

# **ON THE LAWS GOVERNING FREE SPIRITS AND PHILOSOPHERS OF THE FUTURE: A Response to Nonet's "What Is Positive Law?"**

**Peter Berkowitz**

Assistant Professor of Government, Harvard University.

## **I. INTRODUCTION**

To seek an answer to the question "What is positive law?" in Nietzsche's mature writings will strike many as a dubious undertaking. Shall jurists, even the most versatile and erudite, go to school with Nietzsche? Can Nietzsche's thought, which focuses with single-minded zeal on the education and happiness of the higher and highest men, shed light on the mundane realm of positive law? Philippe Nonet's unconventional essay dares the jurist to strip the law of its dignified grey-flanneled and black-robed exterior and think through the ultimate grounds or foundation of legal authority. At the same time, Nonet emboldens the competent student of Nietzsche to claim for herself the true expertise in jurisprudence. Such wild and fantastic possibilities arise directly from Nonet's contention that Nietzsche ought to be understood as "the thinker and prophet of legal positivism."<sup>1</sup> How to judge of these wild and fantastic possibilities is initially not easy to say since, ordinarily, quite different standards attach to the evaluation of philosophical investigations, on the one hand, and the reading of books of prophecy, on the other.

This much, though, may safely be said at the outset. Nonet's essay, which he modestly describes as "a brief introduction to the mature works of Nietzsche,"<sup>2</sup> is, in fact, a learned, skillfully wrought meditation on the fundamental conceptions of Nietzsche's thought: the will to power, the death of God, nihilism, the eternal return, and the way of the creator. For better and for worse, Nonet goes to extreme lengths to lay bare Nietzsche's most extreme thoughts. Perhaps in reaction to the extreme disregard of Nietzsche's extremism so common today, Nonet rivets attention upon the dizzying heights and crushing depths of Nietzsche's philosophical speculations. Yet Nonet's exclusive focus on Nietzsche's final goal at the expense of his prolonged and

unfinished quest, Nietzsche's ultimate destination rather than his intellectual odyssey, not only misrepresents the whole, but also gives a distorted picture of the final goal and the ultimate destination.

How should one approach Nonet's demanding essay? To begin with, it is helpful to ask what is implied in raising the question, seldom heard in the halls of legal academia, "What is positive law?" Second, one should examine whether Nonet's reading of Nietzsche is sound. Third, one is obliged to consider whether, sound or not as a reading of Nietzsche, the view Nonet attributes to Nietzsche is a reasonable interpretation of positive law. I should emphasize that, much as I disagree with certain key particulars of Nonet's readings of Nietzsche, and though I take issue with Nonet's overall understanding of the problem of positive law, Nonet deserves considerable credit for provoking the serious student to face, as few commentators do, the devastating consequences for conventional morality and justice Nietzsche, for one, believed inhered in his doctrine of the will to power and his vision of the death of God; the religious or Christian origins which infuse Nietzsche's highest hope; and the extraordinary and desolate heights, hostile to human nobility and happiness alike, to which Nietzsche's severe morality, in its most uncompromising form, summons.

## II. THE SIGNIFICANCE OF THE QUESTION

In form, "What is positive law?" is a Socratic, and therefore, at first glance, an antiquated question, as it implies a search for the core, essence, or abiding nature of positive law. The closest Plato's Socrates comes to asking "What is positive law?" is in the *Republic*, where the leading question concerns the nature of justice (*dikaiosyne*), and in the *Minos*, where Socrates and a comrade ask "What is law (*nomos*)?" A crucial issue in the *Republic* is whether justice is conventional, that is, whatever the strongest declare it to be, or natural, that is, independent of what individuals choose and what rulers declare. In the *Minos*, similarly, law seems to be in some respect "the official opinion of the city,"<sup>3</sup> the rules actually laid down, but law also appears to embody the wish to discover the truth in regard to organizing a city.<sup>4</sup> Characteristically working from and through popular opinions on the matter at hand, Socrates' conversations reveal that opinions about justice and law are composed of conflicting elements. On the one hand, justice and law seem to make a claim to partake of or reflect something high, universal, or eternal; something determined by reason, the gods, or God. On the other hand, justice and law exhibit a lower character, bound up with the local and temporal, springing from and giving effect to the choices of human beings. The conversations found in the *Republic* and the *Minos* suggest that, while each of these rival opinions has a powerful tendency to crowd out or swallow up its rival, an adequate understanding of justice or of law is dependent upon giving

due weight both to nature and to convention, to reason as well as to will, to what is fixed and enduring and to what is posited and set down.

What, then, is involved in setting aside the search for justice or law, in favor of an investigation, such as the one Nonet undertakes, into the abiding nature of a certain kind of law, of positive law? What is noteworthy about framing a Socratic question around this non-Socratic theme? To see what is at stake, it is necessary to begin from a working notion of positive law.

Positive law is often said to be those rules which are man-made, which have been promulgated by a particular community, city, or nation. A familiar way of putting the point is that positive law is the law that is, in contrast to the law that ought to be. This simple, preliminary formulation, of course, leaves open the question of the consequence of a conflict between the positive law that is and the law that ought to be, between the law of the city and the divine law, between human justice and what is right by nature or dictated by reason.

Consider two familiar views about the relation between positive law and higher law, views which could appear to be worlds apart. Martin Luther King, Jr., writing (from behind bars in a Birmingham jail cell) to explain the grounds of his disobedience of civil laws that enforced racial segregation, echoed the classic natural law teaching of Thomas Aquinas: "[A]n unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust."<sup>5</sup> Official enactments of the state which violate the higher, natural law, are, on King's account, null and void, scarcely worthy of the title "law."

Oliver Wendell Holmes, Jr., more than sixty years earlier, in an immensely influential lecture published in the *Harvard Law Review*, advanced what may seem to be an altogether different view. Against the inclination to mix law and morality, Holmes declared, in what have become among the most celebrated lines in American jurisprudence:

What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the

law.<sup>6</sup> It is a mistake, Holmes believes, to confuse the question "Is a rule law?" with the question "Is a rule just?" In contrast to King, Holmes is committed to the view that all positive laws, the just ones and the unjust ones alike, are laws in the full sense of the term. It is important to realize, however, that Holmes' way of thinking preserves the distinction between the law of the land and the dictates of morality which allows for the criticism of existing laws as unjust, foolish, or depraved.<sup>7</sup> What is more, Holmes does not appear to have believed that the separation of law from justice implied that justice was nothing more than the subjective and arbitrary expression of individual selves. Indeed, he muses at the conclusion of his lecture that through study and meditation on the "remoter and more general aspects of the law" one may "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."<sup>8</sup>

What is vital to see is that for Holmes the positivist, as well as for King the adherent of a natural law teaching, the goodness and justice of positive law -- the laws enacted by legislatures, carried out by executives, and adjudicated by courts -- cannot be entirely determined from within the confines of the legal system. In short, the recognition of a positive law brought into being and maintained by human beings to serve their interests is compatible with a wide range of views about the justice, goodness, and wisdom of such laws. Furthermore, the distinction between the law that is or prevails and the law that ought to be or govern underlies a vast and fascinating array of opinions about the origins or foundations of justice, goodness, and wisdom. In a crucial respect, Nonet's understanding of positive law is closer to the Reverend King's appeal to eternal standards than to Justice Holmes' bad man theory. Like King's view that positive law receives not merely its sanction, but its very character as law by virtue of its conformity to the natural law, Nonet, heading in the opposite direction and driving full throttle toward the extreme, appears to believe that only commands and prohibitions that conform to the essence of positive law deserve the title "law."

What is positive law in this precise or strong sense? Nonet's explication of the essence of positive law begins with the observation that we are accustomed to conceiving of positive law in relation to "a prior and higher Law (*Recht*)," <sup>9</sup> that is, in contradistinction to a natural, divine, or rational law. Indeed, jurisprudence has, according to Nonet, held "positive law to a subordinate place."<sup>10</sup> Scarcely concealing his disapproval for what he believes to be a "long tradition of lawyerly contempt for legislation," <sup>11</sup> Nonet explains:

Through most human history so far, the power of command has indeed been confined to narrow domains, bounded by custom, held in delegation, premised upon and therefore conditioned by limited trust, kept within the scope of presumed expertise.

But this past affords no clue to the significance of positive law in the strong sense of a law that asserts itself as binding on the sole ground that it has been so willed, subject to no other condition. If such a phenomenon has indeed made its appearance in the modern world, it requires to be thought afresh.<sup>12</sup>

No wonder that Socrates and later philosophers right down to Nietzsche failed to raise the question "What is positive law?" if, as Nonet hints, the essence of positive law was, until only recently, absent from the world.

This new or newly revealed phenomenon, Nonet indicates, is rooted in a purification of the "power of command." And it is this purified power of command which represents the inner truth of law and the real subject of Nonet's investigation:

In its primary sense, the name "legal positivism" designates not a philosophical or legal doctrine, but the historic movement by which the power of command rises to the rank of supreme source of law, thus inaugurating the reign of positive law. Nietzsche is the thinker and prophet of legal positivism.<sup>13</sup>

It is certainly not law and legal institutions as understood by citizens, jurists, and statesmen -- nor is it even that philosophical interpretation of positive law which defines justice and law as the command of the sovereign<sup>14</sup> -- which Nonet believes is illuminated by Nietzsche's writings. Rather, accepting as given, as an accomplished historical event, the total overthrow and irredeemable discrediting of nonartificial moral and political standards, Nonet makes the source of artificial moral and political standards, the commands of the human will, the subject of his inquiry. The question "What is positive law?" supplants the questions "What is justice?" and "What is law?" because positive law -- defined with spectacular expansiveness as the beliefs and values constructed and imposed by human wills -- is all there is. Once one sees how this controversial answer about the nature of law and justice is contained in Nonet's novel question "What is positive law?" one begins to understand why Nietzsche is central to Nonet's inquiry. And however much one may be inclined to quarrel with the view that morality, law, and justice are nothing more and nothing less than a project of the human will, one must admire Nonet's shrewd grasp of the fact that the highest -- and lowest -- points of Nietzsche's philosophical investigations concern the nature of an unconditioned and self-certifying command and the character of the human being who aspires to issue it.

### III. NONET'S READING OF NIETZSCHE

All but disdaining preliminaries, much in the manner of Zarathustra when he first

enters the marketplace and proclaims with scant warning or preparation his radical vision of the superman and devastating indictment of the last man,<sup>15</sup> Nonet pauses only briefly, before introducing Nietzsche's fundamental and audacious teachings, to announce a few portentous methodological strictures concerning how to study Nietzsche. Nonet solemnly declares:

To study Nietzsche is not to ascertain the historical record of "what Nietzsche said," nor to seek mastery of that mass of materials in the construction of tidy "nietzschean" doctrines. Great thinkers demand that we let their words draw our attention to the matter at issue in their thought.<sup>16</sup>

To caution against getting bogged down in details or losing sight of the forest for the trees is one thing. Yet one wonders why Nonet fears or encourages the fear that scholarly rigor and philological exactitude will obscure "the matter at issue" in Nietzsche's thought. After all, what, short of ascertaining the historical record of "what Nietzsche said," is to prevent us from confounding the matter at issue in our thought with the fundamental problems pursued in Nietzsche's thought? What, if not the effort to master Nietzsche's writings, will safeguard us from mistaking our heartfelt questions for the cluster of grave questions which Nietzsche asks?

One of the more disquieting aspects of Nonet's essay is that, while preaching textual piety and submission to Nietzsche's authority as a great thinker, Nonet himself exercises enormous interpretive freedom. Nonet's justification for relying primarily on *Beyond Good and Evil* and *On the Genealogy of Morals*, taken together, as an inlet to Nietzsche's mature teaching illustrates this tendency. Nonet asserts: "By Nietzsche's own instructions, these . . . two books are to be read as a single work, since the latter was written as an 'addition intended to complete and clarify' the former."<sup>17</sup> Contrary to Nonet's implication that Nietzsche conveys to the reader an unambiguous directive, Nietzsche's words (which appeared on the backside of the title page of the *Genealogy*)<sup>18</sup> are capable of varied and even opposing interpretations. After all, there is more than one way to "complete and clarify." Shall we, in deference to Nietzsche's instructions, read the two books as a single, well-integrated whole? Or, on the basis of the very same words and with no less regard for Nietzsche's intention, shall we instead read them as independent and self-contained works whose exact relation to one another can only emerge through close attention to each book's distinct argument and plan?

Elsewhere, Nietzsche provides indications or instructions which conflict with Nonet's practice. For example, in the Preface to the *Genealogy*, Nietzsche declares that he offers the third essay as an illustration of the art of the exegesis of an aphorism, specifically, Zarathustra's provocative statement that likens the pursuit of wisdom to a

warrior's conquest of a woman.<sup>19</sup> Nietzsche's plain instruction notwithstanding, Nonet freely lifts thoughts from the third essay without having established their significance in regard to Nietzsche's stated purpose, the exegesis of Zarathustra's aphorism. Nonet's claimed solicitude for Nietzsche's intentions hides a host of controversial decisions Nonet has unilaterally made, and presumes the answers to a number of vexing questions.

Still, suppose Nonet's decisions are sound and his answers correct. What is involved in reading a "single work"? What scruples should we observe? What guidelines shall we follow? Is a single work a seamless web? Do all passages and excerpts count equally? Or should a single work be conceived of as a treasure trove of rough jewels to be cut, polished, and set to suit one's taste, current fashions, or traditional forms? Or ought we to regard a single work as being held together by an overarching intention and plan which accords to each part a precise and indispensable role in the articulation of the whole? The answer, of course, is that it depends on the work. So what sort of single work does Nonet consider *Beyond Good and Evil* and *On the Genealogy of Morals* to form?

Since Nonet eschews the articulation of rules and guidelines for reading Nietzsche, yet nonetheless insists upon the vital importance of grasping Nietzsche's intention or plan, one is left to discern the proper approach to reading Nietzsche from Nonet's scattered remarks and overall practice. While Nonet affirms the authority of Nietzsche's texts over and against the reader's whim and will, Nonet cites to those texts and brings them forward as authority in a highly selective and idiosyncratic manner, uninhibitedly uprooting and recombining thoughts, phrases, and even sentence fragments. And, while Nonet assures the reader that "[c]lose attention" to *Beyond Good and Evil* reveals a "tightly woven whole,"<sup>20</sup> this later assurance stands in marked tension with Nonet's earlier assertion that *Beyond Good and Evil* and the *Genealogy* constitute a single work, for this earlier assertion implies that *Beyond Good and Evil* is partial, incomplete, and unable to stand alone. Nonet is torn between faithfully expounding what he regards as Nietzsche's teaching concerning the primacy of the will, and giving full effect to what he believes to be one of the key consequences of that teaching, namely, that every act of reading is a special form of writing, and all interpretation is essentially legislation.<sup>21</sup> The tone and form of Nonet's own essay, in fact, provide eloquent testimony that, when the will is crowned king, thought takes on the look of prophecy, and professions of piety become indistinguishable from brazen self-assertion.

#### A. Nonet on the True Foundation of Positive Law

Something seems amiss or omitted in the very definition of positive law Nonet

attributes to Nietzsche. Nonet implies that his starting point is a familiar account of positive law. In fact, he puts forward an idiosyncratic working definition, which he seeks to base on Nietzsche's authority. Nonet writes: "[P]ositive law (Nietzsche calls it *Gesetz*) is law that exists by virtue of being posited (*gesetzt*), laid down and set firmly, by a will empowered so to will."<sup>22</sup> Though Nietzsche commonly speaks of the nobility or baseness, rationality or irrationality, and justice or injustice of regimes, codes of law, and religious orders,<sup>23</sup> emphasizing different criteria, declares: "For positive law, to exist is to be valid, i.e., powerful and effective."<sup>24</sup> For a law to be powerful and effective, Nonet goes on to explain, by means of an analogy to medieval Christian theology, that law must meet one and only one requirement: it must give pure, unalloyed expression to its creator's will.<sup>25</sup> To be sure, this is a view encountered at the extremes of Nietzsche's speculations, the outermost reaches of Nietzsche's thought. It finds its fullest expression in Zarathustra's all-consuming desire for Godlike independence, power, and mastery.<sup>26</sup> Yet it is difficult to accept Nonet's contention that Nietzsche equates the existence of positive law with its validity in view of, among other things, Nietzsche's savage polemic against Christianity for its massive and pernicious impact on human civilization.<sup>27</sup> Has there been, from Nietzsche's point of view, a more monumental, fearful, and real power on the face of the earth than biblical religion? And did not Jewish and Christian priests, according to Nietzsche's account, create their extraordinarily effective rituals, beliefs, and afterworlds out of wills that were both powerful and deformed? In sum, is not Christianity, for Nietzsche, a grand system of positive law created and promulgated by wily, power-hungry, and higher men that has, for millenia, clung to existence with a vengeance?

Perhaps Nonet's meaning is that, in Nietzsche's view, Christianity and its various secular offspring -- democracy, liberalism, and socialism -- represent mere shadows of positive law, because these movements fail in some way to give pure, unalloyed expression to their creators' wills. After all, to qualify as positive law in Nonet's precise or strong sense, to be "powerful and effective," a law must originate in a will in which commanding and obeying are one.<sup>28</sup> Unfortunately, support for this somewhat enigmatic doctrine is not to be found where Nonet instructs us to look, in section 19 of *Beyond Good and Evil*. There Nietzsche is concerned, not with existence and validity, but with action and self-governance. Cautioning philosophers who "are accustomed to speak of the will as if it were the best-known thing in the world," Nietzsche argues that, "[w]illing seems to me to be above all something *complicated*, something that is a unit only as a word . . . ." <sup>29</sup> While Nietzsche, contrary to Nonet, actually denies that the will is a unity or that it can achieve unity, Nietzsche does speculate about a certain convergence or identity between command and obedience. However, the identity lies not within the *will* but within the *individual*: "A man who *wills* commands something within himself that renders obedience, or that he



believes renders obedience." <sup>30</sup> Apparently, for Nietzsche, the will, inasmuch as it vies for preeminence, is not the only faculty or power within the self or soul.

Nonet also seeks to establish that Nietzsche subverts the traditional understanding of higher law: "With Nietzsche, the relation between positive law (*Gesetz*) and higher law (*Recht*) is turned upside down." <sup>31</sup> Nonet infers from Nietzsche's assertion in the *Genealogy* that *Recht* and *Unrecht* (its opposite) are brought into being by *Gesetz*, that "*Gesetz*, as the self-assertion of the commanding will, is the spring of justice (*Gerechtigkeit*)."<sup>32</sup> Yet, Nietzsche, in the very passage under discussion, directly contradicts Nonet's inference that justice is essentially a creature of will. The whole section explicitly argues that justice (*Gerechtigkeit*) antedates both *Recht* (higher law) and *Gesetz* (positive law). Moreover, Nietzsche, stressing that the spirit of justice (*Geiste der Gerechtigkeit*), in its original sense, signified spiritual health, explains that, historically, it was the "stronger, nobler, more courageous," the just or comparatively just man (*der gerechte Mensch*), who instituted and administered *Recht*.<sup>33</sup> The original law-giving or legislation aimed to impose "measure and bounds upon the excesses of the reactive pathos."<sup>34</sup> The active, strong, healthy, and noble, on Nietzsche's account, strove to check and contain the reactive, the weak, the sickly, and the base by establishing authoritative or sacred standards for the governance of political life. But, and this is a crucial point in this context, Nietzsche straightforwardly describes, in the instant section from the *Genealogy*, such legislating as rooted in justice.<sup>35</sup> Moreover, since the right to lay down law belongs to the healthy and noble, the distinction between health and sickness, as well as that between nobility and baseness, preexists law-making and value-creating. While Nietzsche does reverse the relation between *Recht* and *Gesetz*, the fact remains that he presents justice (*Gerechtigkeit*) as superior to both. In opposition to, rather than in consummation of, the historical drift of modern philosophy, Nietzsche consistently recognizes and steadfastly relies upon a standard outside of and independent of the will which determines the goodness or badness of the will's assertions and actions. Whether such a conviction or allegiance stands in productive or fatal tension with other characteristic opinions held by Nietzsche is a different question.

Nonet appears to believe that section 265 of *Beyond Good and Evil* lends support to the proposition that will is the exclusive source of law, right, and justice, for that is where the reader is directed by the footnote attached to Nonet's assertion that "the 'egoism' of the will 'is justice itself.'"<sup>36</sup> True, the word "egoism" is to be found in that passage, as is the sentence fragment "is justice itself." To splice the two together to form a simple declarative utterance, however, is, to put it mildly, misleading. Look at a fuller citation which encompasses Nonet's two fragments:

At the risk of displeasing innocent ears I propose: egoism belongs to the nature

[*Wesen*] of a noble soul [*der vornehmen Seele*] -- I mean that unshakable faith that to a being such as "we are" other beings must be subordinate by nature [*von Natur*] and have to sacrifice themselves. The noble soul [*Die vornehme Seele*] accepts the fact of its egoism without any question mark, also without any feeling that it might contain hardness, constraint, or caprice, rather as something that may be founded in the primordial law [*Urgesetz*] of things: if it sought a name for this fact it would say, "it is justice [*Gerechtigkeit*] itself."<sup>37</sup> Remarkably, Nietzsche nowhere in this passage (nor anywhere else in section 265) refers to the will. The egoism Nietzsche equates with "justice itself" is not the egoism of the will, as Nonet would have it, but rather the egoism of the noble soul. Surely it is neither a narrow and petty interest in "what Nietzsche said" nor a slack-hearted and simple-minded wish to construct "tidy nietzschean doctrines" that compels one to wonder whether "will" is a fair and accurate synonym for the noble soul. After all, the soul is thought to be a whole of which the will is merely a part; and the soul (in contrast to the self) is often understood to be at home in an ordered and enduring cosmos.<sup>38</sup> Moreover, in the very passage which Nonet adduces as evidence that, for Nietzsche, will is the fount and measure of law (indeed, of all objects and beings), Nietzsche openly declares that there is an order of rank among beings inscribed in the nature of things, and suggests that the primordial law (*Urgesetz*) -- authoritative and unposited -- gives sanction to a very specific variety of egoism: that born of a noble soul.

Nonet is considerably more illuminating when he zeroes in on Nietzsche's view that the supreme human type is set apart by its monumental aspiration to become like God. While (for reasons I have already suggested and shall later elaborate upon) I think it is wrong, as a description of positivism, to assert that "positivism thought in its most radical implications entails a kind of deification of human power,"<sup>39</sup> I agree with Nonet that the necessity and meaning of man's self-deification becomes a leading theme for Nietzsche. By drawing attention to this side of Nietzsche's thought, Nonet provides a valuable corrective to the politicization, aestheticization, or defanging so frequently imposed upon Nietzsche by scholarly commentators.<sup>40</sup> Yet what Nietzsche characteristically presents as a thought experiment, wish, or unreachd goal -- to achieve pure or unconditioned mastery -- Nonet tends to re-present as an accomplished fact.

Consider Nonet's initial account of how, in Nietzsche's view, the will achieves self-deification. Understandably, Nonet asks from whence the will draws such fabulous power. Nonet offers a variety of formulations: "What indeed empowers the will to command is the will itself. In every commanding, the will wills, above and before the object of its command, its own power to command what it wills."<sup>41</sup> Or, as Nonet goes on to say, "In that it wills first and foremost to empower itself to command, the will attains absolute freedom from all laws other than those it posits for itself: it may then

lay claim to an unconditioned power to legislate -- and thus give a radically new sense to the kantian principle of autonomy." <sup>42</sup> Even as introductory remarks, these formulations are gravely deficient. Though I will myself to fly, I remain earthbound. Though I will myself to swim, I sink. Though I crown myself king, the world pursues its ordinary course and no one pays the slightest attention. What criteria does Nonet, in Nietzsche's name, offer to enable us to distinguish successful or effectual acts of self-deification from vain and misbegotten exertions? How are we to tell the difference between genuine empowerment and self-exaltation, on the one hand, and, on the other, outlandish presumption and mad conceit?

### B. Nietzsche's *Free Spirits*, and the Love of Truth as a Higher Piety

Positive law, according to Nonet's reading of Nietzsche, is nihilism. This is because positive law properly, that is to say, radically, conceived, stands for the proposition that man is the maker of his world. If man is truly the maker of his world, and God is part of the world, then man's Maker is man-made. If God is an artifact of the human will, then God's commands, prohibitions, promises, and sanctions are the no-longer-so-well-disguised legislative project of human legislators. The discovery that what had hitherto been worshipped as highest and holiest, as infinitely superior to man, is human through and through -- the dawning realization that the venerable holy lie is wholly a lie -- brings about the death of God: the shattering of orienting standards of good and bad, just and unjust, noble and base. <sup>43</sup>

This destructive nihilism, this devaluation of all values, "remains radically incomplete," according to Nonet's interpretation of Nietzsche, "until truth 'in the end draws its *most severe conclusion*, its conclusion *against* itself; this occurs (*geschieht*) when it poses the question 'what does the will to truth signify (*bedeutet*)?'" <sup>44</sup> Nonet goes on to declare that "This questioning and denial of the value of truth Nietzsche regarded as his own task . . . ." <sup>45</sup> But to question the value or meaning of truth is one thing; to deny its fascination or authority over us is quite another. Unfortunately, Nonet, referring the reader once more to section 27 from the third essay in the *Genealogy*, confuses the two. There, Nietzsche stresses the enormous costs incurred when the will to truth learns to flex its muscles, and declares that, as a result of the will to truth coming to consciousness of itself as a problem, morality must perish. And, highlighting the ambiguity inherent in the death of morality, Nietzsche immediately adds that this is at once the most terrible and the most hopeful of spectacles. <sup>46</sup> Nonet severely understates the extent to which the self-subversion of slave morality and Christianity represents, in Nietzsche's eyes, not the denial, but rather the triumph of the will to truth.

Nonet observes that *Beyond Good and Evil* begins as the *Genealogy* ends, with the

question of the value of truth.<sup>47</sup> The question of the value of truth raised in section 1 of *Beyond Good and Evil* is, however, preceded by the Preface, which, in fact, begins with Nietzsche's famous suggestion that truth is a woman, and proceeds to offer counsel about how truth, so conceived, may best be courted and won. To suppose that truth is a woman, an object of erotic desire, does call into question certain stuffy and traditional notions of the value of truth. Nonet, however, is too quick to equate questioning the value of truth with denying that truth has *any* value. He fails to see how questioning inherited notions about truth may lead to a renewed reverence for, or love of, truth.

Indeed, Nonet proceeds to assert that Nietzsche denies the supremacy of the value of truth in *Beyond Good and Evil*'s first chapter.<sup>48</sup> Is this assertion true? In this segment of his argument, Nonet discusses or cites two of the twenty-three sections from the first chapter, "On the Prejudices of Philosophers." Section 4, which Nonet quotes at length,<sup>49</sup> argues that human life presupposes false judgments, and that it is nothing more than a moral prejudice to condemn a judgment merely because it is false. Yet Nietzsche's exhortation in section 4 to recognize untruth as a condition of life manifests his dedication to comprehending the truth about the role of untruth in human life. Nietzsche admonishes us to resist the *false* belief that true judgments are necessarily useful judgments and all lies are unjust.

Exhibiting once again that curious cut-and-splice method which dominates his effort to introduce Nietzsche's thought, Nonet further argues:

With the negation of the value of truth, "we move right over and away from morals [*die Moral*], we smother, we crush perhaps the remnants of our own morality [*Moralitat*]." Freed from the domination of faith, philosophy, which as "the morphology and doctrine of the development of the will to power" is now called "psychology," becomes again "the queen of the sciences."<sup>50</sup>

Again, Nonet chooses, as a proof text, fragments from a passage which, upon closer inspection, appears to teach the very opposite of the lesson he wishes to expound. Is it the negation of the value of truth, as Nonet insists, or rather the fulfillment of the demands arising from the standard of truth, which results in the negation or destruction of morality? Does not Nietzsche hold out, as the reward for the devastating loss of one's morality, a monumental increase in understanding: "Never yet did a *profounder* world of insight [*Einsicht*] reveal itself to daring travelers [*wegenen Reisenden*] and adventurers . . ."?<sup>51</sup> And does not Nietzsche declare that, whatever the sacrifice and risk, "it is *not* the *sacrificio dell' intelletto*, on the contrary . . .!?"<sup>52</sup> Moreover, Nietzsche's emphasis on risk and daring in section 23<sup>53</sup> calls to mind section 1 of the same work, where Nietzsche exhibits his own love of truth by

declaring that the problem of the value of truth is a fascinating venture (*Wagnisse*) involving perhaps the greatest risk (*Wagnis*)<sup>54</sup> a risk that Nietzsche courageously embraces. Furthermore, in subsequent chapters, Nietzsche wonders whether "the strength of a spirit should be measured according to how much of the 'truth' one could still barely endure,"<sup>55</sup> and affirms that the philosophers of the future, though hostile to dogmatism, will be friends of truth.<sup>56</sup> And, finally, Nietzsche both supposes and asserts that truth is a woman, implying not a denial of truth but her tantalizing, erotic, and elusive character.<sup>57</sup>

Part I of *Beyond Good and Evil* does suggest that the love of truth is a prejudice; that the life dedicated to knowledge rests on a non-self-evident faith. But it is crucial to add that Nietzsche plainly knows, and emphatically teaches, that the love of truth is *his* prejudice and that dedication to knowledge is a vital part of *his* faith.<sup>58</sup> Neither Nonet's contention that Nietzsche "denies the *supremacy* of the value of truth" nor his more radical contention that Nietzsche negates "the value of truth" withstand scrutiny.<sup>59</sup> Nonet's presentation glosses over Nietzsche's deep and abiding conviction, pervasively exhibited in *Beyond Good and Evil*, that the love of truth is a noble prejudice and the life dedicated to the pursuit of knowledge, come what may, is man's highest calling.

Why is it essential for Nonet to claim that Nietzsche categorically denies the value of truth? Nonet keenly appreciates that, whether we understand truth as an order and structure inhering in the very nature of things, or, perhaps, as the basic categories of mind through which we experience and make sense of the world, truth must inescapably confine and constrain the creative will. The aspiration for an unconditioned creativity is frustrated by the repressive or limiting character of truth. Nonet well understands that the doomed quest to obliterate or think away what governs or confines the will is among the least appreciated and most important aspects of Nietzsche's teaching. Astonishingly, however, Nonet mislocates it when he claims to find it in *Beyond Good and Evil*. This is not the place to argue that the meaning of the supremely immoderate ambition to create under conditions of absolute freedom, to remake the world in one's own image, "to stamp upon becoming the character of being," is pursued with magnificent intransigence and dramatized with unrivaled force in *Thus Spoke Zarathustra*.<sup>60</sup> It is, however, pertinent to observe that, in *Beyond Good and Evil*, which Nonet believes teaches the meaning of self-deification, Nietzsche condemns the taste for the unconditional as the worst of tastes,<sup>61</sup> attributes the desire for the unconditional to the slave,<sup>62</sup> and decrees that "everything unconditional belongs in pathology."<sup>63</sup> These emphatic statements support the presumption that *Beyond Good and Evil*, far from prescribing or exhibiting the self-deification of man, in fact marks a revolt against Zarathustra's consuming lust for eternity, his debasing aspiration to command the greatest things.<sup>64</sup>

Nonet pays altogether insufficient attention to the comparative moderation of speech and aspiration which distinguish *Beyond Good and Evil*. Partly for this reason, Nonet wrongly contends that the second chapter of *Beyond Good and Evil*, "The Free Spirit," reveals how a free spirit, having denied truth, "is liberated from every bond of subordination or dependence, even from the constraint of 'reality.'" <sup>65</sup> Nonet's citation notwithstanding, section 36 of *Beyond Good and Evil* reveals nothing of the sort.

First of all, far from denying reality, section 36 presupposes the distinction between appearance and reality. Nietzsche introduces section 36 with the command to suppose (*gesetz*), or consider as a hypothesis, that nothing is real *except* our desires (*Begierden*), passions (*Leidenschaften*), and drives (*Triebe*).

Second, Nietzsche expressly elaborates his thought experiment in section 36 in accordance with what he presents as an authoritative method governing philosophical inquiry. <sup>66</sup> Indeed, at the end of his thought experiment, Nietzsche asks his readers to suppose (*gesetz*), or consider hypothetically, that "a moral of method" (*eine Moral der Methode*), <sup>67</sup> that is, the morality of intellectual inquiry, has been honored to the fullest. Where Nonet finds a denial of truth and an abolition of the constraints on the will, Nietzsche speculates, under the severe -- and acknowledged -- constraints of conscience and morality, about the nature of the fundamental faculty or power at work in the world.

Nonet feels compelled to give a brief account of the doctrine of the eternal return because he clearly sees that the wish or dream to create with God-like freedom cannot be fulfilled unless one first has gained release from, indeed, acquired mastery over, time's relentless forward march and the mocking tyranny the past exercises over the present. But does this wish or dream dominate in *Beyond Good and Evil*? Nonet's belief that it does rests upon his interpretation of the vocation and the achievement of "the free spirit." Nonet believes that the free spirit "is free to affirm himself in the creation of values," <sup>68</sup> and that this freedom represents the ascent to an "unconditioned power-will." <sup>69</sup> Nonet writes as if Nietzsche's free spirit unambiguously exemplifies the supreme human type. But the free spirit, Nietzsche plainly states, falls decisively short of the highest human excellence:

Need I still say expressly after all this that they, too, will be free, *very* free spirits, these philosophers of the future -- though just as certainly they will not be merely free spirits but something more, higher, greater, and thoroughly different that does not want to be misunderstood and mistaken for something else. <sup>70</sup>

The free spirits, in whose ranks Nietzsche places himself, <sup>71</sup> are seekers after

knowledge, but not knowers; while they believe themselves free of conventional constraints and prejudices, they do not imagine themselves absolute masters.

Consequently, I cannot agree with Nonet that it is Nietzsche's free spirit who deifies, sanctifies, and justifies life through willing, or making subject to his will, the totality of events as prescribed by the doctrine of the eternal return.<sup>72</sup> Nor can I (at least not on the basis of *Beyond Good and Evil*) accept Nonet's suggestion, that the doctrine of the eternal return, or as Nonet refers to it, the triumph of positive law, "signifies at once the fulfillment of nihilism -- the end of the longing for God -- and the overcoming of nihilism -- the deifying affirmation of life on earth."<sup>73</sup> After all, what is the desire to make oneself God, if not a confession of the incapacity to live without Gods, and what is the wish to sanctify life if not an admission that human beings cannot live well in the absence of sacred constraints?

Nonet certainly grasps the general outlines of this fundamental problem (which does bedevil Nietzsche, though it is not a primary concern in *Beyond Good and Evil*). His discussion of "Positive Law as Absence of Law,"<sup>74</sup> which borrows a great deal from Heidegger, shows that, in marked opposition to the prevailing optimistic readings of Nietzsche, Nonet sees in Nietzsche, not a herald of human liberation, but rather a prophet of doom and desperation. Nonet learns from Heidegger that the will cannot hope to overcome nihilism by freeing itself to posit or create new values. The circumstance that makes necessary the creation of new values, the devaluation of the old values (the reduction of *Recht* to *Gesetz*), presupposes the worth of what has been lost, the dignity of nature and the sacredness of God. The very experience of this loss and need signals the enduring presence of the old values. And the dream of a self-affirming will powerful enough to set values, as Nonet rightly emphasizes, reflects the continuing hold over the creative will of the old desire to admire and worship eternal objects.<sup>75</sup>

Building on this insight, Nonet proceeds to argue that it is a consequence of Nietzsche's identification of thinking with creating or commanding that "Nothing escapes degradation at the philosopher's hands."<sup>76</sup> In other words, thought inevitably manhandles the objects it seeks to grasp. Of course, to think about thinking as an act of degradation, violation, or destruction presupposes the existence of an original order, outside the will, underlying the everyday world of custom and appearance, an order that is incessantly tainted and distorted by the clumsy touch of human thought. Nonet credits Heidegger with carrying this thought to the limit, and thereby recognizing that Nietzsche's attempt to overcome nihilism through exaltation of the creative and commanding powers of the will results in the unconditioned and complete objectification of the world.<sup>77</sup> Or, to put the same thought in plainer language, human thought and activity encases its objects in suffocating and

impenetrable masks. Nietzsche's creators cannot look or think without touching, and in a contemporary version of Midas' curse, they cannot touch without deforming the natures of things they seek to grasp. Nonet, following Heidegger, utters a cry of distress about this masking and deforming of finite beings, and the concealment of being.<sup>78</sup> It is noteworthy that Nonet barely considers the consequences of such objectification for the souls of beings of inestimable worth, namely, human beings.

### *C. Nobility and the Love of Truth*

The final section of Nonet's essay, "Positive Law as Rage Against Time," seeks to lay bare the inner devastation which afflicts one who comprehends the need and the impossibility of an unconditioned affirmation of human creative powers. Nonet finds lurking, behind all that Nietzsche holds out as worthy and elevating, a substratum of cowardice, delusion, want, weakness, and even madness. Thus, according to Nonet, Nietzsche's praise of nobility in *Beyond Good and Evil* originates in and masks an incurably base and slavish lack of nobility.<sup>79</sup> Zarathustra's search for redemption through the affirmation of eternity springs from and conceals an unquenchable rage at the will's inability to conquer the past.<sup>80</sup> And, Nonet asserts, Nietzsche's call, in the name of a new nobility, for a revaluation of all values in the *Genealogy* grows out of and covers over the very spirit of priestly revenge which corrupted the original human nobility.<sup>81</sup>

Nonet's unorthodox, disquieting, and exceptionally penetrating observations reveal a seldom explored side of Nietzsche. They belong to an untold part of Nietzsche's spiritual odyssey and raise questions of great importance. However, in telling this untold part, Nonet loses sight of the whole. Take, for example, Nonet's assertion that Nietzsche's "longing for nobility betrays the soul of a slave."<sup>82</sup> While Nietzsche does assert that to long for nobility is a mark of the absence of nobility, he does not, as Nonet implies, acknowledge his own longing for nobility. This is not to say that Nietzsche denies that he is subject to painful, unsatisfied longings; nor is it to dispute that Nietzsche confronts severe limitations on his powers. While nobility of soul cannot be sought, found, or even, perhaps, lost, according to Nietzsche, Nonet badly obscures the possibility that this nobility or reverence for self could receive expression in the yearning or striving for wholeness and perfection. The mark of the noble soul, then, would be not the possession of, but rather the longing for, and preoccupation with, excellence, beauty, and wholeness.

Nonet, following a practice more characteristic of Zarathustra, the prophet of the superman, than Nietzsche, the author of *Beyond Good and Evil*, too readily assumes that what lacks perfection must be perfectly slavish or base, that the world is exhaustively divided into two kinds of human beings, dazzling and resplendent



supermen, and lackluster and pathetic last men. Accordingly, Nonet regards the beautiful acknowledgement that brings *Beyond Good and Evil* to a close, Nietzsche's candid admission that the best writing is inferior to thinking,<sup>83</sup> as little more than a mask for despair and inner desolation.<sup>84</sup> Contrary to Nonet, however, do not Nietzsche's wistful musings, at once melancholy and cheerful, on the eternal too-late of writing, reflect a serene and noble recognition of human limitation?<sup>85</sup>

Nonet's pronounced tendency to abolish the middle ground, to allow the extremes to ride roughshod, can be seen in his revealing remark that the discussion of Eros in Plato's *Symposium* shows that Plato agrees with Nietzsche that the philosopher's longing for wisdom, like the longing for nobility, betrays a base neediness.<sup>86</sup> Nonet writes as if all lacks and needs were equal, or to put the matter differently, as if ignorance pure and simple, and knowledge of one's ignorance, were indistinguishable. In opposition, I believe, to Plato as well as to Nietzsche, Nonet rashly excludes the possibility that one who loves, but does not possess, wisdom, may acquire a strong and glowing dignity from the important knowledge that human beings both need and lack knowledge of the most important things. Such knowledge of human ignorance can, perhaps, even liberate us from two forms of conceit. The first, typical of the fundamentalist, is that we know, without effort or ambiguity, what God commands, what justice proclaims, and what compassion commends. The second and related conceit, characteristic of the dogmatic skeptic, is that we know beyond the shadow of a reasonable doubt that we are unfettered by claims made upon us from such distant and exotic quarters as the teachings of a revealed religious tradition, the duties defining our place in an ordered cosmos, or the inner promptings of conscience and heart.

The philosophers of the future anticipated by Nietzsche in *Beyond Good and Evil*, being friends of the truth and not dogmatists, will be under an obligation to restrain themselves not only from the dogmatic, or vulgar and wholesale *acceptance* of dogma, but also from the dogmatic, or vulgar and wholesale, *rejection* of dogma.

#### IV. CONCLUSION

The jealously guarded secret of positive law, according to Philippe Nonet, is that natural right and divine law are figments or products of the human imagination. From this it follows for Nonet that, not only the laws, but the beliefs, principles, customs, mores, and manners which govern ordinary life, are without foundation or sanction.

Yet, contrary to Nonet, the death of God is not a suppressed presupposition of positive

law. Neither the notion of positive law, nor the position taken by the school of jurisprudence called legal positivism, entails that truth is a fiction and justice a construction of the will, whether individual or collective. For investigation reveals that there are prudential political judgments, strong moral convictions, or deep religious beliefs which justify separating, in practice and in thought, law from morality. Some of those who have considered this question are fearful, based on a thoroughgoing study of the long and dismal historical record, of the injustice they believe would inevitably arise if the state once again came to view the primary task of the law as the teaching and enforcement morality. Others see a grave threat to the church and its earthly mission should the separation between church and state weaken, allowing the state to return to the business of saving souls. In brief, one may say of positive law what Nietzsche said of the will: that it is above all something complicated, something that is a unit only as a word -- "and it is precisely in this one word that the popular prejudice lurks, which has defeated the always inadequate caution of philosophers."<sup>87</sup>

What is perhaps the most astonishing feature of Nonet's essay is that the fabric of ordinary moral and political life vanishes into the air as it is rendered positively irrelevant to the question, "What is positive law?" By framing his analysis in terms of the politically highly charged notion of positive law and then banishing politics from the scene, Nonet gives expression to, without giving an account of, the radical denigration of political life taught by Nietzsche. While Nonet purports to uncover the slavishness bound up with Nietzsche's love of nobility, Nonet is silent about Nietzsche's settled conviction that slavery (for the multitude) is desirable because it is essential to a well-constituted political order.<sup>88</sup> While Nonet dwells upon the inner desolation the death of God causes for the exceptional human, Nonet has hardly a word about the contempt for political liberty and social justice which follow, so far as Nietzsche is concerned, from the doctrine of the will to power. And, while Nonet highlights the superhuman ambition driving Nietzsche's artist philosopher, Nonet leaves unstated that such a one is the supreme tyrant, eros incarnate, whose unconditioned will, recognizing no authority above or outside itself, mercilessly transforms humanity into an instrument for satisfying its private desires.

Philippe Nonet has put his impressive learning and subtlety of mind in the service of expounding what he himself regards as Nietzsche's prophecy. That makes Nietzsche, contrary to his wish not to have believers, and despite his fear of one day being pronounced holy, a prophet.<sup>89</sup> Would it not have been more in keeping with Nietzsche's praise of the free spirit, to which Nonet justly calls attention, for Nonet to have exposed Nietzsche's prophecy or revelation concerning the death of God and all its momentous consequences to a severe and searching philosophical examination?

## FOOTNOTES:

1. Nonet, *What is Positive Law?*, 100 YALE L.J. 667, 669 (1990) [hereinafter Nonet].
2. Nonet, *supra* note 1, at 667.
3. Plato, *Minos* 314c, in THE ROOTS OF POLITICAL PHILOSOPHY (T. Pangle ed. 1987).
4. *Id.* at 315a, 321b.
5. M. L. KING, JR., *Letter from the Birmingham City Jail*, in A TESTAMENT OF HOPE 289 (J. Washington ed. 1986).
6. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).
7. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596-97, 625 (1958).
8. See Holmes, *supra* note 6, at 471.
9. Nonet, *supra* note 1, at 668.
10. Nonet, *supra* note 1, at 669.
11. Nonet, *supra* note 1, at 669.
12. Nonet, *supra* note 1, at 669.
13. Nonet, *supra* note 1, at 669.
14. From the point of view of political philosophy, see T. HOBBS, LEVIATHAN (C.B. Macpherson ed. 1968) (1st ed. 1651) and, from the point of view of jurisprudence, see J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1965). See also Hart, *supra* note 7 (explaining analytic framework and moral sensibility which justifies separation of law and morals).
15. F. NIETZSCHE, *Zarathustra's Prologue*, in THUS SPOKE ZARATHUSTRA § 3-5 (W. Kaufmann trans. 1966) (orig. ed. 1883-1885) [hereinafter, following the initials of the original German title, ASZ].

16. Nonet, *supra* note 1, at 667.

17. Nonet, *supra* note 1, at 667.

18. See the explanatory note in F. NIETZSCHE, 14 SAMTLICHE WERKE, KRITISCHE STUDIENAUSGABE 377 (G. Colli & M. Montinari eds. 1988) [hereinafter KSA].

19. F. NIETZSCHE, ON THE GENEALOGY OF MORALS, Preface § 8 & pt. III (W. Kaufmann & R. Hollingdale trans. 1969) (orig. ed. 1887) [hereinafter GM].

20. Nonet, *supra* note 1, at 687.

21. Nonet, *supra* note 1, at 681-82.

22. Nonet, *supra* note 1, at 667.

23. See, e.g., F. NIETZSCHE, *Der Griechische Staat* (The Greek State), in I KSA, *supra* note 18, §§ 764-77 (arguing aim of perfect state is production of genius, and most human beings derive what dignity they possess from serving, consciously or unconsciously, as a tool of genius); see also F. NIETZSCHE, *Schopenhauer as Educator*, in UNTIMELY MEDITATIONS (R. Hollingdale trans. 1983) (orig. ed. 1873-1874) [hereinafter SE] (Nietzsche once more equates perfect state with regime dedicated to production of genius); F. NIETZSCHE, DAYBREAK (R. Hollingdale trans. 1982) (orig. ed. 1881) [hereinafter, following the initials of the original German title, M] (Nietzsche, reflecting upon destiny of the Jews of Europe, declares Jews are distinguished, among other things, by rationality of their customs or laws coerning family and marriage); F. NIETZSCHE, BEYOND GOOD AND EVIL § 188 (W. Kaufmann trans. 1966) (orig. ed. 1886) [hereinafter, following the initials of the original German title, JGB] (Nietzsche declares all grace, excellence, and mastery in thought, government, or rhetoric is owing to tyranny of capricious laws); F. NIETZSCHE, THE ANTICHRIST §§ 56-57, in THE PORTABLE NIETZSCHE (W. Kaufmann trans. 1970) (orig. ed. 1895) [hereinafter A] (Nietzsche praises law of Manu, religious legal code, as bringing into being a healthy society and embodying natural order).

24. Nonet, *supra* note 1, at 668.

25. Nonet, *supra* note 1, at 668.

26. Thus Spoke Zarathustra is a difficult, fascinating, and coherent philosophical

poem, one which, among other things, reveals the haunting link between the love of creativity and the lust for eternity. A proper defense of these opinions cannot be mounted here, as it would require a careful exposition of, and a full-scale commentary upon, *Zarathustra's* argument and action. I shall, however, call attention to several of Zarathustra's pivotal speeches. In "On the Three Metamorphoses," Zarathustra envisages a strong, reverent spirit whose highest achievement is to pronounce a sacred affirmation (*ein heiliges Ja-sagen*) of the world. In "Upon the Blessed Isles," Zarathustra concludes, from his capacity for unbearable envy of the gods, the nonexistence of gods and of God. Subsequently, Zarathustra spells out the precise meaning of redemption: "To redeem those who lived in the past and to recreate all 'it was' into a 'thus I willed it' -- that alone should I call redemption (*Erlosung*)." Finally, in the concluding speech of Part III of the book, Zarathustra effusively and shamelessly professes his love for eternity. See ASZ, *supra* note 15, "On the Three Metamorphoses," "Upon the Blessed Isles," "On Redemption," and "The Seven Seals (Or: The Yes and Amen Song)." It is a grave mistake to assume that Zarathustra's teaching, as revealed in his speeches and deeds, is nothing more than a poetic anticipation of ideas elaborated in *Beyond Good and Evil* and *On the Genealogy of Morals*.

27. See, e.g., A, *supra* note 23; GM, *supra* note 19, pt. I, § 9-17 & pt. III, § 22.

28. Nonet, *supra* note 1, at 668 (citing JGB, *supra* note 23, § 19).

29. JGB, *supra*, note 23, § 19 (emphasis in original).

30. *Id.*

31. Nonet, *supra* note 1, at 669.

32. Nonet, *supra* note 1, at 669.

33. GM, *supra* note 19, pt. II, § 11. Walter Kaufmann, whose translations are widely used and highly esteemed, unremarkably translates "*Gerechtigkeit*" as "justice". Quite defensibly, in the same section he renders "*Recht*" as "just." His footnotes signal the presence of an ambiguity somewhat obscured in his translation, and, in Nonet's presentation, entirely lost.

34. *Id.*

35. Similarly, Zarathustra, in his speech, "On the New Idol," matter of factly recognizes authoritative political standards. He sharply distinguishes two forms of

political order: peoples and herds, on the one hand, as against states, on the other. The former, of vastly higher dignity than the latter, were brought into being by creators who gave to the people or the herd its own faith and love, its own customs (*Sitten*) and rights or higher law (*Rechten*). In contrast, the state or the modern nation state, according to Zarathustra, embodies a vulgar morality which exclusively serves the interests of the common man. To be sure, in nation states as well as among "people," Zarathustra understands both positive law and higher law as human creations. Nevertheless, Zarathustra views the creation of *Rechten*, rights or higher law, as a distinguishing and praiseworthy feature of "peoples." See ASZ, *supra* note 15, *On the New Idol*. Consider also Nietzsche's blunt utterance in *Twilight of the Idols*: "Equal to the equal, unequal to the unequal" -- *that* would be the true slogan of justice [*Gerechtigkeit*]." F. NIETZSCHE, *Skirmishes of an Untimely Man* § 48, in TWILIGHT OF THE IDOLS (in THE PORTABLE NIETZSCHE, *supra* note 23). The order of rank among men and states of soul is a pervasive theme of *Beyond Good and Evil*, one which is invoked in seven of the nine Parts. (The exceptions are the short fourth part called "Epigrams and Interludes," and part eight, which is entitled, "Peoples and Fatherlands.") See, e.g., JGB, *supra* note 23, §§ 6, 30, 59, 194, 213, 219, 221, 228, 263, 294; see also A, *supra* note 23, § 57, where one finds Nietzsche praising a religious code, the law of Manu, because it establishes political life on the basis of "the supreme, the dominant law [*Gesetz*]," which Nietzsche explains "is merely the sanction of a *natural order* [*Natur-Ordnung*], a natural lawfulness of the first rank [*Natur Gesetzlichkeit ersten Ranges*], over which no arbitrariness, no 'modern idea' has any power."

36. Nonet, *supra* note 1, at 669 (citing JGB, *supra* note 23, § 265).

37. JGB, *supra* note 23, § 265.

38. For a valuable discussion which touches on these matters, see C. TAYLOR, SOURCES OF THE SELF 19-24, 111-58 (1989).

39. Nonet, *supra* note 1, at 670.

40. I refer to intelligent and provocative studies which nonetheless refuse, even as an important preliminary, to confront Nietzsche's conception of human excellence and its political implications on Nietzsche's terms. See, e.g., A. NEHAMAS, NIETZSCHE: LIFE AS LITERATURE (1985) (declares perspectivism core of Nietzsche's thought, dismisses Nietzsche's ethical and political speculations, and argues Nietzsche's ideal calls for creating a literary character out of oneself); M. WARREN, NIETZSCHE AND POLITICAL THOUGHT (1988) (repudiates Nietzsche's views on human excellence, but argues Nietzsche's thought can be reconstructed in a manner faithful to

his "fundamental problematic" to support a progressive politics favoring egalitarianism, pluralism, and individual freedom). Heidegger's major and pathbreaking reading of Nietzsche is not free from this tendency. *See* M. HEIDEGGER, 1 NIETZSCHE, THE WILL TO POWER AS ART (D. Krell trans. 1979); 2 NIETZSCHE, THE ETERNAL RETURN (D. Krell trans. 1984); 3 NIETZSCHE, WILL TO POWER AS KNOWLEDGE AND METAPHYSICS (D. Krell trans. 1986); and 4 NIETZSCHE, NIHILISM (F. Capuzzi trans. 1982) (regards Nietzsche as last great metaphysician, but disregards his ethics and politics). For a fine new book which convincingly argues that "the political dimension [of Nietzsche's thought] cannot be excised without distorting the whole," see B. DETWILER, NIETZSCHE AND THE POLITICS OF ARISTOCRATIC RADICALISM 13 (1990).

41. Nonet, *supra* note 1, at 670.

42. Nonet, *supra* note 1, at 670.

43. Nonet, *supra* note 1, at 673.

44. Nonet, *supra* note 1, at 674 (citing GM, *supra* note 19, pt. III, § 27).

45. Nonet, *supra* note 1, at 674 (citing GM, *supra* note 19, pt. III, § 27).

46. GM, *supra* note 19, pt. III, § 27.

47. Nonet, *supra* note 1, at 674.

48. Nonet, *supra* note 1, at 674.

49. Nonet, *supra* note 1, at 674 (citing JGB, *supra* note 23, § 4).

50. Nonet, *supra* note 1, at 675 (citing JGB, *supra* note 23, § 23).

51. JGB, *supra* note 23, § 23.

52. *Id.*

53. *Id.* Nietzsche introduces section 23 with the observation, "All psychology so far has got stuck in moral prejudices and fears; it has not dared [*gewagt*] to descend into the depths." He speaks of the "immense and almost new domain of dangerous insights [*gefährlicher Erkenntnisse*]" that become visible to those who break free of moral prejudice. And he speculates about the riches awaiting "daring [*verwegenen*] travelers

and adventurers . . . ."

54. *Id.* This judgment is consistent with Nietzsche's declaration in *The Antichrist* that "[T]he service of truth is the hardest service." See A, *supra* note 23, § 50.

55. JGB, *supra* note 23, § 39.

56. *Id.* § 43.

57. *Id.* Preface & § 220.

58. And not only in *Beyond Good and Evil*. In a section from the fifth book of *The Gay Science*, entitled "How we, too, are still pious," probably written shortly after *Beyond Good and Evil*, Nietzsche gives eloquent expression to the ethos animating his anticipations of new philosophers: "[E]ven we seekers after knowledge today, we godless anti-metaphysicians still take our fire, too, from the flame lit by a faith that is thousands of years old, that Christian faith which was also the faith of Plato, that God is the truth, that truth is divine." See F. NIETZSCHE, *THE GAY SCIENCE* § 344 (W. Kaufmann trans. 1974) (2d. ed. 1887).

59. Nonet, *supra* note 1, at 674-75 (emphasis added).

60. See *supra* note 26.

61. JGB, *supra* note 23, § 31.

62. *Id.* § 46.

63. *Id.* § 154.

64. Nietzsche draws attention to the contrast in style, form, and intention between *Thus Spoke Zarathustra* and *Beyond Good and Evil* in *Ecce Homo*. That *Beyond Good and Evil* exhibits a distancing from the teaching of *Thus Spoke Zarathustra* is borne out by Nietzsche's remark that, whereas *Thus Spoke Zarathustra* was a farsighted book, *Beyond Good and Evil* focused on what lay nearest; and by Nietzsche's disclosure that *Beyond Good and Evil* represents an act of recuperation from the debilitating effort called forth by the writing of *Thus Spoke Zarathustra*. See F. NIETZSCHE, *Why I Write Such Good Books*, in *ECCE HOMO* (specifically, the section entitled "Beyond Good and Evil") (W. Kaufmann trans. 1969) (written in 1888; orig. ed. 1908) [hereinafter EH].



65. Nonet, *supra* note 1, at 675 (citing JGB, *supra* note 23, § 36).

66. JGB, *supra* note 23, § 36 (The thought experiment must meet the demands of "the conscience of method [*vom Gewissen der Methode aus, geboten*]." This requires, among other things, that one seek to explain the whole of human life in terms of one basic form of will: the will to power.).

67. JGB, *supra* note 23, § 36.

68. Nonet, *supra* note 1, at 675-76.

69. Nonet, *supra* note 1, at 676 (citing JGB, *supra* note 23, § 44). When section 44 is read in context, it is by no means obvious that it is the will of the free spirit which Nietzsche believes rises to an "unconditioned power-will." Nietzsche is expressly writing as a free spirit, as a herald and precursor of new philosophers. He ascribes the achievement of an unconditioned power-will to those human beings who have "so far grown most vigorously to a height." Does the free spirit attain this exalted rank? Hard to say.

70. JGB, *supra* note 23, § 44 (emphasis in original).

71. *Id.*

72. Nonet, *supra* note 1, at 676-77.

73. Nonet, *supra* note 1, at 677.

74. Nonet, *supra* note 1, at 679-86.

75. Nonet, *supra* note 1, at 681.

76. Nonet, *supra* note 1, at 682.

77. Nonet, *supra* note 1, at 683.

78. Nonet, *supra* note 1, at 684-85.

79. Nonet, *supra* note 1, at 692.

80. Nonet, *supra* note 1, at 694.

81. Nonet, *supra* note 1, at 697.

82. Nonet, *supra* note 1, at 692.

83. JGB, *supra* note 23, § 296.

84. Nonet, *supra* note 1, at 688-92.

85. JGB, *supra* note 23, § 296.

86. Nonet, *supra* note 1, at 691-692. I shall simply note in passing that, whereas Diotima, according to Socrates' recollection, presents Eros as a fundamentally dual-natured creature, whose father is Resource (*Poros*) and whose Mother is Need or Poverty (*Penia*), Nonet implies that Eros has just one face. Accordingly, Nonet tells us that Eros "is first of all always a slave, one who must work, rough, dirty, barefoot, homeless, always in need." Nonet, *supra* note 1, at 692. Fair enough. What Nonet does not tell us, however, but which Diotima immediately adds, is that Eros also takes after his father in that he "plots to trap the beautiful and the good and is courageous, stout, and keen, a skilled hunter, always weaving devices, desirous of practical wisdom and inventive, philosophizing through all his life, a skilled magician, druggist, and sophist." PLATO, SYMPOSIUM 203d.

87. JGB, *supra* note 23, § 19.

88. See the early polished reflection, *Der Griechische Staat*, *supra* note 23; see also A, *supra* note 23, § 57; JGB, *supra* note 23, § 61; SE, *supra* note 23.

89. See *Why I am Destiny*, in EH, *supra* note 64, § 1