

Against Nietzsche (Part One) On the Genealogy of Morals

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Howard Richards presented his text “‘Against Foucault’:
Middle Foucault (1970-1976) (Part Twelve)” on 26th May 2013 in Pretoria, South
Africa, on video. In his presentation, he referred to “Against Nietzsche, Part One” and
“Against Nietzsche, Part Two.”

“To breed an animal who has the *right to make promises (das versprechen darf)* – is this not the paradoxical task nature has set itself with respect to humans? *Ist es nicht das eigentliche Problem vom Menschen?* (Is it not precisely the human problem?)” (Nietzsche 1887, p. 319) With these questions Nietzsche opens the second of his three essays on the genealogy of morals. They imply, taken in their context, that promise making and promise keeping are the central issues of ethics. They are what really matters. They concern being responsible (*Verantwortlichkeit*). (Id. p. 321) They concern making human behavior calculable (*berechenbar*), reliable (*regelmässig*), and certain (*notwendig*). (Id. p. 320) They are about debts (*Schulden*) and contractual relationships (*Vertragsverhältnisse*). (Id. p. 326) Here Nietzsche echoes Kant. It will be remembered that throughout his book on the foundations of the metaphysics of morals (Kant 1785) Kant works with a single example of a strict categorical imperative: the imperative not to contract a debt without intending to pay it; here echoed by Nietzsche’s condemnation of “...the liar who breaks his promise even at the moment when he utters it.” (Id. p. 322)

The second essay of Zur Genealogie der Moral is designed to prove that solving the *eigentliche Problem vom Menschen* has nothing to do with religion. Valid and essential moral principles – unlike the “life-denying” ones Nietzsche despises, which are discussed in the first and third essays – come from a secular lineage. Their progenitors are in law, in commerce, in the *Handel und Wandel* (trade and traffic) of everyday life. (Id. p. 327 and *passim*)

Having in his two opening questions identified the key problem, Nietzsche immediately affirms that to a high degree it has been solved. (Id. p. 319) A remarkable feat! To have made promise-keepers out of animals who are forgetful and *must* be forgetful because if they did not routinely forget most of the information provided by their senses they would be swamped in hopeless confusion! (Id. pp. 319-20) In an account of the history of morals not entirely consistent with the one he has just given in the preceding essay (see below), and in a manner that appears to presuppose the inheritance of acquired characteristics, Nietzsche writes of how much violence, how much punishment, for how many long severe centuries, nature has required to breed a race of promise-keepers. (Id. pp. 322-359)

But wait. Before we are swept into the torrent of Nietzsche’s reasoning, let us examine his first premise. Let us ask whether he has accurately identified the *eigentliche Problem*.

Surely Nietzsche must be forgiven for pardonable personification when he writes that “nature” has “set itself” a “task.” Nature does not define educational objectives and organize learning activities as a mother might for her children or as a teacher might for

her students. The requirements of nature are imposed by the brute force of circumstances. A basic requirement is compliance with an open set of conditions whose consequence is survival; the organism must survive long enough to reproduce, its offspring must do so also, and a population of organisms must over time be compatible with the survival of its habitat. Although survival is not the whole purpose of life, it is a prerequisite for doing anything else. The means a species or a culture uses to survive influence everything else. (Richards 1995) From nature's verdict on compliance with this circumstantial imperative there is no appeal. The species that does not comply dies out.

"Nature" has thus in a metaphorical sense set a task "...in *Hinsicht auf den Menschen...*" (with respect to humans). (Nietzsche 1887, p. 319). The task of complying with the requirements for survival is for *homo sapiens sapiens* a cultural task. The conditions whose consequence is survival apply more to groups with their cultures than to individual physical bodies with their genes. (In this paragraph and the following ones I am speaking in my own voice, not Nietzsche's, but the point I just made is one he also makes.) We are the weakest animals, with muscles flabbier than those of monkeys, teeth duller than those of tigers; we live in myths (defined by Joseph Campbell as social dreams); we live in dreams (defined by Joseph Campbell as individual myths). Human strength is collective. Its sinews are cultural structures. The "strength" of the upper classes praised by Nietzsche for their cleanliness (Nietzsche 1885 p. 246), their good taste, and their happiness, is collective strength; its cause is a collective fact, an institutional fact, a cultural fact, albeit one whose historical origin was often brute violence. Property. (Including Bourdieu's "cultural capital") A similar and complementary point can be made regarding those designated by Nietzsche as "weak;" those whose presenting symptoms include foul smell (e.g. Nietzsche 1885 pp. 169-70), bad taste, and *ressentiment* (envy). They are "weak" to some considerable extent – and one should be careful neither to underestimate nor to overestimate the extent – because the law denies them access to resources.

Nature, strictly speaking, does not want anything. It does not set tasks. It does not prefer one type of human personality over another. It does constitute conditions with which cultures must comply to be sustainable. It does provide raw material for the ethical construction of social realities.

Viewed in the light of the foregoing considerations, breeding an animal who makes sincere promises, who is therefore a responsible party in contractual relationships, can be regarded as a subset of the larger problem of education. Education is the transmission and renewal of culture. In some cultures education has featured gift-giving, because gift-giving relationships have been more important than contractual relationships. (Malinowski 1922, Mauss 1925) In general, human cultural structures can be thought of as built from diverse forms of reciprocal obligation, among which *Handel und Wandel* are some but not the full range. (Gouldner 1960) Although how to breed promise-keeping animals has not been precisely the problem for all hitherto existing cultures, nor need it be precisely the problem for all possible cultures not yet created, it is nonetheless the *eigentliche Problem* for a society that is mainly organized as ours is and Nietzsche's was and Kant's was. By markets. A society where an Adam Smith relies for his daily bread more on his baker's self-interest than on his benevolence (and where third, fourth, fifth... and nth alternatives are disregarded) is one where daily bread depends on the sincerity of promises. Commercial agreements, the moving gears and

camshafts of modernity's wonderful bread machine, must be stable; they must not randomly change shape and bend and shrink and expand like the gears and camshafts of Wittgenstein's imaginary machine whose parts behave in unpredictable ways. Promises strangers make to strangers must be honored because without them the basic needs of the inhabitants of a modern city are not met.

Although Nietzsche takes large notice of the historical and geographical variation of morals in general (e.g. Nietzsche 1885 s. 186), with respect to what he takes to be the *eigentliche Problem*, he somewhat incongruously supposes that commercial transactions display an *älteste Art Scharfsinn* (oldest kind of astuteness) to be found everywhen and everywhere. (Nietzsche 1887 s. 2-8) But if we trace the genealogy of the property rights and commercial agreements that organize our modern world-system (see Richards 2000), we will find that they have evolved over time; and that far from being cultural universals they belong to a particular cultural tradition passed on from early Rome to classical Rome and from there to the Byzantine Eastern Empire, and from there to early modern Europe and from there to the world.

In early Rome, at the beginning of its first four centuries (approximately 750-350 B.C.), land was "...divided among heads of families according to the necessities of the agricultural economy." (Iglesias 1958 p. 42). The Roman city-state was composed of *gentes* (whose further evolution produced the classical 35 tribes of Rome), each of which was a grouping together of *familiae*. (Id. p. 12) The chief and sovereign of a *familia* was a *paterfamilias*, who was expected to rule its persons and things not for personal gain but as a patrimony to be maintained intact and passed on to the next generation. (Id. p. 247) "The *paterfamilias* is diligent, that is to say *religiosus*. There exists a kind of *religio* which the *paterfamilias* scrupulously complies with. It is in this *religio* that there operates the wise and sacred will of the *maiores* [elders], transmitted from generation to generation." (Id. p. 533) The chief of a *gens* was a *pater gentis*. Whatever their disadvantages – and they were many when compared to modern institutions and when compared to the still older patterns of human life believed to have existed before patriarchy (Eisler 1987) – the most ancient Roman *mores* had the advantage of prescribing that everybody was included. There could be no class of landless laborers because each individual was part of a family and each family had access to land. This feature of Rome's most ancient customs was not, of course, peculiar to Rome, but rather typical of indigenous peoples the world over. (e.g. Tonnies 1887) Already, however, at the beginning of the Republic (510 B.C.) exclusions had begun which would fuel the social struggles that wracked Rome for nearly a thousand years until its fall. There appeared plebeians (people who belonged to no *gens*) and proletarians (people who had no property). (Id. pp. 15-16) (Nietzsche refers to *Plebejer* as pertaining to people of low rank without mentioning – something he surely knew – that its Latin cognate originally referred to people who were low precisely because they were socially disconnected. (e.g. Nietzsche 1885 s. 224)

"*Paterfamilias appellatur qui in domo dominium habet.*" (Digest, book 50: 16, 195, 2). ("The one who has dominion over the house is called the *paterfamilias*.")) This is a definition of *paterfamilias*. "That which defines the *familia*, the *familia proprio iure*, is the submission of all of its members to the same authority – *manus, potestas* – the same chief, who is the lord and sovereign of the family, and not the 'father of the family.'" (Iglesias 1958 pp. 529-30) Similarly, Max Müller writes, "In ancient times, when most

wars were carried on, not to maintain the political equilibrium of Asia or Europe, but to take possession of good pasture, or to appropriate large herds of cattle, the hurdles grew naturally into the walls of fortresses, the hedges became strongholds, and those who lived behind the same walls were called a *gotra*, a family, a tribe, a race.” (Müller 1909, p. 37). The head of the family was the lord, the strong protector. (Id. p. 49) It was not until late in its evolution that Roman Law defined a *familia* as people related by blood. Originally the *familia* was what the *paterfamilias* ruled. It included persons and things: women, slaves, animals, and land. The “family” was a household that was to a large extent economically self-sufficient. (This fact is reflected in the etymology of “economics,” which is derived from the Greek *oikos nomos*, “the rule of the household.”) The *Digest*’s definition of *paterfamilias* sheds light on that Roman concept of property which has become our concept; that has become our social structure; that came to be the prevailing concept in pre-modern Europe and then came to be the prevailing concept of how persons relate to things on a global scale as the European world-system became the modern world-system. It was *dominium*. It is *dominium*. The idea of “property” was in early Rome and under the Republic expressed as “*dominus*.” It was what the *paterfamilias* dominated. Originally the most legitimate *dominium* was acquired by seizing things from the enemy in war. (Iglesias 1958 p. 266 citing Vogel 1948) (The Latin source of our word “property” i.e. *proprietates*, did not come into general use until the beginning of the Empire, that is to say until the reign of Augustus beginning in 27 B.C.; and when *proprietates* did come into general use it was defined in terms of *dominus*. (Iglesias 1958, p. 249)

A word with a meaning similar to *dominium* was *mancipium*, from *manus*, the Latin word for hand. All the persons in the household were under the hand of its *paterfamilias*. (Iglesias 1958 p. 247) They were also said to be in *potestas*, under his power. Only the *paterfamilias* was a juridical subject, capable of owning property and of being a party to a contract, capable of having legal rights recognized by public magistrates. Custom and religion organized human life *within* the household, but the law was not about that. The law did sometimes concern itself with religious matters. In its early days and decreasingly under the Republic it did draw on custom as a source of authority, until under the Empire the decrees of the Emperor eclipsed custom as a source of public law, while contracts increasingly became a source of private law; one definition of contract being that a contract is a law that private parties give themselves by their mutual agreement. But in any case in its beginnings Roman Law was not about relationships *within* households but about relationships *between* one household and another. It was about what the magistrate (frequently the *praetor*) would enforce with the backing of public arms when one *paterfamilias* complained of another. It was about peace in a limited sense of the word. It was about avoiding mini-warfare between the mini-king of one mini-state and another mini-king of another mini-state. It was about settling disputes without civil wars that would have divided Rome against itself, and therefore made it vulnerable to enemy attack. What a *paterfamilias* did with his children, his slaves, and his women; as well as what he did with his animals and his other possessions within his own household; was governed by social norms and expectations, but not by law.

To become a juridical subject, a person under the *mancipium* of a *paterfamilias* had to be emancipated. This Roman origin of western traditions has influenced the shape

of successive movements for emancipation. It has given concrete meaning to ideals of liberty and freedom. To be emancipated is to become, like a *paterfamilias*, a sovereign individual who can make pacts (at first mainly in the ancient form of *stipulatio* and later in the modern form of contract), who is not someone else's property but who is instead capable of being an owner of property. It is to have rights and to be able to appeal to the law for the enforcement of one's rights. The tendency over the centuries has been for first adult male children, and then slaves, and then women to become emancipated. Today there is a tendency for even minor children to become emancipated, as public agencies intervene in families to protect children's rights. Generally in western countries children are emancipated at the age of eighteen. (Over time Roman Law itself came to recognize as free of *mancipium* and having the status of a *paterfamilias* a male who in fact had no household, but who was legally eligible to establish one if he should choose to do so. It also came to recognize intermediate stages in which an adult son, and in some respects a woman, could, without being a complete legal subject nonetheless enjoy certain legal capacities.) (e.g. Iglesias 1958, pp. 137-157)

It is a remarkable fact that Roman Law became a system. Moreover, after its revival and "reception" in modern Europe to serve the needs of nascent capitalism; from the 17th century forward; it gave rise to what purported and still purports today to be a "science" of law. Customs, agreements, the deliberations of popular assemblies (such as the *concilium plebis*), the decisions of the Roman Senate, the edicts of magistrates, and the decrees of Emperors, all were brought together in such a way that posterity inherited from Rome a coherent legal framework, which could serve, and has served, as the historical predecessor of the normative structure of what Immanuel Wallerstein names as the modern world-system. The agents who welded the sources together were neither the governors nor the governed. Roman Law became a system not because of the work of Rome's officials and rulers, the governors; and not because of the collective action of its citizens and inhabitants, the governed; but instead because of the activity of a specialized educated class, the *iuris prudentes*. (Iglesias 1958 pp. 54-58). It is true that when the classical age of Rome was already history, the Byzantine emperor at Constantinople, Justinian, ordered the compilation of the Institutes (533 A.D.), the Digest, and the other books that later came to be regarded as comprising the Corpus Juris Civilis. But Justinian did not decree the law. Justinian decreed that a group of jurists would compile and codify the law. The jurists were *iuris prudentes* who took as their sources the books that had been written by earlier *iuris prudentes*. The *iuris prudens* is an interpreter of the law, an expert on legal matters. During the classical period when the principles of Roman Law were formulated (27 B.C. to 235 A.D.) providing legal counsel was a private liberal profession, practiced by experts who without holding public office advised litigants and others who wanted to know what the law was.

I would offer the history of Roman Law as evidence that logic is an active force in history. It refutes Justice Oliver Wendell Holmes' famous assertion that the law is 9/10 history and 1/10 logic. (Holmes 1881) Roman Law's history *is* logic. This is not to say that there is only one logic, or only one standard of rationality; it is to say that clearly defined concepts knitted together to form a coherent system tend to flourish over time partly – in any given case certainly not entirely – just because they are clear and are coherently systematized. Logical organization makes legal norms more useful. It makes them easier to teach. It makes the law more predictable, and therefore makes it easier for

people to plan ahead knowing the legal consequences of their actions. When the law works on the whole to keep the rich rich and the poor poor – as Roman Law certainly did – its logical coherence makes it easier to intimidate the poor verbally, thus diminishing the need to intimidate them physically. A lucid rational exposition of the laws governing *dominium*, slavery, and the status of women makes it easier to forget and harder to remember that their origin and cause is violence. For these and other reasons, constitutive rules consciously organized are historical causes with historical effects *pace* Archaeologie du Savoir and *pace* Paul Veyne. (Veyne 1971, p. 173 and *passim*)

The classical jurist Ulpian (died 228 A.D.) carried systematization so far that he regarded the whole of law as derived from three principles, as nearly 15 centuries later Sir Isaac Newton would derive the whole of mechanics from three laws of motion. Comparisons of systematization in law with systematization in physics, geometry or philosophy; of Ulpian with Newton, Euclid, or Spinoza, may or may not be helpful. I will try to make such comparisons in helpful ways in this chapter and the next; noting that it is often as helpful to note the differences as to note the similarities. Ulpian, like Newton, proposed three principles to characterize and synthesize a vast array of data; unlike Newton, he treated the opinions of authorities as data. Ulpian was followed by the compilers working for Justinian, who put at the head of the Institutes, which was intended as an introduction to law for beginning students, the same three principles. *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.* (Digest book 1; 1, 10, 1. Institutes 1) “The principles of jurisprudence are these: live honorably, do not harm others, to each his own.” The first principle *honeste vivere*, live honorably, shows *ius* (law) to be a continuation of *mores* and rooted in *mores*; it enjoins *virtu* (from *vir*, the Roman word for man, the root of the English words “virile” and “virility” as well as “virtue”), the conduct expected of a good man. The second principle *alterum non laedere*, do not injure the other, shows that although law is rooted in *mores* it demands less: although customary norms may prescribe helping others, the law only forbids harming others. Leave them alone and do not hurt them. The *praetor*’s aim is to keep the peace; he will intervene in fights but he will not insure that everyone cooperates to till the fields and bake the bread. The latter functions belong to the *familia*, not to the *res publica*. They belong more to slaves and women than to men. The third principle *suum cuique*, to each his own, commits the law to confirming existing property rights, as they have been established by conquest, maintained by inheritance, and modified by commerce. That Roman Law favored a limited form of social peace based on respect for the *status quo* is confirmed by Ulpian’s definition of justice, which was, like his three principles, endorsed and carried forward in Justinian’s Institutes: *constans et perpetua voluntas ius suum cuique tribuendi.* (Ibid.) “Justice is the constant and perpetual will to give to each what the law defines as his.” The administration of justice so defined represented a Roman achievement that should not be underestimated. Logic won out over constant internecine warfare. It limited the tendencies of Romans to fight among themselves, and thus helped them to live more happily and to conquer a vast empire.

Contracts, the aspect of law most immediately relevant to Nietzsche’s *eigentliche Problem*, are not mentioned explicitly in any of Ulpian’s three fundamental postulates. To be sure, nearly 15 centuries later Samuel Pufendorf coined a maxim expressing the first principle of contract law, *pacta sunt servanda* (pacts are “served,” i.e. honored, complied with). (Pufendorf 1688) Pufendorf worked in and contributed to the Roman

Law tradition; his maxim might be added as a fourth postulate of the system, one that was implicit in Ulpian's day, remained implicit in Justinian's day, and became explicit in Pufendorf's day.

The delay in seeing contract as a fundamental concept of the Roman legal system can be explained in two ways.

Firstly, it can be explained by observing that the practice of making contracts developed slowly in Rome. Since discourse follows practice; since even though the two are inextricably mixed in discursive practices the practical aspect tends to drive the discursive aspect; since – as the legal historian Sir Henry Maine showed in Ancient Law (Maine 1861) – it is normal for practice to change faster than language, so that for a time the new substance parades under the same form, the new wine remaining in the old bottles; since – as the same writer shows in the same book – the transition from a society where a person's activities are mainly determined by his social role (i.e. his status) to a society where a person's activities are mainly determined by markets (i.e. by contracts) is the work of centuries, not of years; it is to be expected that doing business by contract, which evolved slowly in Rome in practice, would evolve even more slowly in theory. “Even as late as the reign of Justinian, the Roman jurists did not conceive of the performance of promises as a matter of urgent social necessity.” (Hyland 1994 p. 413) The Romans did not at first use the consensual contract – what for us is the normal contract, which consists of a meeting of the minds leading to the drafting of an agreement that expresses the joint will of the parties. Instead they often used what they called a *stipulatio*. (Iglesias 1958 p. 441ff) A *stipulatio* was a ceremonial performance in which the parties engaged in asking and answering a standard set of questions and answers. Many things we do routinely by contract – buying or selling a house, renting a farm, hiring or being hired, chartering a boat ... – they did by *stipulatio*. There remain remnants of the *stipulatio* today in our European and Europeanized successor states of the Roman Empire; for example at that point in a marriage ceremony when the preacher asks standard questions and the bride and groom answer “I do.” There are similar echoes of the ancient past in Roman Catholicism, for example in that part of the sacrament of first communion when the priest asks a series of questions beginning with, “Do you renounce Satan and all his works and all his pomps?” The gradual decline of *stipulatio* and other early practices, and the rise of the consensual contract, that is to say of contract in its modern form, accompanied the growth of the Empire and the growth of commerce. “Consensual contracts are those whose validity does not require the observance of a standard form ... Purchase and sale, lease, forming a partnership, and giving a power of attorney fall in the category of consensual contracts, ruled by the principle of good faith, free of formal requirements, and available to foreigners.” (Iglesias 1958 p. 415) In discussing the emergence of contracts as we know them Iglesias refers to the *jus gentium* or law of nature, a school of thought that proposed to distill from Roman Law and from what it took to be natural reason a common law applicable to everybody whether Roman or non-Roman; so that anybody, regardless of religion or nation, could engage in trade with anybody else. “Born in the school of the *jus gentium*, at the time of the expansion of Rome, they [consensual contracts] spoke to the new necessities of world commerce.” (Ibid.)

Secondly, the delay in seeing contract as a fundamental concept of the system can be explained by saying it was really not a fundamental concept of the system after all. It

is a derived concept, and as such it was an important part of the Roman law of obligations. (Iglesias 1958 pp. 401-69) This second explanation is consistent with the first if one posits that the ancient Romans had all the premises from which *pacta sunt servanda* follows. Over a thousand years after Justinian, the growing commercial importance of contracts led European jurists to make the consensual contract even more central than it had been in the last days of Rome. The work the *jus gentium* began was interrupted for a thousand years during the Middle Ages and then completed in early modern times. If *pacta sunt servanda* could be ranked since the 17th century as a fourth fundamental postulate of the system, alongside Ulpian's three, it is not because jurists discovered something new in the 17th century; it is because the historical process Karl Polanyi describes as the disembedding of market relationships from social relationships had made contract the glue of glues, the social glue that more than any other social glue was responsible for holding society together. (Polanyi 1944) But Ulpian and Justinian were right to treat it as a corollary of first principles, not as a first principle. Conceptually contract law is like Sir Isaac Newton's parallelogram law. It is not one of the three laws of motion from which mechanics can be deduced; it is rather their first and perhaps most important corollary. (Newton's parallelogram law states that the resultant of two combined vector forces can be calculated by drawing a diagram in which the two forces are depicted moving outward from a single point, the length of their corresponding line segments showing their magnitude, the angles the lines make with the axis showing their direction; completing a parallelogram by drawing two more lines parallel to the first two; and then drawing a third line segment starting from the same point and through the middle of the parallelogram as its diagonal. The diagonal graphs the resultant vector force.)

As Newton could derive his first corollary, the parallelogram law, from his three laws of motion, somewhat similarly the concept of contract, as it developed in the *jus gentium* and later in modern European law, can be regarded as a logical outgrowth of the principles of early Roman Law (see (1) three paragraphs below).

In the light of the considerations just adduced, I want to make three suggestions, the first two rather novel, the third rather commonplace. (1) The development of modern contract law was driven by the internal logic of the Roman Law tradition, as well as by other factors which I shall name as "history;" (2) Once in place, the resulting normative structure made inevitable what is often called the dynamic of capital accumulation; (3) The dynamic of capital accumulation has been a major, perhaps the major, dynamic of modern history; as has social exclusion, which is another consequence of the same normative structure.

If these three suggestions are valid then it follows that (4) I am not naïvely expecting ethics to play a better role in the future than it has in the past. Expecting ethics to be a key to building a better future is a reasonable expectation in the light of past shaping of the dynamics of history by normative structures, quite apart from other good reasons there may be for holding the same expectation. I take as granted here a point I have already been making, which Nietzsche and Kant assume, and which I will continue to make in the following chapter: that ethics and law are so intertwined that in a genealogy of morals they can be treated together. Let me now say a little about what I mean by and why I believe in my first two suggestions (1) about how modern ideas of contract came from Roman Law, and (2) about norms framing and enabling a capitalist

dynamic). I assume the third ((3) above) as given. (see e.g. Luxemburg 1913; Amin 1974; Mies 1986; Du Boff 1989)

(1) The first legal subject was the *paterfamilias*. He was a sovereign individual. Subsequently other classes of people became legal subjects like him, which meant that they too became sovereign individuals. The *paterfamilias* held *dominium* over property, which meant that he controlled it absolutely. So, therefore did the wider circle of his successors. How could two such sovereign individuals organize the relationship of one to the other if they should meet? Neither could coerce the other, because coercion would violate their sovereignty, their *dominium*, their honor. (Remember *honeste vivere*.) Nor should any third thing, for instance some public policy or custom, coerce them. The only logical way for them to cooperate is to reach a meeting of the minds, to share a common will, so that the will of one is also the will of the other; in other words to make a consensual contract. I suggest, therefore, that as Europeans over time eliminated incongruities in their legal systems, making them more coherent and therefore more useful, they tended to adopt modern notions of contract because of the internal logic of the Roman Law tradition, as well as for other reasons.

I do not consider myself refuted by the objection that Great Britain did not have Roman Law and nonetheless also generated a modern conception of contract, because I agree with those who see the British legal tradition as in the main a branch of the Roman Law tradition. Throughout the Middle Ages a text derived from Justinian's compilations called the *Lex Romana Wisigothorum* was authoritative in England. (Iglesias 1958 p. 65) There was no explicit "reception" of Roman Law in Britain in the 16th or 17th century simply because in those centuries and earlier the Roman concepts congenial to commerce and to monarchical rule were already more advanced in Britain than on the continent. The common law is also more Roman than the Romans, in the sense here relevant, because historically the assertion that England had its own common law was part of an effort to limit the powers of the sovereign (Foucault 1976), which translates today into limiting the powers of government to modify property rights. That government is limited because Roman concepts of property precede its formation, frame its context, and limit its powers is *more* rather than less traditional legal doctrine in England than on the continent.

It is true that the needs of expanding commerce led to the adoption and extension of *jus gentium* principles in early modern Europe. But the arrow of causation can also be regarded as pointing in the other direction. My view is that modern European cultural structures both caused and were caused by the expansion of markets. Specifically, contract law facilitated the expansion of markets, and the expansion of markets favored the growth of contract law. Modern Europe drew on Roman sources to develop a law that was known both as the *jus civile*, the civil law, and equivalently as the *jus fori*, the law of the fair, i.e. of the market (Durkheim 1930 p. xxiv). Immanuel Wallerstein points out that in the 15th century the expansion of the Chinese economy, or perhaps some other economy, to become a global economy seemed just as likely as Europe-led globalization. My suggestion is that the availability of Roman Law principles partly explains Europe's success, while Europe's success explains why today's global economy is governed by Roman Law principles. What Wallerstein calls Europe's "legal coherence" (Wallerstein 1974, p. 18) facilitated commerce, drove capital accumulation, and helped create relatively strong state machineries. (see Wallerstein 1974 pp. 15-38) Max Weber makes a similar point. (e.g. Weber 1920, pp. 326-27).

(2) Another name for the historical production of a proletariat, as described, for example, in the chapter on “Primitive Accumulation” in Marx’s Capital is massive social disintegration. It has happened more than once, and more than once the normative structure driving it has been Roman Law. The story of the rise of the *jus gentium* in the last years of the Roman Empire is also the story of that empire’s fall. The story of the spread of Roman Law principles around the world is also the story of colonialism with its massive deconstruction of indigenous cultures. (Mies 1986). The present time of neoliberalism, which might also be called a time of neo-Romanism, is also the time of War on Terror directed in the first instance against people described as Muslim fundamentalists and generally against traditional ways of life that resist the cosmopolitan (read Roman) ethics of modernity. (Jabri 2007) Foucault’s account of the massive confinement of the insane (along with the unemployed and the disabled) in the 17th century – a confinement motivated, as he suggests in *Histoire de la Folie* and confirms later, by the requirements of production generated by early capitalism – is also an account of the massive production of insanity, not just because some people decided to define other people as insane, but also because many people were driven insane by isolation. Mental illness can be interpreted as the individual experience of social disintegration. (See Frank 1965) The confinement of the mentally ill coincided with the “reception” of Roman Law. It was the time when the *Gemeinschaften* of the Middle Ages were disintegrating; the time when the evils of feudalism were being superseded by the evils of capitalism; a time, one of many times, when the *dominium* of some meant the exclusion of many, when the consensual contract facilitated the commercial transactions of those who offered products that somebody else wanted to buy, while the dissolution of personal bonds, and their replacement by the arms-length transactions defined by the *jus gentium*, isolated those who had only labor power to sell, inspiring fear in those who succeeded in selling their labor power today but who knew they might not succeed tomorrow, and despair in those who did not succeed. (Belloc 1937) The same disintegration of local communities that facilitated the commercial transactions of people who had something to sell facilitated the slide into mental illness of people who had only labor power to sell and whose labor power remained on the shelf unsold because nobody wanted to buy it. Their social and psychic exclusion was precipitated by legal and economic exclusion. Restated in terms of the then new science of political economy (a science whose first great text, the Wealth of Nations, was written by a professor of jurisprudence) (Smith ca. 1762)): they were excluded because nobody had a rational expectation of accumulating *Mehrwert* (surplus value) by first buying their labor power (by means of one consensual contract) and then selling (by means of another consensual contract) the products which the exercise of *dominium* over their labor power would produce.

If “exclusion” appropriately describes the modern condition, and even more the post-modern condition, which Anthony Giddens wisely prefers to call the condition of radicalized modernity, then “integration” can be named as a general task of our times, one that is called for to solve problems, to serve life. Foucault gives a considerably different description of our condition, tending to name it as “normalization,” and he accordingly tends to think of integration into social institutions not as the solution to a problem but as effects of power to be resisted. (e.g. Foucault 1983 pp. 369-70) My claim *pace* Foucault is that inclusion and integration are two good words usually naming life-serving processes that on the whole tend to adjust culture to physical function, where it is

understood that the successful performance of culture's physical functions requires meeting the needs of all bodies insofar as it is possible to do so. The task requires, given our condition, greater reliance on dynamics other than the dominant one. It requires assuring that needs are being met whether or not somebody is making a profit meeting them. Otherwise put, it requires mobilizing more than one kind of cultural resource, where cultural resources are defined as whatever rules it takes to motivate and to organize the work and the play needed to get needs met. Probably contrary to Foucault's expectations, the myth (an extension of the Roman myth that the *jus gentium* was natural law) that economics is a natural science has not waned in the interval between his time and ours. Today more than ever it is necessary to criticize the view that the dominant dynamic, and the complicated financial accounting procedures employed to monitor the performance of mainstream business enterprises, are simply natural egotism writ large, the products of no cultural tradition; so that modifying it or them would conflict with egotism, and therefore with nature, and therefore would not be feasible. The complicated procedures employed to monitor the performance of financial institutions can and should be revised to make them better serve their social purposes; which means, in the end, better serving physical purposes; and which also means, in the end, continuing to do, and hopefully doing better, what humans have done since history began: harnessing egotism, supplementing it, transforming it, and also sometimes cultivating it. In Nietzsche's terminology, the tasks confronting us require both the Romans and the Jews.

One might feel that I should be more prolix and specific here concerning what I mean when I say that a normative structure is "driving" economic and therefore social exclusion. And about why I believe that once in place, the normative structures of late Roman Law and of modern European law derived from it made inevitable the dynamic of capital accumulation. And about to what extent my analysis is the same as Marx's and to what extent I envision a broader process fueled by what Marx, following Aristotle, calls the M – C – M (Money-Commodity-Money) cycle, chrestomathy, buying in order to sell; a process older and more general than the extraction of *Mehrwert* from workers by employers. And about when I differ from Foucault, when I do not so much differ as refocus, when I neither differ nor refocus; and about when without joining Foucault in regarding "integration" and "normalization" as pejorative terms I nevertheless sympathize with what I take to be the substance of his views and advocate neo-Foucauldian practices designed to combat the authoritarianism he hates and fears. But to be more prolix and specific here would be repetitive, and not only with respect to Foucault. In Chapter Two I already stated in detail my reasons for attributing causal powers to rules; and why, therefore, social change is cultural action, not so much changing people as changing cultural codes. I already explained why precisely property law and contract law make the dynamic of accumulation inevitable. I have already discussed several key ideas of Marx, of major critics of Marx, and of major subsequent Marxists.

I will, however, here add a few more comments on Nietzsche tending to justify my Durkheimian options. I think a single Durkheimian phrase composed of two words, "social integration," names "the task" of our modern and post-modern times. It names a key opening doors to solving all 15 of the problems listed at the beginning of Chapter One, as well as the 16th, the 17thand the nth problem on that open list. I use that Durkheimian phrase to name processes that free us from a dynamic of capital

accumulation that governs us more than we govern it. Social integration empowers us to approach any problem whatever with greater cohesion and rationality.

Nobody despised “modernity” (as he understood and used the term) more than Nietzsche, but he did not despise it because it was heartless; nor because it was an epidemic of what Emile Durkheim called *anomie* (normlessness) or an epidemic of what Mahatma Gandhi in his critique of modernity called *adharma* (absence of *dharma*, i.e. of guiding myths, of religion) (Gandhi 1909); nor because it excluded the propertyless and those whose bodies and souls were rejected by the labor market. Nietzsche rejected what he called “modernity” for the different and incompatible reason that *heute herrscht das Vorurtheil, welches “moralisch”, “unegoistisch”, “desinteressé” als gleichwerthige Begriffe nimmt, bereits mit der Gewalt einer “fixen Idee” und Kopfkrankheit.* (...today prevails the judgment according to which “moral” “unselfish” and “disinterested” name equivalent concepts, already with the force of a fixed idea and brain sickness). (Nietzsche 1887 p. 284) Nietzsche despised the English moralists for whom “good” meant “useful” and “useful” meant useful for the entire population. (Nietzsche 1885 s. 201). They knew nothing of the genealogy of the word “good” and similar terms used in making value judgments. The word “good” did not originate, as the English moralists in their historical ignorance assumed, as a term employed by the weak masses to praise the strong benefactors who were kind to them. In all early languages “good” is equivalent to “noble,” as “bad is equivalent to “base.” Its etymologies in several languages show that “good” began as a word defined by elites to praise themselves for their power, their wealth, and their truthfulness; and to distinguish themselves from the common people, the lying common people. (Nietzsche 1887 pp. 283, 286-7) What Nietzsche calls “modern ideas” he regards as degenerate, as sick, as anti-life. Modernity is democracy (Nietzsche 1885 pp. 130-31; 1887 p. 286), it is pity (*Mitleid*, feeling another’s pain) (Nietzsche 1887 p. 274), it is levelling (*Ausgleichung*) (Nietzsche 1887 p. 302); it is mediocrity and fearfulness (Nietzsche 1885 p.128); it is herd-animal morality (Id. p. 130); it is socialism (Id. 130, 133; 1987 p. 288); it is effeminate (Nietzsche 1887 p. 275); it is the triumph of a twisted herd instinct over what nature wants.

Nietzsche offers an account of how modernity, and with modernity its ethics, came about, which differs from the Braudelian/Wallersteinian/Polanyian/Weberian sort of account I have been offering in that for Nietzsche the main historical dynamic leading up to 19th century Europe as he lived it was not to be found in commerce, and consequently not, as I have been suggesting, in the normative structures that govern and drive commerce, but rather in psychology. In the beginning were the aristocrats. In their ethics good=noble=powerful=beautiful=happy=loved by God. (Nietzsche 1887 p. 292) In many places the aristocrats were divided between the warriors and the priests, but it was the Jews who, fatefully for the West, carried priestly tendencies to an extreme and initiated an inversion of values, a slave morality. (I prefer to call it a “service ethic,” noting that “service” is derived from *servus*, the Latin word for “slave”.) Nietzsche writes: “This inversion (*Umkehrung*) of values (which includes using the word “poor” as synonymous with “holy” and “friend”) constitutes the meaning of the Jewish people: with them begins the slave rebellion in morals.” (Nietzsche 1885 pp. 121-22) Now the poor, the lowly, the weak, the suffering, the sick, the ugly are blessed by God. And one knows who inherited this turning of values upside down: the Christians. (Nietzsche 1887 p. 292)

The motive of the Jews was an envious form of hatred combined with a desire for imaginary revenge. It was a form of hatred characteristic of those who are too weak to take revenge physically, often named by Nietzsche using a French cognate of resentment, *ressentiment*. (Nietzsche 1887 p. 295)

The slave morality that the Jews bequeathed to Christianity, Christianity bequeathed to democracy. Now that the Judeo-Christian tradition has thoroughly poisoned our culture, it no longer matters whether religion and the church continue to exist or not. Now that the morality of the common man has won, now that the mob has won, it does not matter that the church repels us. “Even without the church, we still love the poison.” (Nietzsche 1887 p. 295) Democracy, in turn, leads to the agitators, the anarchists and the socialists. (Id. p. 288)

On Nietzsche’s account, history is moved by a sort of class struggle that is at bottom a psychological struggle between the higher values of the aristocracy and the lower values of the mob. “The symbol of this struggle, inscribed in letters legible across all human history, is ‘Rome against Judea, Judea against Rome.’ There has until now been no greater event than *this* struggle, *this* question, *this* deadly contradiction. Rome felt the Jew to be something like anti-nature itself, its antipodal monstrosity. In Rome the Jew was regarded as guilty of hatred for the human race, and rightly so if one identifies the salvation and the future of the human race with the unconditional dominance of aristocratic values, i.e. of Roman values.” (Nietzsche 1887, pp. 311-12) After the passage just quoted, Nietzsche goes on to interpret the French Revolution as a victory for Judea in its centuries-long ongoing struggle against Rome, and the subsequent coming to power of Napoleon as a victory for Rome in the same ongoing struggle. A few pages later, in Part III of his *Zur Genealogie der Moral* Nietzsche makes the same point differently: there he says Plato vs. Homer is the complete, genuine, antagonism; Plato plays there the part of the Jew, the precursor of Christianity and of herd morality; Homer plays there the part of the Roman, the warrior, the aristocrat.

(Nietzsche was not, however, anti-semitic. For a debunking of common misconceptions concerning him see Solomon and Higgins 2000.)

I have been offering, in contrast with Nietzsche, an interpretation of the dynamics of history which is more sociological than psychological, in which over the long haul cultural structures count more than *ressentiment* or any other feeling. The symbolic structures derived in the past from the *familia* ruled by a *paterfamilias* had consequences over the centuries at the level of the cerebral cortex, quite apart from what was going on in the deeper and older layers of the brain. (see MacLean 1973) When Romans and later Europeans modified the ancient norms, adding to what was necessarily in early Roman law a social structure that gave precedence to military over economic considerations (Iglesias 1958 pp. 596-7) provisions intended to facilitate getting the work of the world done and getting everybody’s needs met; for example by in later Roman times requiring landlords to reduce the rent of farmers when unforeseen weather led to bad harvests (Id. 428); they did so within a framework of normative structures laid down centuries earlier. The same can be said of the acceptance of Roman Law categories centuries later by European social democrats (Renner 1904) with consequences that necessarily led to frustration (Richards and Swanger 2006). I would offer as further support of the view that on the whole human conduct is patterned more by culture than by *ressentiment* or any other passion, the empirical work done by psychologists who have studied moral

development, which tends to show that normal adults think and to a great extent behave according to conventional norms. (Kohlberg 1969) I would also offer the philosophy of psychology of Harre and Secord, and the other considerations adduced in Chapters One and Two, which show that social science is well advised to adopt methods that presuppose that humans are biologically predisposed to form cultures with rules (with suitable amendments to accommodate those who for one reason or another prefer to use some other term instead of “rules”).

I would also explain the conflicts of rich people against poor people as due in large part to conflicts of material interests. It is true that such conflicts are often expressed socially in terms of values, as an ideological conflict between, for example, the conflict Nietzsche describes as one between the aristocratic values of the rich and the slave morality of the poor, but nevertheless underlying material needs, such as the need for food, also tend to set human against human. In this respect we are not different from other animals. (For a long review of much of the evidence and argument concerning what it is that people have been fighting about through the ages see Giddens 1981.)

With respect to Nietzsche’s interpretation of Christian love and democratic solidarity as disguised hatred and lust for revenge, I suggest that his interpretation is more a philosophical choice than a conclusion drawn from generalizing the available empirical evidence. Given that Nietzsche takes the will to power as a fundamental concept, one that describes both nature in general and human nature, it is hard to see how he could have believed any evidence that contradicted his interpretation. Whatever one values, will to power is presupposed because “...valuing (*Werthschätzen*) is itself only this will to power.” (Nietzsche 1884-1888 s. 675). The will to power is a metaphysical doctrine. (Heidegger 1937ff) It would seem to imply that whatever appears to be love and solidarity is a misleading appearance. It is true that Nietzsche does not simply declare that his general principles imply that Christian love and its analogues are necessarily some form or other of will to power regardless of what they may appear to be. He provides evidence for his claim. He quotes at length the early Christian theologian Tertulian gloating over the pleasures the saved will enjoy on Judgment Day and thereafter, as they watch the humbling of the rich and powerful, and as they observe the exquisite torturing of the damned in hell, especially those among the damned who persecuted the Christians on earth. (Nietzsche 1887 s. 15) He provides other evidence also. But he does not assess the balance of envy and hostility on the one side, and generosity and service to others on the other side, throughout all the centuries during which Jews, Christians, democrats, anarchists, and socialists (and others Nietzsche does not name) have been advocating and apparently to some extent practicing generosity and service to others. I suggest that in his mind he was not simply selecting witnesses to make his case, leaving it to those who disagree with him to line up evidence to make their case. He had powerful reasons for not believing any evidence the other side might produce, stemming from his metaphysical commitment to a neo-Schopenhauerian doctrine that the underlying reality of human nature, whatever appearances may be, is the will to power.

Jacques Derrida claims that Nietzsche had no metaphysics. (Derrida 1974) According to Derrida, Nietzsche succeeded where others failed; he attacked metaphysics without ending up asserting metaphysical claims himself. My opinion is that Derrida’s perspective is not so much incorrect in its own terms (the terms of Derrida’s understanding of the *logos* as the fount of western metaphysics; for a different

understanding see Richards 1995) as beside the point. Nietzsche is not a metaphysician, according to Derrida, because of the way he uses language. He poetically evades commitment while illuminating but not asserting. But Nietzsche's roots are in Schopenhauer, and more remotely, as Heidegger shows, in ancient Greece. The point about Schopenhauer's will is that will is substance before ideas, and therefore implicitly before language and reason. (Schopenhauer 1819, Stace 1942) Nietzsche's ideal aristocrat is no intellectual. He (I omit she intentionally) prefers deeds (i.e. fighting) to words, actions to ideas. (Nietzsche 1887 s. 1:10) But this does not refute my suggestion that will to power is for Nietzsche his metaphysical essence; it confirms it. As Nietzsche portrays the impulsiveness of his hero (Ibid) it shows his will to be real at a level deeper than *logos*. Thus Derrida's interpretation is correct in its own terms; neither Nietzsche nor Nietzsche's hero is deceived by language as Derrida thinks Plato was. But there may still be a good reason for calling Nietzsche a metaphysician; he may still, and I suggest he does, view the world through conceptual lenses that eliminate love and solidarity as dynamic forces in history *a priori* without benefit of inventory.

A claim Nietzsche makes that I agree with – and I think it too should count as a metaphysical claim – is that what all the ethical codes of all the world's cultures have in common is that they all demand obedience. *Jede Moral ist, im Gegensatz zum *laissez aller*, ein Stück Tyrannei gegen die "Natur" auch gegen die Vernunft...* (Nietzsche 1885 p. 112) (Every morality is, contrary to *laissez faire*, a bit of tyranny against "nature," and also against reason...) The conditions of the human species on planet earth are such that there must necessarily be ethics of some sort. The variations and diverse interpretations of the conditions are apparently the reasons why Nietzsche puts "*Natur*" in quotation marks. It is nature itself that requires culture as its complement and as its contradiction. Nietzsche confirms Wittgenstein – or rather Wittgenstein confirms Nietzsche because Nietzsche wrote first – in the respect that even reason must bow to authority: "Following a rule is analogous to obeying an order. We are trained to do so; we react to an order in a particular way." (Wittgenstein 1953, p. 82) But I do not agree with Nietzsche that centuries of bloody scaffolds and grotesque punishments are required to breed humans to be responsible (*verantwortlich*), predictable (*berechenbar*), and reliable (*regelmässig*). (Nietzsche 1887 pp. 319-59) Gentler methods are possible and preferable, such as those suggested by the child psychologist Jean Piaget: "In the sphere of clumsiness and untidiness in general (putting away toys, personal cleanliness etc.), in short in all the multifarious personal obligations that are so secondary for moral theory but so all-important in daily life (perhaps nine tenths of the commands given to children relate to these material questions) it is quite easy to draw attention to one's own needs, one's own difficulties, even one's own blunders, and to point out their consequences, thus creating an atmosphere of mutual help and understanding. In this way the child will find himself in the presence, not of a system of commands that require ritualistic and external obedience, but of a system of social relations such that everyone does his best to obey the same obligations, and does so out of mutual respect." (Piaget 1932 pp. 137-38) Authority can be non-authoritarian, and it can be conscientiously socially constructed to meet the needs of bodies insofar as it is possible to do so.

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*Walter Kaufman translates *versprechen darf* as “has a right to make promises.” His translation captures the moral dimension of *darf* perhaps better than mine.

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