaism and legal literalism, which he describes, refers exclusively to the Talmudic or rabbinic tradition. This is a tradition which emerged from a critical transition in the Jewish mode of being—a transition marked by the destruction of the second temple, expulsion from ancestral lands, and eventual dispersion in the European Diaspora. As soon the Israelite or Hebrew arrived on European soil, he became, for the first time, a Talmudist and “*a Jew*.” This represented a major change in his ontological condition. Nietzsche understood this point acutely. What is remarkable, however, is the manner in which Schütz develops this insight into a critique of Nietzsche:

[Nietzsche] misses the point of the equation of “Jewish” and “legal,” a point that has been established through centuries and millennia of Christian history. He misses the point of the resulting concomitancy between antilegalism and anti-Judaism. . . . He is caught between two bonds and two duties: as a fighter against the Jewish-Christian continuity of *ressentiment*, he participates in, indeed leads, the great Western crusade against the law; however, the German bourgeois Protestants, anti-Semites, socialists who are his readers and contemporaneous fellow fighters in this crusade, embody *ressentiment* more perfectly. Nietzsche despises them and exposes them. . . . He has, of course, never ever thought to become interested in rabbinic Judaism. He has not succeeded in asking the law question afresh¹⁴⁹

¹⁴⁶ *Id.* at 135.

¹⁴⁷ *See, e.g.,* Weisberg, *supra* note 128, at 155 (describing the Christian reading as the weaving of a distortion into the Jewish Bible).

¹⁴⁸ Schütz, *supra* note 134, at 135.

¹⁴⁹ *Id.* at 129 (emphasis added).

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The critical problem identified here is that, while Nietzsche clearly wishes to reject the Wagnerian concept of the Jew as “the degenerate Other,”¹⁵⁰ he consciously, or even strategically, avoids addressing the extent to which Christian anti-Semitism originates in a seminal disagreement over textual interpretation of religious law. Perhaps even more interestingly, Schütz’s critique includes the provocative aside in which he castigates Nietzsche for his failure to consider the question of Jewish interpretation from within the rabbinic tradition itself. Placing Schütz’s broader arguments momentarily to the side, it might be fruitful to consider whether a detour via Talmudic law would have made Nietzsche a better comparatist. Would Nietzsche have been able to more faithfully understand the Jewish people had he taken the time to familiarize himself with *their law*? Perhaps, but what Schütz overlooks is that it is altogether impossible to identify with any degree of certainty a unified body of law that can be singularly associated with, or attributed to, any people—particularly where “*the Text*,” properly speaking, is in the order of a shared inheritance.

Nietzsche can indeed be said to be a responsible comparatist (to the extent that the conditions of responsibility and comparison are not mutually exclusive), wherever he treats “*the Jew*,” and by extension, “*Jewish Law*,” as a living text and as a dynamic component of the broader European self. Despite the originality of his analysis, Schütz fails to consider the possibility that Nietzsche may have purposefully ignored the anti-Semitic association between rigid legalism and Judaism, not because explicit acknowledgment would have brought him into the orbit of his anti-Semitic enemies, but precisely because he rejected the notion of scientific truthfulness clinging to any essentialized subject-object rendering. This is, of course, entirely conjecture. However, Nietzsche was not without Jewish contemporaries and he was well versed in the conditions of the secular *Grenzjuden* and European Jewry more generally.¹⁵¹ Had he dwelled on the interpretive particularities of Talmudic Law, Nietzsche may have done little more than detract attention from the popular, bourgeois, and aristocratic anti-Semitism he sought to expose and deride.

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., GOLOMB, *supra* note 24, at 14 (citing the historical record of the intellectual relationship between Nietzsche and Joseph Paneth and the record of their conversation regarding the role of secular Jews in Europe).

Despite my criticism, Schütz’s observation that the Jewish and Christian traditions treat the textually identical “*Old Testament*” differently is undeniably accurate.¹⁵² The Jewish religious tradition can indeed be distinguished from the Christian one, particularly in terms of its literalism. Having accepted Christ as the messiah, Christianity was forced to engage in a faith-based textual revision of the Old Testament—a revision aimed at uncovering or identifying prophetic passages in the earlier text and bringing its narrative into accord with the Gospels. In this manner, the Jews became historically associated with legal positivism.¹⁵³ Here, Schütz’s suggestion that Nietzsche’s philo-Semitic rhetoric is in tension with an unconsciously Christian anti-positivism is not without merit.¹⁵⁴ However, it is my hope to demonstrate that this rendering represents only part of the story. In the sections which follow, I will consider this question through the varied assessments of Richard Weisberg and Gilles Deleuze.¹⁵⁵

XIV. NIETZSCHE: JEW, GENTILE AND JURIST

Like Schütz, Weisberg locates a critical nexus between Nietzsche’s concept of law and his treatment of the Jewish people.¹⁵⁶ However, Weisberg diverges significantly from Schütz in his schematization of this nexus.¹⁵⁷ While Schütz accuses Nietzsche of failing to address the tension between his anti-anti-Semitism and his “antilegalism,” Weisberg dissolves this problem by breaking the concept of legalism into two component parts: legal interpretation and justice.¹⁵⁸ This critical maneuver enables Weisberg to distinguish Nietzsche from the Christian interpretive tradition while drawing out Nietzsche’s social consciousness in a manner not fully canvassed by Schütz.¹⁵⁹ More importantly, Weisberg rejects the assertion that Nietzsche is inherently “antilegal” or “law-critical” and concludes, contra Schütz, that Nietzsche endorses the law as a means to justice—provided that it is “properly propounded and interpreted.”¹⁶⁰

¹⁵² As acknowledged by Nietzsche himself. See e.g., GM III, 23, *supra* note 2, at 580.

¹⁵³ Schütz, *supra* note 134, at 128-33.

¹⁵⁴ *Id.*

¹⁵⁵ Weisberg, *supra* note 128; DELEUZE, *supra* note 129.

¹⁵⁶ Weisberg, *supra* note 128, at 149-51.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

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Unlike Schütz, who relies heavily on *The Antichrist*, Weisberg understands the link between Nietzsche’s treatment of the Jewish legal tradition and *the law of the other* through the ocular of the eleventh aphorism of GM II.¹⁶¹ Weisberg highlights this aphorism for its critical distinction “between justice and knee-jerk revenge or *ressentiment*” and its favorable treatment of a sober Judaic textual exegesis over the more absolutist and value-laden Christian exegetical tradition.¹⁶² Here, the Jewish law “of the heroic Old Testament” is ranked above “the rococo” of the “privatized spiritualization of the Gospels,” precisely because “the will to power emerges from the realm of self-perfection into the world of socialized humanity.”¹⁶³ This aspect of Weisberg’s analysis is critical to my own treatment of Nietzsche for several reasons. First, it coincides with my theorization of the law-positing and truthful qualities of the Zionist enterprise. Second, it acknowledges the differing Jewish and Christian interpretive traditions without placing Nietzsche in the crosshairs of a contradiction or rendering him as a hypocritical Christian exegete. Third, as will be shown in my analysis of Deleuze, it opens up the possibility of a newly imagined *legal other* capable of bridging binaries and overcoming the pathologization of *ressentiment*.¹⁶⁴

XV. ACTIVE AND REACTIVE FORCES

Contra Schütz, what is most critical in Weisberg’s analysis of Nietzsche’s rendering of Old Testament legality is the degree to which Nietzsche is read to endorse not only legality itself, but also the Jewish interpretive tradition.¹⁶⁵ Here again, Weisberg identifies the operative passage in the eleventh aphorism:

Historically understood [in the Old Testament and ancient Judaism], the place of justice on earth is situated as a battle against the reactive emotions, a war waged by means of that active and aggressive power that here uses a part of its strength to quiet the ceaseless rumblings of *ressentiment* and to enforce a settlement The most decisive move, however, made by the higher power against the predomination of grudge and spite, is the establishment of the law¹⁶⁶

¹⁶¹ *Id.*

¹⁶² Weisberg, *supra* note 128, at 151.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 150 (citing GM II, 11).

¹⁶⁶ *Id.*

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Here, Jewish legalism is understood as a bulwark against arbitrariness and the corrosive tendency of *ressentiment*.¹⁶⁷ Weisberg reads Nietzsche’s lionization of Jewish legal ordering and the Jewish interpretive interpretation as a direct refutation of the dominant forms of Christian legal interpretation which span the two thousand year history from the Gospels to Vichy revisionism.¹⁶⁸ Far from Schütz’s belief that Nietzsche espoused Christian anti-legalism, Weisberg suggests that Nietzsche actively endorsed Jewish legalism and its adherence to the form of justice embodied in the strength of the original codifier against the *ressentiment* of later day interpreters:

However much the Jewish scholars protested, everywhere in the Old Testament there were supposed to be references to Christ and only to Christ and particularly his cross. Wherever any piece of wood, a switch, a ladder, a twig, a tree, a willow, or a staff is mentioned, this was supposed to indicate a prophecy Has anyone who asserted this ever believed it?¹⁶⁹

The lesson to be drawn from Weisberg’s reading of Nietzsche’s praise for the Jewish legal order and its honest adherence to the text, or *von der goetlichen Gerechtigkeit*,¹⁷⁰ is *not* that Nietzsche was a legal positivist or arch-codifier. He is, after all, the same man who declared: “I mistrust all systematizers and I avoid them. The will to system is lack of integrity.”¹⁷¹ However, it is necessary to dwell on two of Weisberg’s assertions: “(1) the text must instantiate the vitalistic urge to justice of the codifier and (2) the text must be—as consistently as possible—*interpreted* from the perspective of the same set of positive values.”¹⁷² I enthusiastically endorse the first proposition and urge caution on the second. My concern is that Weisberg may be inadvertently reassembling Zarathustra’s broken tablets—a proposition which risks seriously distorting the ongoing creativity essential to the Nietzschean legal dynamic. However, I am

¹⁶⁷ *Id.*

¹⁶⁸ Weisberg, *supra* note 128, at 151-53 (“emergency” has a long history of providing an impetus for willful textual distortion—from “the early Gospel writers’ prediction that the End of Days was approaching” through to today’s alarmist post-9/11 environment).

¹⁶⁹ *Id.* at 153 (citing Friedrich Nietzsche, *The Dawn*, at 84).

¹⁷⁰ *See id.* at 152 (Weisberg translates this as “the book of divine justice” or the “Old Testament”).

¹⁷¹ Nietzsche, *Twilight of the Idols*, I, *supra* note 117, 26 at 470.

¹⁷² Weisberg, *supra* note 128, at 152.

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completely in accord with Weisberg wherever he highlights Nietzsche’s belief in the inspirational possibility of remarrying law and justice on the ancient Hebraic model—an approach which, contra Schütz, bears little resemblance to either the Christian interpretive tradition or its scientific liberal successors.

XVI. RETURNING TO DERRIDA

Despite highly significant critical differences,¹⁷³ Goodrich and Weisberg share an essentially Talmudic understanding of the textual dynamism of law and its dualistic quality as a marker of both radical consistency and radical creativity. This commonality is most acutely expressed in the overlap between Nietzsche’s concept of the eternal return and Derrida’s poetic articulation of the manner in which the closing of the book endlessly triggers its reopening and starting afresh. Igor Stramignoni draws heavily on Derrida’s “Ellipsis,” the final essay in his *Writing and Difference*, to make this point in the particular context of comparative law:

[L]e retour au livre- de Dieu, de l’homme, de Jabès, de Derrida, de l’Autre en droit—n’est pas au-dedans du livre. ‘La répétition, ne réédite pas le livre, elle en décrit l’origine depuis une écriture qui ne lui appartient pas encore ou ne lui appartient plus.’ . . . Le retour au livre, suggère donc Derrida, ‘est d’essence elliptique’. Il ne touch rien—ni ‘même’ ni ‘autre’—et, pourtant, ‘tout le sens est altéré pas ce manqué . . . l’origine a joué’ et le livre, pendent ce temps, ‘s’est laissé penser comme tel.’ . . . Et ça, come l’écrit Derrida, ce sera le retour eternal dont parlait Nietzsche.¹⁷⁴

In the Zarathustrian breaking of the tables, Nietzsche’s eternal return, and Derrida’s closing of the book, the same revival of the Jewish interpretive approach is at play. Contrary to the refrain of Christian anti-Semitism, Jewish law is neither dead letter nor positivistic—it is the locus of action and strength expressed in the drive to affirm life through reverence to the text—an unorthodox

¹⁷³ Many of which hinge on the question of whether Nietzsche’s texts ought to be read deconstructively and whether they presage Derrida’s brand of messianic legalism. See, e.g., Weisberg, *supra* note 130, at 152, 160; Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2065 (2001).

¹⁷⁴ Igor Stramignoni, *Le regard de la comparaison: Nietzsche, Heidegger, Derrida*, in COMPARE LES DROITS, RESOLUMENT 147, 174-75 (Pierre Legrand ed., 2009).

reverence expressed in the movement from smashing to writing anew. This is the deconstructive understanding, and it is far closer to the ancient Hebraic tradition than it is to Pauline revisionism. As rightly emphasized by Goodrich and Valverde, and wrongly overlooked by Weisberg, Derrida, like Nietzsche before him, harkens back to a Jewish and pre-Christian understanding of law wherever he embraces the reverential, yet radical return to the text.¹⁷⁵

XVII. SELF & OTHER: AGAINST THE DIALECTIC

Due to the cruel (or merciful) metaphysical contrivance of world limits, I must limit my discussion of Deleuze. However, the magnitude of his contribution cannot be ignored, I will therefore treat the Deleuzian responses to our themes "like cold baths: quickly into them and quickly out again."¹⁷⁶

Deleuze reminds us that Nietzsche's philosophy operates as a totalizing rejection of both Hegelianism and dialectical reasoning—a critical break which permits us to abandon the pathological drive toward reconciliation and to finally embrace a calmer analytical stance capable of conceiving of the human condition as a delicate and nuanced set of "*coordinations* to be interpreted."¹⁷⁷ Although Deleuze would not necessarily reject Gilman's typology,¹⁷⁸ he would certainly caution against treating the Jewish other as either analytically opposite, or completely distinct from, the corresponding Christian self. This is nowhere more obvious than in his treatment of Zarathustra, whose anti-Hegelianism is discerned in his embrace of contradiction.¹⁷⁹ What is more important for our immediate purposes, however, is that the dialectic is part of the broader Christian interpretive tradition. A distinctly metaphysical tradition which drives singularly toward reconciliation through obliteration—a drive expressed in the forced reconciliation of the Old and New Testaments (a revision of the former aimed at accommodating the latter). This is what Deleuze means when he says, "what has been discovered by Hegel's early writings is in fact, the final truth of the dialectic: modern dialectic is the truly Christian ideology."¹⁸⁰

¹⁷⁵ Goodrich & Valverde, *supra* note 1, at 10-11.

¹⁷⁶ Friedrich Nietzsche, *The Gay Science*, V, in BASIC WRITINGS OF NIETZSCHE, *supra* note 4, 381 at 176-77.

¹⁷⁷ DELEUZE, *supra* note 129, at 15.

¹⁷⁸ Gilman, *supra* note 131, at 76.

¹⁷⁹ DELEUZE, *supra* note 129, at 15-16.

¹⁸⁰ *Id.* at 18.

XVIII. FROM GREEK TO SEMITIC LEGALITY & RESENTMENT

Decimating (but *not* resolving, dialectically or otherwise) the Gentile/Jew binary, Deleuze emphasizes Nietzsche's critical distinction between *Semitic legality* (both Christian and Jewish) and its noble Hellenic precursor. Both Greek and Jewish antiquity are equally representative of a nascent or childlike cocoon preceding Christian adulthood.¹⁸¹ And, as is well known, Nietzsche preferred the wisdom of children to that of adults.¹⁸² In keeping with his properly anti-Hegelian reading, Deleuze accentuates Nietzsche's commitment to a reverse teleology in which the Greek childhood represents the apex of European legal intuition and Christian adulthood represents its nadir. From here, it is no great leap to argue that Nietzsche's concept of Semitic legality, at least its rabbinic or priestly incarnation, functions as the adolescent bridge separating Europe's Hellenic childhood from its Christian adulthood. Like all adolescents, this Judaic teenager embodied both the natural freedom of childhood and the brooding seriousness of adulthood.

Deleuze emphasizes that Nietzsche's harshest words for the Jewish people lies in their transition from the life-embracing childishness of the Jewish antiquity (a phase which recalls, or even exceeds, the greatness of Hellenic culture¹⁸³) toward the proto-Christian *ressentiment* of rabbinic Judaism. Most crucially, after the fall of the second temple and the diasporatic dispersion of the Jews, the previously worshipful and largely unmediated, relationship between the ancient Israelites and almighty God was terminated.¹⁸⁴ As a result of this changed relationship, all spiritual or religious impulses were brought into the orbit of rabbinic asceticism—a development characterized by the second prong of Gilman's typology and unabashedly despised by Nietzsche.¹⁸⁵ A critical question poses itself here—perhaps even against all of Nietzsche's interlocutors canvassed

¹⁸¹ *Id.*

¹⁸² *See, e.g.*, BGE IV, 94, *supra* note 4, at 273.

¹⁸³ *See, e.g.*, Nietzsche, *The Dawn*, *supra* note 90, 205 at 88-89.

¹⁸⁴ *See, e.g.*, Nietzsche, *The Antichrist*, *supra* note 90, 25 at 594 ("Originally, especially at the time of the kings, Israel also stood in the right, that is, the natural, relationship to all things. Its Yahweh was the expression of a consciousness of power, of joy in oneself, of hope for oneself . . . Yahweh is the god of Israel and therefore the god of justice; the logic of every people that is in power and has a good conscious.").

¹⁸⁵ *See, e.g.*, Nietzsche, *The Antichrist*, *supra* note 90, 56 at 642 (describing what Kaufmann translates as the venomous quality or "ill-smelling Judaine of rabbinism").

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above, including Derrida. Doesn't Nietzsche hint at a “*pre-Judeo-Christian*” spirit alive in an idealized Oriental *Shangri la*?¹⁸⁶

Only with the final destruction of the second temple, and the dispersion of the Jewish people, would the nihilistic tendencies of priestly Judaism be permitted to take root.¹⁸⁷ When the second temple was destroyed, so too was the practice of gathering together in a sacred place and offering sacrifices to God. Here, ancient Judaism's pagan¹⁸⁸ perfection embodied in the balance of Dionysian and Apollonian forces would finally collapse into an orgy of *ressentiment*. Understood in this way, we might finally move beyond seeing Nietzsche as either a Christian or Jewish exegete. After all, if we are interested in collapsing and perforating binaries, which we are, this is the only proper intellectual course. We must, in fact, consider the possibility of an earlier form of being which was entirely non-exegetical. Deleuze explains this operation in the move from “topology” to “typology.”¹⁸⁹ Topology describes the naturalistic and life-affirming manner in which man's “animal psychology” provides a release valve for reactive forces. Typology describes the means by which priestly manipulation gives negative shape and meaning to what would otherwise be passing and forgotten urges toward violence, hate, and exclusion.¹⁹⁰ This priestly manipulation lays the groundwork for a proto-Christian and proto-Hegelian reversal of values—suddenly, the natural animal feelings of men are captured and exploited in an elaborate *system* of remembering and accusing.

When considered from a Deleuzian perspective, a new dynamic is brought to bear on the archetypal distinction between the Jewish and Christian interpretive traditions. The petty legal formalism attributed to the Jewish interpretive tradition might now be understood as an expression of Christian self-loathing aimed at its own eventual perfection of the priestly and ascetic impulse. This is undoubtedly Nietzsche's reading.¹⁹¹ Deleuze recognizes in Nietzsche his extraordinarily long and multifaceted grasp of history—a history

¹⁸⁶ See, e.g., BGE III, 52, *supra* note 4, at 255 (describing the greatness of the Old Testament, the perversity of its forced integration with the New Testament, and the dwarfing of Christian Europe by “the ancient Asia” of the Hebrews).

¹⁸⁷ This point is made obliquely by Nietzsche himself. See Nietzsche, *The Antichrist*, *supra* note 90, 17 at 583-85. See also GOLOMB, *supra* note 24, at 133.

¹⁸⁸ GOLOMB, *supra* note 24, at 76-77 (citing Berdichevski's Nietzschean “historical research aimed at a reevaluation of the religion of the ancient people of Israel” in terms of “nature worship and idolatry” rather than modern “monotheism”).

¹⁸⁹ DELEUZE, *supra* note 129, at 116.

¹⁹⁰ *Id.*

¹⁹¹ BGE III, 52, *supra* note 4, at 255.

which extends to a prehistoric time before Europe's imagining in the life-affirming innocence of both Hellenic and Hebraic antiquity.¹⁹² This aspect of Nietzsche's thought was not lost on Golomb's Hebrew Nietzscheans, all of whom wished to escape the confines of their European inheritance to return to the ancient past—a pre-rabbinic, even pre-Talmudic, dynastic past.

In Deleuze's formulation of *ressentiment*, we might finally imagine ourselves to have overcome "the Jewish question" and to have finally replaced it with an analysis of the priestly or rabbinic condition. Regardless of how it is conceived, however, what is most significant is that we are now able to shift our focus from the Jew/Gentile binary (including all variants thereof) to the nature and quality of the priestly manipulation of both the human soul, and "*the Text*"—a manipulation that would "prove decisive for the whole of European history"—from the Christian concept of sin and guilt to the Hegelian dialectic. Seen through this ocular, we *might* finally be able to dissolve the apparent tensions between the so called Jewish and Christian interpretive traditions.¹⁹³

XIX. CONCLUDING REMARKS: REPRISING OBJECTIVES AND REVISING QUESTIONS

Having shifted perspectives in the latter half of the dissertation, I hope to have made possible an imagining of self and other which reaches behind Schütz's "Christian-Jewish divorce in matters of interpretation,"¹⁹⁴ to a time before either the marriage or the courtship. Indeed, I have sought specifically to think upon the Oriental cocoon of Europe's Hellenic and Hebraic past. Throughout, the intent has been to press the outer limitations of our usual way of seeing, thinking, and knowing. It is hoped, however, that the reader will have sensed my particular reverence for Nietzsche, a thinker who enlivened the spirit of my people. Equally importantly, it is hoped that we might finally abandon our attachment to crippling binaries such as Jew/Gentile—binaries which represent a sterile metaphysical rendering of the human condition. On the day that we undertake this monumental abandonment, the crucial thinker to whom we will surely turn is Nietzsche. Until then, Nietzsche remains a constant reminder of the primordial truth of law and the possibility of becoming, knowing and positing anew.

¹⁹² *Id.*

¹⁹³ DELEUZE, *supra* note 129, at 118-19.

¹⁹⁴ Schütz, *supra* note 134, at 129.