A DYNAMICS THEORY OF JUSTICE:
NIETZSCHE, HOLMES AND SELF-ORGANIZING CRITICALITY

by

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Problem: Although Oliver Wendell Holmes Jr. transformed American jurisprudence into critical self-awareness, there is no consensus on the nature of his legal theory. Holmes imperfectly represents each of several incompatible approaches. Commentators presume Holmes lacked any original or coherent theory of justice.

Friedrich Nietzsche is likewise presumed a critical philosopher without a coherent theory of justice. Nietzsche wrote esoterically, but there is no consensus on the content of his esoteric agenda. Nietzsche’s attitudes toward women appear misogynistic, but his philosophy paradoxically appeals to many feminists.

Method: By re-conceptualizing Holmes and Nietzsche in terms of the principles of self-organized criticality, their understandings of causation and developmental dynamics become coherent. This thesis re-conceptualizes common-law legal reasoning as exploiting principles of self-organized criticality to build knowledge inductively. This reveals that Holmes and Nietzsche’s genealogical critique of idealism rests on the computational implausibility of assuming there always exist micro-level rules to achieve desired macro-level goals. The legal-reasoning model shows that justice entails an inexhaustible open-system dynamic of applying limited resources to accommodate better an ever-broadening matrix of conflicting values. Nietzsche assesses psychological and social conditions that foster this collective creativity and decadent conditions that inhibit the growth of justice. Nietzsche identifies problems specific to institutions that require special safeguards that he esoterically conceals. Using Nietzsche’s exoteric accounts of psychology and rhetoric based on principles of self-organized criticality, Nietzsche’s esoteric techniques can be inferred, including his syncretism of pagan myths, which reveals his esoteric content.

Conclusion: Holmes and Nietzsche applied a coherent theory of justice based on principles of causation and dynamics not widely accepted until the late twentieth century but having roots in ancient myths and isolated prior thinkers. Nietzsche defines justice as pursuing robust community growth without sacrificing the future for the present. Both Holmes and Nietzsche accord pursuit of justice with the good life whereby individuals promote their own development for greater sacrifice for the community. Nietzsche’s esoteric solution to his problem of institutions was matriarchy. Nietzsche’s matriarchy follows from his identification of the root of the institutional problem as male windfall opportunism, an evolved unconscious male tendency resulting from uncertainty over genetic parentage.
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Family involvement has been another *sine qua non*. My parents provided encouragement, insight and innumerable Sunday dinners. Our daughter Allison inspired and rewarded every extra effort to understand principles of development. Tracey inspires and rewards everything.
This thesis presents a theory of justice based on principles of nonlinear dynamics.

Some social scientists consider the study of nonlinear dynamics to be a recent innovation. "During the past several years, a radical change in world view has begun to take hold in the traditional social sciences. This new worldview is based on concepts such as complexity and chaos that underlie a more general perspective referred to most commonly as the study of dynamic self-organizing systems." Yet Stephen Kellert observes that the mathematics for nonlinear dynamics were in place at the beginning of the twentieth century and he seeks, instead, to account for why it took so long for a science of nonlinear dynamics to develop. This thesis claims that in the late nineteenth century Friedrich Nietzsche had already thoroughly understood these developmental principles and methods and extended them to construct and apply a radically different theory of justice. This thesis presents and elaborates Nietzsche's dynamics theory of justice.

Many legal readers will not yet be familiar with the study of nonlinear dynamics and the application of its concepts within social science. However, practitioners of common-law legal reasoning already possess some intuitive understanding of these principles. Indeed, Oliver Wendell Holmes, Jr. drew on his mastery of common-law legal reasoning to develop independently, also in the late nineteenth century, a genealogical method substantially similar to Nietzsche's. Nietzsche developed his understanding and methods more thoroughly than Holmes did and progressed further in constructing a theory and praxis of justice, but Holmes, properly

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understood, is the more approachable introduction to nonlinear dynamics for a practitioner of common-law legal reasoning.

What is a nonlinear dynamic system? The recent scientific concepts are mathematical ones used in physical sciences and are not very meaningful to those unfamiliar with dynamic equations. To spare the uninitiated reader, this thesis avoids mathematical concepts, with no small loss in economy of expression. This thesis attempts to express nonlinear dynamics in concepts somewhere between precise mathematics and the ambiguous metaphorical rhetoric of Nietzsche and Holmes. To avoid a difficult mathematical and scientific introduction, the characteristics and principles of nonlinear dynamics will be presented anew through each aspect of the theory of justice over the course of the thesis.

To a non-mathematician, then, what is a nonlinear dynamic system? In the context of human affairs, it is easier to conceive a nonlinear dynamic system as an information system with a memory that uses an implicit model of itself—including its needs and capabilities—and of its world to perceive and record its experiences selectively, and then spontaneously modifies that model inductively from recorded perceptions. The modification in turn alters the selective nuance of the model, which alters the perceived relevancy of future experiences and the capacity for pragmatic inductive invention. In common-law legal reasoning, for example, legal doctrine selects “relevant” evidence and facts within precedent cases, and subsequent judges periodically re-conceptualize the doctrine inductively from sets of precedent cases. The re-conceptualization alters the scope of relevant evidence and facts.

There is an inherent circularity in using a model to shape perceptions to modify the model. The historical development of a nonlinear dynamic system has a looping, feedback effect that can reinforce and propagate the side effects of the selective biases of earlier, less mature
stages in the development of the internal model. Two initially identical nonlinear systems within
the same environment can develop to escalate slight variations in the sequence, frequency,
intensity, duration or quality of experiences into disproportionately distinct models, particularly
respecting self-perception of needs and capabilities. In this sense, the system is said to be
"nonlinear." The phenomenon is like two oak trees growing along the same boulevard—the
hierarchical branching process is chaotically sensitive so that the two trees grow quite differently,
each achieving a temperate-zone canopy effect with different branching solutions. In terms of
common-law legal reasoning, two common-law jurisdictions can develop doctrines with quite
distinct conceptual hierarchies because of different decisions in borderline, hard cases early in the
development of the doctrine. Early conceptual commitments, with implicit burdens of proof,
shape the subsequent development of conceptual exceptions in response to the side effects of the
original choice. In the Anglo-Canadian law of negligence, for example, inconsistent doctrinal
concepts of “foreseeable as probable” (*Wagon Mound (No. 1)*) and “foreseeable as possible”
(*Wagon Mound (No. 2)*) developed in parallel within the same system of common law.3

The sensitivity to slight variations is said to be “chaotic” because disproportionate effects
can arise from variations in cause that are slighter than the perceptive nuance of the model. In
common-law legal reasoning, for example, much of the doctrinal development originates
unpredictably from within the “equity” of doctrinal concepts such as “reasonable.” The deciding
factor in a borderline, hard case generally lies hidden from doctrine within the realm of equity;
yet, such factors can immensely influence the subsequent development of doctrinal concepts.

Mathematics has shown it is logically impossible for a self-modeling, nonlinear dynamic
system ever to model completely its own developmental possibilities. Relative to the current

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cognitive power of a model, the future developmental path of the model necessarily remains indeterminate and open-ended. In common-law legal reasoning, the advice of a black-letter lawyer must always be qualified as inherently incomplete.

In particular, the implicit model of a nonlinear dynamic system cannot fully model the system's spontaneous physical process of inductive modification of the model. That is, the system's model of its own dynamics for modifying the model is inherently incomplete. In common-law legal reasoning there are principles of *stare decisis* to regulate the process of changing doctrine; however, the doctrines of *stare decisis* do not fully regulate the process of change and the doctrines of *stare decisis* themselves develop nonlinearly.

The inherent instability and uncertainty of a nonlinear dynamic system, however, paradoxically enables it to become highly adaptive to its environment. Some nonlinear dynamic systems spontaneously exploit the chaotic sensitivity of the dynamics to achieve system intelligence. The system accumulates countless stresses from the environment that are slighter than the nuance of the system's modeling capability. By exploiting the holistic causal properties of what is now called "self-organizing criticality," an inductive process of conceptual modification driven by "avalanches" of local adjustment transactions can achieve system intelligence beyond the initial modeling capability. For example, the two oak trees with very different branching patterns converge upon reasonably wind-tolerant canopy patterns without the branches having any capacity to model the overall canopy. Windstorms break off branches of varying hierarchy—the avalanches of varying scope—and the remaining branches develop locally in a way that fills the gap in the over-all canopy. In common-law legal reasoning, for example, J.C. Smith has shown that the two conflicting doctrines of foreseeability in negligence (*Wagon Mound (No. 1)* and *Wagon Mound (No. 2)*) more or less converged to the same "deep
structure," which was implicitly more nuanced than the concepts in either doctrine. The common-law process was self-organizing in the sense that by faithfully applying the local dynamics of common-law legal reasoning, the judges implicitly achieved an holistic deep structure without conscious awareness of where they were headed or of even having achieved it.

The power of a nonlinear dynamic system, then, is that it can adaptively evolve in response to innumerable types of stresses that have not already been conceptualized by the system’s implicit model. An organically branching tree, for example, is chaotically sensitive to not only sun and wind, but to slight variations in viability due to soil chemistry, precipitation, squirrel populations, lovers carving initials, and so forth. A rationalist gardener, on the other hand, who prunes according to a top-down tree-theory, renders the tree vulnerable to tragic collapse from variations in variables unforeseen by the model and so taken for granted. The adaptive intelligence of the apparent self-organizing criticality of common-law legal reasoning may explain the “English” paradox that plagued Max Weber’s social theory.4

This thesis uses principles of nonlinear dynamics to present new understandings of the development of knowledge, the development of the individual, the development of social systems, and the interaction of all three levels of development. Nietzsche, despite lacking modern concepts of nonlinear dynamics, had already understood these principles within all three levels—knowledge, individual and social system—and produced his genealogical method based on the developmental interaction among all three. For Nietzsche, justice entails proactive management of the inter-level dynamics to design partial restrictions on development that would enable the community to become more robustly adaptable to changing circumstances into the future.

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4 Weber argued that a rational legal code generates significant economic utilities, but then had to explain the relative success of the English legal system and economy. See Max Weber, Economy and Society: An Outline of Interpretive Sociology, edited by Guenther Roth and Claus Wittich, translated by Ephram Fischoff et al. (Berkeley: University of California Press, 1978).
Proactively managing the dynamics of justice is a difficult and uncertain matter because of the necessary incompleteness of rational deduction using conceptual models to explain causation. The proactive dynamic is a creative process of self-organizing criticality that draws on background myths to incorporate gesture-based experience selectively into narrative representations from which new concepts are inductively invented to discipline accommodation of conflicting values.

Holmes likewise understood without adequate concepts the genealogical method of nonlinear dynamics. Holmes's understanding derived from his mastery of the method of legal reasoning as a particular instance of the proactive management Nietzsche examined more generally. However, Holmes poorly conceptualized his mastery of legal reasoning. The basic methodological strategy of the thesis has been to expand J.C. Smith and S.C. Coval's conceptual model of legal reasoning using Holmes and nonlinear dynamics and then to extend it into a theory of justice using Nietzsche as a guide.

Using Nietzsche as a guide presents a problem of nonlinear dynamics in itself. First, Nietzsche aptly compares the development of his thinking to the growth of a tree. Nietzsche does not start with the roots, move up to the trunk, out to the branches and then the leaves. Rather, all parts grow in unison. In a sense, each work presents his entire philosophy from a different vantagepoint. With each successive work, the underlying philosophy and the rhetorical sophistication mature, much as a tree's branching pattern matures year after year. From a linear

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perspective, Nietzsche’s thinking from work to work is as hopelessly self-contradictory as the leaf pattern of an oak tree from one year to the next, but from a dynamics perspective the development is remarkably coherent. Second, Nietzsche’s textual style is to present the leaves but not the branches. The reader is left to inductively infer the pattern of the supporting branches, so that Nietzsche’s text functions as a training workbook from which the persistent reader can acquire a working understanding of Nietzsche’s new scientific method. Third, Nietzsche’s theory of justice entails a duty of praxis to use rhetoric to cultivate just tendencies in those who study his texts. In sum, Nietzsche’s understanding of nonlinear dynamics pervades his thinking, his writing style, and his praxis of justice.

By working from concepts for nonlinear dynamics in mathematics and physics, and now developmental psychology and various social sciences, the implicit structure of Nietzsche’s thinking can be better articulated. This thesis offers a novel, coherent and timely reading of Nietzsche on justice, but even if one rejects this reading of Nietzsche, the theory of justice and model of legal reasoning based on nonlinear dynamics stand on their own. Furthermore, by examining Nietzsche’s application of nonlinear dynamics to rhetoric, science and his praxis of justice, the pervasiveness and richness of nonlinear dynamics within the problem of justice is further demonstrated.

Nietzsche presents his mature theory of justice most directly and thoroughly in *On the Genealogy of Morality*. The chapter of this thesis entitled “Cultivating Justice” will present the theory of justice by following Nietzsche’s approach in that work. As noted already, the problem of justice revolves around the problems introduced by the interactions of three levels of nonlinear dynamic systems: knowledge development, individual development, and social systems.

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development. The most important feature of the social systems level is that systems go through a systole and diastole cycle of enhanced strictness—to become habitual within individuals—and then relaxation to widen empathy for competing values. The nature of language and logical reasoning disposes social systems to remain within the ideology of the phase of enhanced strictness, which imperils the adaptability of the system. Nietzsche claims that to further the development of the social system the community requires creative types who exploit the nonlinear dynamics of knowledge formation to modify background myths and create new moral codes (or legal doctrines) suitable to the next phase of development.

Nietzsche’s theory of justice generates three sets of norms. First, the nonlinear dynamics of the formation of new moral code or legal doctrine must be specified. That model shows that a set of skills is required and that the potential quality of legal reasoning depends heavily on the degree of attained skill of its practitioners. This implies Nietzsche’s second set of norms, which concern the cultivation of these skills and the preservation of such creative work-in-progress from the unchecked demands of other social systems, notably capitalism. Third, Nietzsche develops norms to safeguard community interests from abuse of discretion by those entrusted to modulate moral codes, legal doctrines and background values.

The credibility of the theory of justice depends heavily on first establishing within the reader an intuition for nonlinear dynamics and showing that knowledge can be constructed through a manageable process of self-organizing criticality. Because legal reasoning is more familiar to legal readers than philosophy of science and because legal reasoning leads more directly to the broader problem of justice than does scientific method, the goals of this thesis are better advanced by first examining legal reasoning in depth as a nonlinear dynamic system and

81, section 192.
then considering the problem of justice. The chapter "Legal Reasoning" therefore precedes the chapter "Cultivating Justice."

The theory of justice requires praxis of justice within its citizens. The plausibility of the theory of justice depends upon the psychological plausibility of the type of person who would forego the opportunity to abuse discretion for windfall gains and thereby sacrifice for community values. This is the focus of the chapter "Joy in Duty."

The thesis continues the argument by shifting focus to Nietzsche's praxis of justice. Nietzsche, it will be argued, thought that controversial measures would be required to safeguard the community from windfall opportunism. This thesis therefore addresses the thorny problem that Nietzsche claims to have hidden an esoteric agenda within his text and to use subliminal rhetorical techniques to advance his justice project. The chapter "Nietzsche's Horrific Thought" addresses the content of Nietzsche's esoteric agenda in a way that eludes his suspect rhetorical influence.

Finally, having identified the aim of Nietzsche's rhetoric in terms of his project of justice, the chapter entitled "Para-Conceptual Rhetoric" will examine how Nietzsche's rhetorical techniques exploit principles of self-organizing criticality. This will show how Nietzsche could simultaneously do science, educate his readers to use a new scientific method, and legislate new values through use of myth and text.

In sum, after an introductory overview of Nietzsche, Holmes and the themes of this thesis—"Emerson's Twins"—the chapters will be "Legal Reasoning," "Cultivating Justice," "Joy in Duty," Nietzsche's Horrific Thought" and "Para-Conceptual Rhetoric." The three chapters on legal reasoning, justice and duty complete the theory of justice; however, the final two chapters on Nietzsche's praxis are necessary to substantiate the claim that this theory of justice is a
defensible interpretation of Nietzsche's text. The implicit circularity of ending on rhetoric and interpretation reflects Nietzsche's own circularity in using his theory of nonlinear dynamics to design his rhetoric—one must already understand the nonlinear dynamics of knowledge development in order to get to the roots of Nietzsche.
CHAPTER 1
EMERSON’S TWINS

1.1 Introduction

It is a curious phenomenon that Holmes and Nietzsche have been attracting increasing scholarly attention at the close of the twentieth century.¹ This is not simply historical curiosity—there is a nagging sentiment that Holmes and Nietzsche remain essentially undiscovered, as though Nietzsche and Holmes were ancient Greeks who still sound strange to modern ears. What could the twentieth century have overlooked? Given the legion of first-rate thinkers from almost every discipline who have used Nietzsche, why Nietzsche again? Should legal theorists not start with Michel Foucault and move on? Why Holmes now?

Nietzsche and Holmes understood causation in a holistic way strange and heretical to the theoretical ambitions of Western rationalism. Each developed his understanding of causality by applying inductive science to a discipline of the humanities with such Promethean tenacity as to undergo a series of crises and self-transformations. Both came to understand this strange causality by doing it, but neither could logically construct precise conceptual definitions from established causal concepts. So, as strong writers each sought to create an understanding in his reader by inducing the reader to apply inductive methods to experience a similar series of crises and self-transformations. Nietzsche and Holmes each produced impressionist works that manifest subtle insights into the nuance of causation, the limits of reason, and most importantly to this

thesis, the implications for a theory of justice. Only late in the twentieth century, with the advent
of the sciences of chaos theory, self-organized criticality and computational complexity, can
Nietzsche and Holmes come into clear conceptual focus. This thesis refines and applies
principles of self-organized criticality to clarify their image of justice and to add detail to the
quick, masterful brushstrokes Holmes used to portray legal reasoning.

What is self-organized criticality? Scientists use this term to refer to systems that
demonstrate characteristic holistic behavior. These systems spontaneously organize themselves
by incremental buildups of stress interlaced with periodic, discontinuous transformations that
dissolve and reconfigure the system structure to varying degrees.² A prevailing metaphor is a
continuous stream of sand grains falling to form a sand-pile that suffers intermittent avalanches.
The system is “critical” once it has become saturated with enough incremental buildups that the
precise timing, location and extent of avalanches are chaotically unpredictable. In a critical
system, any prior event absorbed by the system could later become a necessary catalyst to trigger
an avalanche of any size, even if the original effect of that prior event was immeasurably small.
Causation is holistic in the sense that no divide-and-conquer model to compartmentalize the
system could achieve certainty of prediction—small events can have large non-local effects.
Negative inferences—such as the law of the excluded middle—always remain subject to
counterexamples chaotically spilling in from other compartments of the system. One can only
make holistic, statistical predictions—for example, that the system will have an exponential
distribution of transformation sizes within its range of criticality. Typical self-organized critical
systems that have been studied include earthquake zones, eroding landscapes, ecological
evolution, traffic patterns, economic markets, and neural structures. However, the young science

of self-organized criticality has barely considered its manifestation in psychology, rhetoric, and the humanities. Therefore, following the lead of Nietzsche, this thesis looks to ancient myth, thermodynamics and computational theory for guidance, in addition, of course, to Holmes and Nietzsche.

Nietzsche and Holmes initiated a restoration of justice—what this thesis calls “heretical jurisprudence”—on the motif that self-organized criticality and dramatic mythic narrative are required to surpass the computational limitations of conscious rationality. To gain a preliminary understanding of how mythic narrative and self-organized criticality might together contribute to knowledge building, consider the evolution of scientific knowledge. Scientists write narratives of experimental events. To add to existing knowledge, the narratives cannot merely be derivative from established theory. A narrative of the experimental event describes a set of facts and an outcome and the scientist seeks an implicit pattern of causality not already explained by theory. On the other hand, unconstrained narrative detail can become excessive and overwhelming. Therefore, background mythic metaphors guide narrative relevancy, and narrative relevancy selects the empirical grist for the pattern-recognizing transformations of theory. Building on the work of C.S. Peirce and Deborah Mayo, one might say the background myths crystallize an

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6 Thomas Kuhn’s concepts of paradigm shifts and scientific revolutions are related to the concept of transformation introduced here; however, Kuhn’s concept of paradigm shifts focuses on the largest scale transformations. Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

intuitive, pragmatic sense for meaningful errors—Nietzsche's “small doses” of irrationality—which become the accumulating, incremental stresses that drive theory transformation. This thesis argues that such transformations are direct by-products of self-organized criticality. The concept of self-organized criticality itself, however, has been anticipated in pagan mythic patterns, which motivated Nietzsche’s attempted restoration of ancient mythic equations in the form of thermodynamics (Will to Power). These myths are the myths of myth making. Indeed, in the manner of Michel Serres, one might describe self-organized criticality as the new mythic background metaphor for science, permanently blurring the boundary line between myth and scientific knowledge: —“There is no pure myth except the idea of a science that is pure of myth.”

This thesis focuses on the manifestation of myth, narrative and self-organized criticality in jurisprudence rather than philosophy of science—Holmes posits a science of jurisprudence where judicial opinions and doctrine correspond to empirical narratives and theory in science. A revival of mythic narrative presents a disturbing—heretical—challenge to the rationalist ambitions of positivist science and traditional jurisprudence.

By emphasizing narrative as a source of non-representational or para-conceptual knowledge in the theory-building process, this thesis superficially resembles the Law and Literature approach to jurisprudence. However, this thesis differs radically by deriving the narrative relevance of judicial opinions in terms of the requirements for self-organized criticality.

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A link between narrative and, in effect, self-organized criticality has already been observed within the study of literature itself. Italo Calvino in his Charles Eliot Norton Lectures explores links between literature and "lightness."\textsuperscript{10} Harold Bloom explores a related connection in his Charles Eliot Norton Lectures\textsuperscript{11}—he views literature as a community of writers striving to creatively surpass the influence of narrative precedents, thereby propagating self-organized criticality within a collective enterprise. In particular, Bloom demonstrates that a study of the canonical process of literature itself further elucidates the myths of myth making.

Following the path of Holmes, this thesis analyzes common law dynamics in terms of collectively propagated narratives transformed by self-organized criticality. For Holmes, the link between inductive science and law is profound. Indeed, Francis Bacon published \textit{Novum Organum} in 1620 while Lord Chancellor of the Judiciary.\textsuperscript{12} One might say the discipline of legal practice gave birth to the discipline of scientific practice. Science having been profoundly affected by evolutionary science, Holmes re-examined law from the standpoint of inductive science. Holmes never completed this task. This thesis will argue that the principal distinction between legal reasoning and science is that judges are compelled to make decisions on a much tighter budget. To illustrate, one might cast Hamlet as the scientist, postponing theory commitment and action pending complete analysis using consequential reasoning. Othello, by contrast, acts decisively, quickly and inexpensively according to his soldier's code of conduct using antecedent reasoning. Legal reasoning blends the two styles. Legislative reasoning employs expensive consequential reasoning to undertake wholesale revisions to a code of conduct and is

followed by application of the code using inexpensive antecedent reasoning. Common law blends the two styles differently. Case-based reasoning generalizes context-specific precedents into antecedent rules that are applied inexpensively. However, each case has a limited budget to do consequential reasoning to consider localized, risk-justified amendments. Larger consequential amendments must be generated internally by the process of self-organized criticality, resulting in bottom-up knowledge from the broadest base of empirical experience available. Legal reasoning is a carefully structured mixture of consequential reasoning and antecedent reasoning—Hamlet and Othello. Legal reasoning is science in action.\textsuperscript{13} This formula is expressed by familiar iconography that has justice holding scales (science, measurement) and a sword (decision, action). (See figure 1.)

Holmes and Nietzsche do not merely purport to describe legal and moral reasoning—their claim is much stronger. They define justice as the use of self-organized criticality to cultivate self-organized criticality in legal and moral reasoning. They derive their definition from

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\textsuperscript{12} Peter Urbach, "Editor’s Introduction" in Francis Bacon, \textit{Novum Organum}, tr. & ed. Peter Urbach and John Gibson (Chicago and La Salle, Ill: Open Court, 1994) ix and xi.

\textsuperscript{13} This differs from but is not unrelated to Bruno Latour’s “Science in Action.” Latour shows that the need for action constrains science as well, in ways not generally recognized. However, the constraint is plainly more onerous in legal reasoning. Bruno Latour, \textit{Science in Action: How to Follow Scientists and Engineers Through Society} (Cambridge, MA: Harvard University Press, 1988).
a claim that a computational bottleneck in conscious rationality limits the progress of justice. They claim, in effect, that self-organized criticality is the most powerful computational tool we have for adaptive transformation in response to critical feedback and that justice should be constructively defined in terms of self-organized criticality rather than rationality. This thesis makes an important conjecture that reveals the force of Nietzsche and Holmes's theories of justice: by tuning an embodied self-organized critical system so that each energy transaction represents a data-processing step, one can exploit the exponential-order avalanches of self-organized criticality to achieve an exponential order of calculation power. In the jargon of computational complexity, with self-organized criticality the order of effective computational power increases from polynomial to at least NP-complete and perhaps exponential. That is, good creative decision-making is an emotional event, and should be to alleviate the computational bottleneck. Nietzsche and Holmes's postmodern critique, in effect, deconstructs rationalist theories of justice that implicitly rely on non-computable or non-operational concepts to overcome the computational bottleneck.

Nietzsche and Holmes go beyond postmodern critique by providing a constructive theory of justice based on self-organized criticality in neural structures regulated by emotional intelligence. Consider again the three aspects of science set out above: myth, narrative and self-organized criticality. Both science and common law stage self-organized criticality to transform theory or doctrine, respectively, using recorded narratives. Narratives of scientific experiments correspond to narratives of judicial decisions. Background myths and metaphors in science correspond to what in common law? —Values.

Nietzsche and Holmes, both evolutionists, each understood justice with a “life” philosophy as the source of values. *Justice is science in action for life*. Both Nietzsche and Holmes believed an emotional intelligence based on the joie-de-vivre emerging from unrepressed sexuality was essential to motivate the self-sacrifice required to fully incorporate community values in the emotional process of self-organized criticality. Holmes and Nietzsche’s life philosophy derives values from reproductive goals. These goals entail dutiful and cheerful self-sacrifice to the long-term interest of future generations. These values, however, are not fixed ideals for either Nietzsche or Holmes—our understanding of them evolves in the same manner as theory in science or doctrine in common law. The difference between Holmes and Nietzsche is one of perspective. In terms of the formula “justice is science in action for life,” Holmes the jurist focuses on legal reasoning as science in action and adds a life philosophy. Nietzsche the evolutionary psychologist focuses on life values in action as joyousness and applies it to the method of science. *Justice is joyous science*.\(^{15}\) Thus, while Holmes and Nietzsche superficially appear unrelated, their understandings of justice are profoundly connected and their approaches complementary.

1.2 Holmes and Nietzsche Today

The twentieth century has overlooked the constructive role of self-organized criticality in Holmes and Nietzsche probably for the same reasons that rationalist philosophical foundations of science have retarded the development of chaos theory.\(^{16}\) Over the course of the twentieth century a series of incompatible jurisprudence movements have claimed Holmes as their own, starting with

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\(^{15}\) “Joyous Science” is the title of one of Nietzsche’s most important works.

the legal realists, but Holmes’s present status is perhaps best characterized as polyvalent—or inconsistent. Writing in 1995, Thomas Grey observes:

If we turn to the commentators for some initial sense of the main outlines of Holmes’s ideas, we can see why he still attracts interpretive debate. The extensive paper trail he left behind is really no trail, but a confusing (if inviting) expanse of open territory. While it has been explored by many experienced travellers over many years, their maps do not yet agree on even the basic features of the terrain.¹⁷

We are so far from a definitive reading of Holmes that, for example, it is possible to publish a work that claims he was actually a natural law jurist—even though this was the one position he forcefully and unambiguously rejected¹⁸—on the basis that the forcefulness of his conscious rejection of natural law betrayed an unconscious conviction toward it which became repressed in his Oedipal battle against his father.¹⁹ In 1997 the Harvard Law Review republished “The Path of the Law” on its one hundredth anniversary with a set of nine short essays in which jurists from a variety of perspectives mused on the theme “Why Holmes now?”²⁰ Plainly, no stable jurisprudential account of Holmes has been produced. The uncharitable call him self-contradictory and not an admirable personality type but acknowledge indebtedness to Holmes for taking American jurisprudence out of the nineteenth century. The charitable call him self-

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¹⁸ For example, Oliver Wendell Holmes Jr., “Natural Law” (1918) 32 Harvard Law Review 1.
contradictory but, if asked, would consider adding him to Emerson’s book of Representative Men as an edifying exemplar—taking their cue from Richard Rorty’s cautious use of Nietzsche.\(^\text{21}\)

Nietzsche’s posthumous fate is notorious and his mythic status well known even to popular culture. While Holmes had a Faustian aura about his preternatural longevity, octogenarian good looks, charm, fame and productivity, Nietzsche was indicted in the courts of literary justice by Thomas Mann’s Doctor Faustus. As with Holmes, many different flags have flown over the Nietzschean landscape. Nietzsche’s scholarly fate remains polyvalent—or inconsistent—producing titles such as The Other Nietzsche, which indicates scholarly resignation that Nietzsche is self-contradictory and conflicting territorial claims may peacefully co-exist.\(^\text{22}\)

However, the mid-1990s have shattered this truce. Stanley Rosen and Geoff Waite each argue strongly that Nietzsche was an esoteric writer with a focussed and deliberately disguised political agenda.\(^\text{23}\) Indeed, so focussed that Claudia Crawford makes a strong case that Nietzsche staged his mental breakdown as a rhetorical ploy.\(^\text{24}\) Carol Diethe argues that scholarship on Nietzsche’s views on women has hardly begun to resolve manifest paradoxes.\(^\text{25}\)

The surges of recent interest in Holmes and Nietzsche appear to be unrelated phenomena. Comparison of Holmes and Nietzsche is not often made, which is understandable given that Holmes rarely appears in philosophical discourse and, until recently, Nietzsche rarely appeared in legal studies. Indeed, given Nietzsche’s background role in the critical attack on the legitimacy of law, one would not expect to find Holmes, with his “soldier’s faith” in the legitimacy of common law process, sharing a common landscape with Nietzsche. However, when an eminent jurist such

\(^{22}\) Joan Stambaugh, The Other Nietzsche (Albany: SUNY Press, 1994).
as Richard Posner describes Holmes as the “American Nietzsche” this warrants pause to re-
evaluate our understandings of both thinkers.²⁶

Furthermore, Holmes’s application of self-organized criticality in law may have much to
offer postmodern readers of Nietzsche. Michel Foucault’s archaeology of the background myths
of the human sciences overlooked self-organized criticality and so failed to apply Nietzsche
beyond the level of critique.²⁷ Consequently, Foucault’s analysis of justice likewise stalls at the
level of critique.²⁸ Indeed, Jacques Derrida has recently announced that postmodernism stands
haunted by the problem of justice and has launched his own attempt to restore justice.²⁹ Scholars
are beginning to find the roots of postmodernism in self-organizing systems and computational
theory, particularly Derrida’s “distributed representation” of knowledge—which Holmes locates
in dramatic narrative.³⁰ As Nietzsche and Holmes have already gone some distance down this
path, revisiting Nietzsche and exploring what Holmes has to offer postmodernism is timely.

1.3 The Path to Justice as Empirical Science

Posner stumbled onto a much deeper insight than his passing comparison of Holmes and
Nietzsche would suggest. This thesis claims that Holmes and Nietzsche shared fundamentally the

See also J.W. Burrow, “Holmes in His Intellectual Milieu,” in The Legacy of Oliver Wendell Holmes Jr., ed. Robert
W. Gordon (Stanford: Stanford Univ. Press, 1992) 29: “There is an intensity that makes one want to murmur
‘Nietzschean’ rather than ‘Darwinian’ about Holmes’s celebration of war, intensity of life, heroism, and will.” Robert
W. Gordon in “Holmes’s Common Law as Legal and Social Science” (1982) 10 Hofstra Law Review 719, 742 notes
Holmes’s “Nietzschean insight into the power relations underlying systems of rights and morals.”
²⁹ Jacques Derrida, Specters of Marx: The State of the Debt, the Work of Mourning, & the New International (New
1997).
same understanding of self-organized criticality—which Nietzsche sometimes called "genius"—
and its role in the problem of justice. Indeed, one is tempted to make the radical claim that the
only way to understand Holmes is through Nietzsche. In answer to the question "Why Holmes
now?" this thesis claims that Holmes began a path to justice as an empirical science. By
following this path with a map from Nietzsche and a flashlight from recent science, Holmes leads
us to a new model for legal reasoning and an accompanying methodology for legal argument.

This thesis will develop a much more detailed model of common law legal reasoning,
legal argument and collective learning dynamics than Holmes ever made explicit. A detailed,
computationally plausible model enables future empirical work using computers. Computer
modeling of dynamic systems and evolutionary processes is proving to be an extraordinarily
powerful laboratory tool to confirm the relative value of various strategies of adaptive change.\(^\text{31}\)
The results of this new science of legal reasoning could be applied both to improve the collective
learning strategies of common law and to improve strategies of legal practice.

Before discussing methodology, the next section of the Introduction will summarize the
reading of Nietzsche and Holmes developed for this thesis. This reading may prove controversial;
nonetheless, no attempt will be made to sketch its development in the Introduction. A nettlesome,
spiral circularity here defies concise, straightforward presentation—for example, one cannot
intelligently design interpretive strategies before discerning Nietzsche’s esoteric intent.\(^\text{32}\)
Moreover, we find that the design of Nietzsche’s peculiar rhetorical style demonstrates and
applies the content of his philosophy and psychology. In essence, therefore, the basic


\(^{32}\) This problem is Geoff Waite’s primary concern in *Nietzsche’s Corps/e, supra*, note 1.
methodology of this thesis was to apply Nietzsche to Nietzsche holistically until he was no longer self-contradictory. Put mathematically, interpreting Nietzsche is like recursively applying a nonlinear dynamic equation to itself until it eventually settles into a stable attractor state.\textsuperscript{33}

A preliminary comment on method may be helpful at this point. Overcoming the manifest self-contradictions that have stymied commentators of both Nietzsche and Holmes required the generation of new interpretative possibilities using recent developments in science regarding causality, psychology and evolution. One need not assert that these new scientific developments are true—indeed, they are young theories—and this thesis will not claim that Nietzsche or Holmes necessarily understood them in their most developed forms. However, this approach does raise a concern about using hindsight to read in too much. Nonetheless, in the case of manifestly insightful and obsessively self-reflective thinkers such as Nietzsche and Holmes, a charitable presumption of self-consistency is biographically justified. An attribution of prescient scientific intuitions within Holmes and Nietzsche is the weakest available interpretation that makes them self-consistent and is biographically plausible.

A dividend of this approach is that it indicates how to transform Holmes and Nietzsche into an empirical research program relevant to our time. How well this model of justice, legal reasoning and legal argument stands up to empirical testing is ultimately more important to a science of jurisprudence than the historical warrant of Holmes or Nietzsche—their literary and philosophical virtues are another matter. Nonetheless, Holmes is generally recognized as the pre-

eminent figure of American law,\textsuperscript{34} so his warrant is good title to at least investigate and evaluate the trajectories he initiated.

Ultimately, this thesis is less a \textit{discovery} of history than a \textit{use} of history, which fully accords with the pragmatist sentiments of Holmes and Nietzsche. Indeed, Nietzsche began his early essay “On the uses and disadvantages of history” quoting Goethe: “In any case, I hate everything that merely instructs me without augmenting or directly invigorating my activity.”\textsuperscript{35}

Why Holmes now? —Because he is useful for reconstructing legal theory in the wake of critical upheaval.

1.4 Holmes and Nietzsche in Hindsight

A competent reader of Holmes and Nietzsche should quickly notice that they independently derived virtually identical genealogical methods and similar life philosophies. However, none of Holmes's commentators have seriously compared him to Nietzsche on the philosophical problem that each inherited from Plato and Emerson—the problem of justice as a \textit{scientific} inquiry into the dynamics of the relationship between genius and state. Holmes's ambition even before becoming interested in law was to become a philosopher-scientist and artist-scientist and he later purported to approach law as a scientist to find its Darwinian principles of change.\textsuperscript{36} Even more distinctly Nietzschean, Holmes applied his philosophy to his own living experience, attempting


to understand and self-consciously craft developmental processes below the level of conscious and social thought.\textsuperscript{37}

A key to unlocking Nietzsche and Holmes is to appreciate that their paradigm of self-organized criticality came from their understanding of the psychological process of adaptive creativity. Within a creative person, an accumulating buildup of stressful experiences discontinuously relieves itself by generating new form—"genius" in the sense of begetting new structure, as a mother gives birth to a new child. Creative invention is no more an act of will than begetting a child. One can willfully promote self-organized criticality by satisfying necessary preconditions, but the creative transformation itself is a chaotic byproduct of the holism of the system—an unpredictable event of grace. For Nietzsche and Holmes this procreative genius manifests the adaptive intelligence of evolutionary processes in general—the engine of all creative becoming. The causal nuance of self-organized criticality, therefore, not only constitutes a topic of science; it constitutes the process of scientific creativity itself. Scientists do not "will" mathematical models out of experimental data—the positivist conception of science must yield to a more passive style of inductive empiricism.

To modern ears, Nietzsche and Holmes sound ambivalent about science or even anti-scientific. Self-organized criticality produces a different paradigm of causation than the binary, unidirectional cause-and-effect logic of modernism.\textsuperscript{38} This rival paradigm of causality has recently become a topic of the new sciences spawned by chaos theory. The philosopher of science Stephen Kellert has recently examined some ways in which chaos theory fundamentally uproots modern causal paradigms. Without mentioning Nietzsche or Holmes, Kellert opines that scientists could have developed chaos theory in the nineteenth century but for some reason

\textsuperscript{37} Novick, 176.
overlooked it until the late twentieth century. A parallel claim is made here. Commentators of Holmes using methods based on pre-chaos theory concepts were doomed to find him self-contradictory. In chaos theory, scientists now conceptualize “fractal” landscapes as mere static snapshots of the historical manifestation of non-linear dynamic processes. In legal theory, the surveyors of the Holmesian landscape have erred by attempting to map its unstable topology using jurisprudence constructed from linear causality rather than seeking non-linear dynamic principles as the foundation of Holmes’s science of justice. Sir Francis Bacon anticipated this difficulty when introducing new methods of inductive science:

It must be clearly said that no judgement on my method, or whatever may be found by it, can be reached by using anticipation (that is, the method of reasoning now employed). For it cannot be that my method should be judged by one that is itself on trial.

It is no easy matter even to teach and explain what I am proposing, for things new in themselves will still be understood by reference to things already known.

Likewise, Nietzsche is perhaps best understood as an empiricist in the tradition of Francis Bacon. Causation was a central issue for Nietzsche. The centerpiece of *Twilight of the Idols* is “Four Great Errors” which Kaufmann attributes to Nietzsche’s interest in Bacon’s “Four Great

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Nietzsche also featured causation in *On the Genealogy of Morality* by putting it in section 12 of the Second Essay, the midpoint of the work. However, Nietzsche’s sense of causation was so much more nuanced than in traditional scientific positivism that Nietzsche could be said to have fundamentally reinvented empiricism—so unrecognizably that one is tempted to conclude Nietzsche was anti-scientific.

For Nietzsche, the problem arises because the grammatical structure of language eventually hinders more than it assists the observation and description of causal dynamics. The grammar of language channels the inquirer into a subject-object relationship with the phenomena the inquirer seeks to understand. The binary, unidirectional causal presuppositions of grammar’s subject-object syntax implicitly shape observation within an *a priori* causal logic, so that limitations of grammatical language impede the pattern-recognizing receptivity of the investigator. Nietzsche was fundamentally concerned to increase the perceptive bandwidth of the observer’s pattern-recognizing creativity by making the inquirer an emotionally engaged participant rather than an “objective,” cold-blooded observer. In a stunning reversal of perspective, Nietzsche sought to subvert the effect of grammar by having the inquirer become an “object” to an “other” that functions as grammatical subject—in hot-blooded rhetoric: masochism as means to self-empowerment—in mythic rhetoric: the consort self-sacrifices to the Goddess to become reborn, transformed.

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44 Geoff Waite also infers that Nietzsche intended to emphasise this section by placing it in the centre of *Genealogy of Morals*. Likewise, Laurence Lampert infers special emphasis of sections 310 and 363 of *Joyous Science* by their placements at the midpoints of Books 4 and 5, respectively. This rhetorical structure reflects the mythic importance of the mid-month in the pagan 28-day month calendar, which, of particular significance for Nietzsche, commemorates the self-sacrifice of the Sun-King at the mid point of the Oak month (June 24, now St. John’s day) just following the summer solstice (the “great noon”).
Becoming an emotionally engaged participant who can reliably subvert subject-hood to allow self-reconstruction from patterns of absorbed emotional experience—*How One Becomes What One Is*—entails profound psychological preparation. Arguably, traditional positivism prudently favoured cold-blooded inquiry precisely because of the unreliability of hot-blooded emotional engagement. Transforming a hot-blooded inquirer into a well-tuned scientific instrument requires superhuman dedication to psychological hygiene and fitness training. Indeed, works such as *Zarathustra, The Wagner Case* and *Ecce Homo* can be read as training guides for Promethean geniuses. Nietzsche found that the values and psychological needs of the participant-inquirer that trigger hot-blooded emotional reactions are integral to the reliability of the engagement process. The task of psychological hygiene compelled Nietzsche to undertake a critique of the entire value-production process of social living. Nietzsche could produce such penetrating critique of value systems because of the clarity of his task and his uncanny intuition for relating causality and emotions in terms of the functional needs of genius. Nietzsche became acutely sensitive to that which distorts the emotionally engaged process of creative observation. Foremost in Nietzsche’s psychosocial critique was to reveal how individuals vent resentment through acts of cruelty, especially by means of enforcing moral ideals. In *On the Genealogy of Morality* Nietzsche sought to demonstrate that social systems spontaneously gravitate to moral codes that exploit this need for cruelty. Indeed, sophisticated religions evolve doctrines to ensure a continual well of resentment within their adherents to fuel the will to discipline individuals to further the system’s institutional needs. Thus, as Gilles Deleuze metaphorically summarizes the

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46 Stephen Toulmin argued modernism has its roots in an attempt to find intellectual common ground to re-establish social order in the wake of the Thirty Years’ War: see Stephen Toulmin, *Cosmopolis—The Hidden Agenda of Modernity* (Chicago: University of Chicago Press, 1990).
outcome of Nietzsche’s analysis, the believer’s suffering only pays interest and can never pay off the debt.\textsuperscript{48} Then, by acting as physician to the symptoms of the wound it has inflicted, the institution wears the mask of benefactor to the individual when in fact it is the institutional will-to-power that is the controlling force.

Understanding Nietzsche’s overall task is essential to developing an understanding of the limits of his social theory, or more appropriately, his social critique. Nietzsche’s psychological hygiene promised to produce a congenial yet powerful—thus dangerous—personality that would satisfy our general concerns about social conscience. Indeed, Nietzsche’s genius-cultivating process necessarily requires self-subversion to values external to subject-hood, and so Nietzsche felt confident his geniuses would first and foremost express social instinct. However, Nietzsche’s social thinking was pure critique: only at the level of the individual did he provide an architectural plan to construct creative genius. Nietzsche offloaded the problem of institutional design on future geniuses. Nietzsche evidently felt that contemporary society should give priority to the cultivation of great geniuses and let those geniuses create a new architecture for society, which would no doubt build in a high priority for the reproduction of geniuses. At some point, this social vision must overcome the self-reinforcing “will-to-genius” feedback loop. Nietzsche at several points came dangerously close to saying the species exists for the sake of producing geniuses. However, it is elsewhere plain that Nietzsche thought that because social instincts would bind the inherently self-sacrificing nature of hygienic geniuses, a disposition toward social magnanimity would prevail.

\textsuperscript{47}“It is too idealistic ... and therefore cruel” wrote Doestoevsky, whom Nietzsche much admired, in \textit{The Insulted and Injured}. Quotation taken from Gilles Deleuze, “Coldness and Cruelty” in \textit{Masoichism}, tr. Jean McNeil (New York: Urzone, 1989) 15.
Nietzsche did not take on the task of creating an architectural plan for genius in social institutions. Indeed, this was perhaps a wise move, as he seems to have been ill equipped for that task, both in education and disposition. Nonetheless, this was a serious omission in the face of Nietzsche's fragmentary critique of the institutional logic of capitalism, developed more fully by Jean Baudrillard.\(^4\) Nietzsche understood capitalism to achieve a degree of causal genius—the "invisible hand"—but without the inherent self-subverting dynamics—masochism—which Nietzsche built into his principles for self-cultivation of individual genius. Nietzsche was brilliant in how he exploited the contingent individual human circumstances of death and sexuality to create doctrines—particularly his doctrine of the eternal recurrence of the same—that at once grounded individual genius in social instincts and propelled creative energy. Capitalism's logic of causal genius is self-perfecting but its ultimate suitability depends on the values of the consumers it serves. Without its own death and sexuality, the capitalist "will-to-genius" has no built-in logic of self-subversion so its manifest tendency is to shape consumer values spontaneously toward perfection of its own institutional needs—over-discipline in the manner of religious institutions. Nietzsche's concern was that capitalism would erode the cultivation of strong social instincts in individuals, creating a meaning void filled with resentment and the need for compensating self-indulgent palliatives and acts of cruelty dressed up in moral finery. Nietzsche feared morality would degenerate into a prudent egoism, a social contract of minimizing reciprocal risks of interfering with each other's self-indulgent activities—decadent palliatives of the sort that Nietzsche felt geniuses who followed his hygienic program would not need. One might argue that in the long long term the capitalist logic would spontaneously adapt to recognize and discipline consumers to cultivate the social instincts necessary to its continuing

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economic genius. This, however, makes very strongly optimistic assumptions about blindly overcoming dangers of path dependence and lock-ins—fatal garden paths. Nietzsche's critique claimed that capitalism would be a fatal garden path unless its institutional-level “will-to-genius” were subverted to a cultural power to nurture individual geniuses who ensure social values reflect social instincts. Otherwise, capitalism would merely perfect a social contract of individual atomism that fundamentally sought to provide safe cocoons for individual decadence. Society, for Nietzsche, should become benevolent therapist to all individual weakness\textsuperscript{50} and not merely a means to pre-empt violations of a leave-me-be social contract. This is the difference between welfare in order to help those in need, versus welfare to quell rebellious behaviour. The apologist of capitalism implicitly claims that in the long long term the two paths converge with little danger of fatal garden paths.

Nietzsche was original and brilliant in three broad respects. First, through a highly selective mixture of Heraclitus, Aristotle, Spinoza, Schopenhauer and Darwin, he achieved an uncanny intuition for the principles of causality now studied in what is variously called chaos theory, non-linear dynamics, self-organized criticality and complex adaptive systems. Nietzsche transformed his paradigm of the fundamental elements of reality to construct observable reality from the interaction of forces, with self-reinforcing causal loops (each a “will-to-power”) and holistic self-organized criticality as constitutional. Entities are conceived as symptoms of the interaction of forces—functionally integrated stable hierarchies of feedback loops. Interaction is not only between entities—the dynamics of friend and enemy—it also goes both “upwards”

\textsuperscript{50} Victor Frankl (\textit{Man's Search for Meaning}) reflected this aspect of Nietzsche's program, particularly the deep need to find meaning in social participation. Indeed, Nietzsche appears to have coined the phrase “the meaning of life.” Frankl, however, failed to develop a profound understanding of Nietzsche's life philosophy or concept of psychotherapy, which is reflected in Frankl's watering down of the eternal recurrence doctrine, and of Nietzsche generally. Frankl was too much a cognitive therapist (\textit{logo-therapy}) to fully accord with Nietzsche. Victor E. Frankl, \textit{Man's
(materialism; the biology side of socio-biology) and “downwards” (idealism; the social construction side of socio-biology) in direction—the dynamics of master and slave. In terms of causation, “genius” is the exploitation of a holistic self-organized criticality—an emergent, holistic macro-level effect of distributed processing by innumerable concurrent wills-to-power that create a higher level of feedback loop—to reorganize an integrated hierarchy. The numerous levels of loops mean that, as a dynamic trajectory proceeds, entities become both cause and effect to each other’s development, adding a fractal nuance to causation that confounds any attempt to render it into unidirectional binary causal logic. Genealogy is Nietzsche’s method of tracing how forms (stable patterns of force) become commandeered by various wills-to-power from time to time.

Second, Nietzsche understood that genius occurs within the emotional aspect of neural activity and that language merely channels the effect of this into calculatively manageable and communicable grammar. For Nietzsche, primarily emotions drive creativity and decision-making from patterns unconsciously detected within a series of prior emotional experiences—decision-making and creativity are more elite skills than objectively verifiable intellectual calculations. Again, Nietzsche has avatars in recent science, as reflected in recent paradigm-shifting books such as Antonio Damasio’s *Descartes’ Error*, Mihaly Csikszentmihalyi’s *Flow* and *The Evolving Self*, and Stanley Greenspan’s *The Growth of the Mind*. With this understanding, Nietzsche then devised a program for subverting the effect of grammar and reversing the weakening or debilitating effects of developmental distortions in one’s psychology. This aspect of Nietzsche

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should be read as an athletic training manual written by a sports psychologist. Nietzsche was not being wholly ironic in *Ecce Homo* when he attributed his genius, in part, to appropriate attention to nutriment, residence, cleanliness, weather, exercise and cycles of stress and recovery. Less original was Nietzsche’s Aristotelian faith that, hygienically purified, a bodily social instinct would prevail. In this respect Nietzsche was an unapologetic socio-biologist, but, anticipating recent approaches to socio-biology that derive altruism from the natural selection will-to-power, Nietzsche used a socio-biology that generates magnanimous and just social behaviour as its perfected logic rather than a narrow, prudent egoism.\(^{52}\) To achieve this, however, Nietzsche both discerned and sought to overcome various game-theory free-rider problems entailed by a will-to-power roughly equivalent to Dawkins’ “selfish gene.”\(^{53}\) Unchecked tendencies to maximize individual reproduction of DNA at the expense of community welfare must be overcome.

Specifically, Nietzsche recognized a constitutional distinction between males and females in that males evolved in a context of uncertainty as to parentage and thus remain prone to unconsciously detecting and pursuing strategies with negative-sum social consequences. Nietzsche’s solution to overcoming these asocial tendencies was highly original and Nietzsche expected it to be extremely controversial—male geniuses masochistically subverting to female geniuses—in mythic rhetoric: the consort self-sacrifices to the Goddess to become reborn, transformed.

Third, Nietzsche was highly original in his rhetorical solution to three problems: (1) communicating insights into causality that he could not conceptualize, (2) concealing his controversial socio-biology in his writing until readers were ready for it, to keep his works in the

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mainstream, and (3) generating in his readers an addictive desire to understand his works. From no later than 1876 on, Nietzsche sought rhetorical means to emulate what in an 1872 essay “The Greek State” he identified as the essence of Plato’s writings—“a profound secret study of the connection between state and genius, eternally needing to be interpreted….”\textsuperscript{54} Nietzsche then applied his understanding of genius to devise a rhetorical strategy where he seeded the reader using a series of compact emotional skirmishes—like letters to the editor—so as eventually to induce pattern-finding transformations in the reader, as though Nietzsche were an impressionist painter of the reader’s unconscious. Nietzsche’s key aphorisms were forms intended to take on new interpretations genealogically as the reader progressed through levels of self-transformation. Moreover, Nietzsche hid meanings on the surface of his writing that would only become apparent after certain transformations had occurred within the reader. These meanings would then stand out like an inside joke—such as his bald assertion that Sir Francis Bacon was the originator of some of Shakespeare’s plays, but for reasons undisclosed.\textsuperscript{55} Nietzsche’s grand style, which deliberately included biographical events, could be described as the first computer-video game, where the player accumulates “small doses” of emotional strength to transform to successively higher levels and discover hitherto unseen elements of the landscape. Nietzsche at once produced, in effect, an intellectual ritual incantation that induced the very experience of “genius” he meant without having to fully conceptualize it, and also concealed dimensions of his thinking from all but the initiate—especially the full socio-biological and political implications of the consort and Goddess myth. Nietzsche’s self-cultivated talent as a wily esoteric writer makes it difficult to present his thinking in any form but assertive declarations. The fragmentary, mythic and a-sequential aspects of Nietzsche’s writings work to undermine the manifest legitimacy of

any such declaration—the reader of secondary literature must likewise become a Nietzsche video-game addict to pass judgment on high-level Nietzsche commentary. Ultimately, one cannot confidently understand Nietzsche without carefully untangling the Gordian Knot of his rhetorical praxis. Only then can one chart the horizons of his overall landscape.

To find an operational theory of justice within the Nietzschean landscape, however, we must overcome Nietzsche’s pessimism regarding the incorporation of masochistic genius into principles of institutional design. It is in this respect that Holmes is an essential supplement to Nietzsche’s work.  

Holmes’s masterful emotional engagement with legal process allowed him to locate these constitutional dynamic principles in the nature of common law legal reasoning. Holmes the juridical scientist was a warm-blooded investigator by profession. Indeed, this was the point of his “bad man” methodology, which is a mere technique of inductive methodology that has often been mistaken for a crude positivism that claims law is simply what sovereign powers say it is. In “The Path of the Law” Holmes counseled us to approach the law as would a “bad man” who was concerned only about what courts would do and not the underlying moral reasons:

> The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

This was meant as “cynical acid” to be applied in conjunction with his psychological observations about the warm-bloodedness of judging:

55 How this “inside joke” is used to bolster the confidence of the newly initiated will be explained later in the thesis.

56 In the same way, one might say Harold Bloom’s view of literature as community is an essential supplement to Italo Calvino. *Supra*, notes 10 and 11.
But after all the place for a man who is complete in all his powers is in the fight. The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace. But to make up your mind at your peril upon a living question, for purposes of action, calls upon your whole nature.\textsuperscript{58}

Holmes the judge was a paradigm of engaged agency:

\begin{quote}
If you want to hit a bird on the wing, you must have all your will in a focus. You must not be thinking about your neighbor, you must be living in your eye on that bird.\textsuperscript{59}
\end{quote}

Egotism vanishes in the great business to be done.\textsuperscript{60}

Great affairs are so absorbing—they so swallow your personality that everything seems different.\textsuperscript{61}

My way of writing a case is to get into a spasm about it.\textsuperscript{62}

Holmes’s “bad man,” unconcerned about cold-blooded objective theories of law, uses cynical acid to strip away the armor of rationalizing concepts to discern the warm-blooded processes within the judges. Indeed, Holmes’s “bad man” is to approach the corpus of case law as the reader is to approach Nietzsche’s corpus—it is the only way to gain access to judicial “genius” in the system. Holmes’s “Path of the Law” is a guide to induce the legal investigator to use “genius”

\begin{footnotesize}
\begin{enumerate}
\item Oliver Wendell Holmes Jr., “Speech at Dinner of the Boston Bar, March 7, 1900,” \textit{Speeches} (Boston: Little Brown, 1891, revised eds. 1895, 1896, 1900, 1913) 121, 125.
\item Novick, 245.
\item Novick, 247.
\end{enumerate}
\end{footnotesize}
to attempt to understand judicial genius in order to appreciate the role of judicial genius in law. In Holmes's rhetorical strategy, the "law" as fully conceptualized warm-blooded genius is a receding impossibility that continually destroys any cold-blooded claim to completeness. Holmes's "law" is a rhetorical "Medusa," to speak Nietzsche's dialect of Greek, used rhetorically as Nietzsche used the eternal recurrence doctrine in "Zarathustra." If one tried to look directly at the Medusa (i.e., attempt complete conceptualization of law's genius), then like Hamlet, one would be paralyzed by indecision. Once one understands that any conceptualization is necessarily an incomplete account of genius in legal dynamics, then a methodological device is required to destabilize any single cold-blooded conceptual account of "law." Holmes achieves this with his "bad man" methodology, making himself vulnerable to superficial charges of self-contradiction.

The rhetorical structure of "The Path of the Law" might be graphically represented as follows:

Figure 1.2  Rhetorical Structure of "The Path of the Law"

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Each circle is a conceptual approach that must be willfully blind to the entirety of "law" so as not to be petrified by the desire for a complete conceptualization of fractal nuance. The dramatic dynamic of the speech uses the "bad man" method to shift the reader's gaze from the literal circles to induce the gestalt effect of the missing square. The "cynical acid" of the "bad man" continually shifts the focal plane from theory (word) to brute empirical prediction of case outcome (deed). Again, causality is the root of the problem. Each of the circles could be characterized as the conceptualization of law that results from making just one of the Aristotelian four causes foundational: material cause (law's authority as historical tradition); efficient cause (law's authority as politics); formal cause (law's authority as doctrinal logic); and final cause (law's authority as utility). "Law" for Holmes is that which holistically resists collapse to causal reductionism and is the site of common law's creative genius. Law's authority derives from its presumed evolutionary genius, which continually exploits self-organized criticality to generate new coherence truths that accommodate each of the four competing conceptions of law simultaneously by finding doctrinal solutions that surpass minimal fitness thresholds for each. None of the four constituents is wholly satisfied and, conversely, none of those four reductive approaches can provide a complete account of law's dynamics.

The rhetorical strategies of Holmes and Nietzsche differ in an important respect. Nietzsche makes a much more concerted effort to design ritualistic means to induce genius within the reader as a performative effect of engaging with his text. Holmes, on the other hand, merely provided a methodological tool. Holmes was less interested in the ritual problem because he could take the rituals of common law process for granted. In other words, the seduction-effect Nietzsche sought to create was already a fundamental element of common law process that Holmes could take for granted. Holmes could accomplish the same thing more efficiently by
inspiring legal warriors to march off to conquer the law armed with a tenacious “soldier’s faith” and the “bad man” methodology.

The surface transparency of “The Path of the Law” is deceptive—a rhetorical master is at work here who only needs a few “rapid uncorrected brushstrokes” to produce a profound image. Sheldon Novick describes Holmes’s production of “The Path of the Law” as follows:

Filled with self-confidence and pleasure in his work, he gladly accepted an invitation to talk to the law students at Boston University, ... Holmes painted in rapid uncorrected brushstrokes his vision of law as a science. Law study began with what seemed sordid and unpromising materials. But when pursued with scientific, even religious, devotion, it became a way to wisdom.  

Wisdom indeed, as Holmes saw “law” as one manifestation of the elusive causality of genius that generates all evolutionary creativity, and thus his whole metaphysics. Holmes was not merely engaging in high rhetoric when he concluded the speech as follows:

The remoter and more general aspects of law are those which give it universal interest. It is through them that you not only become a great master of your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

Holmes’s “Law in Science and Science in the Law” was an important sequel to “The Path of the Law.” In it, Holmes ventured to look more directly into the law-Medusa to catch a glimpse of the universal—the causality of genius:

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64 Novick, 223.
66 “Law in Science and Science in Law,” 443.
Anyone who thinks about the world as I do does not need proof that the scientific study of any part of it has an interest which is the same kind as that of any other part.\(^67\)

Holmes's "bad man" strategy yielded an important dividend: it brought to light how common law operates as a system of collective learning. In "Law in Science and Science in Law," the individual judge is merely a role player following local dynamic principles—a cell in a great coral plant. Holmes described the macro-level developmental effects of this by examining evolutionary aspects of the common law plant, which is all Holmes could do without a "genetic" theory to explain law's conceptual evolution. Indeed, the nineteenth-century evolutionary concepts Holmes had at his disposal for this essay were plainly inadequate to capture even his macro-level understanding of the reproductive and selective mechanisms of "law."\(^68\)

Applying the "bad man" method as a local selective principle in each judge's engagement with "law," common law sets up a network of inter-judicial seductions—distributed reproduction of genius—that produces macro-level effects no one judge could fathom or control. Judges produce opinions to seduce the preconscious emotional aspect of subsequent judges. Holmes later remarked in a January 6, 1908 letter to Lewis Einstein:

> Since I wrote the last word I have had my day in Court, fired off decisions, and been bored with listening to those of others. We waste two thirds of the day in solemnly spouting our views and our differences, when it all goes into print and the real audience is the "vide-ence" that reads.\(^69\)

\(^67\) "Law in Science and Science in Law," 451.

\(^68\) Donald Elliott discusses the tensions generated by Holmes's attempt to map Darwinian and Spencerian concepts onto law. See E. Donald Elliott, "Holmes and Evolution: Legal Process as Artificial Intelligence" (1984) 13 *Journal of Legal Studies* 113.
A theory of collective seduction-propagation produces new criteria against which to evaluate
Holmes’s opinion-writing practice, which has attracted criticism for inadequate reasoning. Those
seeking to preserve Holmes as a rhetorical exemplar have had to separate his rhetoric from his
instrumental ends—a move that would have surely disappointed Holmes.  

Holmes’s understanding of inter-judicial seduction now created a role for dissents.
Indeed, Holmes sat at the Supreme Court of Massachusetts for over seven years before becoming
the first to write a dissenting opinion in 1891 and later achieved national fame on the U.S.
Supreme Court as the “Great Dissenter.” The Holmesian judge must therefore dutifully play a
role, even in dissent, without fully understanding the whole. This motif achieves closure with the
first speech in Holmes’s great trilogy (1895-1897-1899), “The Soldier’s Faith,” which
generalized the judge’s dutiful role into a life philosophy. Speaking to the Boston Bar in 1900,
Holmes said:

The rule of joy and the law of duty seem to me all one.

Thus while Holmes, like Nietzsche, found reason to place faith in life as sanguine expression of
bodily instinct, especially social instinct, unlike Nietzsche, his warm-blooded participation in
society supported a faith in the genius of common law, and so in the genius of a constitutionally
dynamic social order in general.

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69 Oliver Wendell Holmes Jr., Letter to Lewis Einstein, January 6, 1908, The Essential Holmes, ed. Richard Posner
71 Novick, 366.
72 Oliver Wendell Holmes Jr., “The Soldier’s Faith,” Speeches (Boston: Little Brown, 1891, revised eds. 1895, 1896,
1900, 1913) 84. For identification of the trilogy, see G. Edward White, “Investing in Holmes in the Millennium”
73 Oliver Wendell Holmes Jr., “Speech at Dinner of the Boston Bar, March 7, 1900,” Speeches (Boston: Little
Brown, 1891, revised eds. 1895, 1896, 1900, 1913) 121, 126.
However, Holmes should not be read as a naive “my country right or wrong” soldier’s faith. Writing to Clara Stevens September 3, 1909 Holmes reflected:

For the past two years I have been struck with the question oppressing all sorts of writers, what will become of ideals when historic religion fails? My answer is simple and probably you know it. Years ago, having the same prepossession, I tried in my speech The Soldier’s Faith to bring home by example that men are eternally idealists—a speech that fools took as advice to young men to wade in gore—but of course that was not the place to philosophize and give reasons why.  

Holmes’s faith must be read as being grounded in constitutional principles that would achieve what Nietzsche’s handbook of genius would achieve on the individual level. Specifically, the institutional logic of law must be a self-subverting logic to create within its logical field an inexhaustible space for the incorporation of values external to the current state of the system: — subversion to external values must be logically possible and cyclically generated as a modal phase (i.e., mutation). The constitutional principles of legal reasoning must generate a continual masochistic desire to incorporate values external to the current stage of development of the legal system (i.e., magnanimity). Finally, the constitutional principles must exploit sites of self-organized criticality to integrate new values and causal knowledge into the code of the legal system (i.e., genius).

Why then do we need Nietzsche to understand Holmes?

Gilles Deleuze observed that it is perhaps in England that Nietzsche was most misunderstood because of the dominance of empiricism and pragmatism, which meant that a
Nietzschean detour from French rationalism and German dialectics was of no great value.\textsuperscript{75} Put another way, in his chilly milieu Nietzsche had to stamp his feet and leave the premises to become a hot-blooded investigator. At the beginning of \textit{Ecce Homo} (immodestly titled, "Why I am So Wise"), Nietzsche emphasizes the beneficial effects of periods of deprivation in so many aspects of his life—one is able to perceive more clearly what one would otherwise have taken for granted. Holmes, on the other hand, was born from the womb of American pragmatism and became a warm-blooded social participant in a warm-blooded social institution. As noted already, Nietzsche had to forge his ritualistic rhetoric using seduction principles derived from his psychology, whereas Holmes merely perfected the seductive aspect implicit in judicial writing, supplemented by a few important speeches. Along another dimension, the married Holmes learned to exploit his sexuality as a stimulant to his creativity. Holmes realized the effectiveness of this tonic—sometimes taking out the volumes of Casanova memoirs kept in a locked safe at the Athenaeum library.\textsuperscript{76} To Harold Laski he later wrote:

\begin{quote}
C's book did me good at a critical moment—just when I had got out of my Common Law and had some symptoms that for the moment I mistook for a funeral knell. It is an amazing work as you no doubt know...\textsuperscript{77}
\end{quote}

Indeed, Holmes was a notorious flirt (most probably celibate) with society women of high intellect, the beneficial effect of which even his wife Fanny Dixwell seemed to acknowledge by occasionally forcing him to take a solo trip to England. Sheldon Novick's biography on Holmes


\textsuperscript{76} Novick, 164.
included a charming incident where Holmes, then over sixty years old, impressed President Theodore Roosevelt in this regard.

Once Washington's season began, Holmes and Fanny went everywhere together, although of course they played their separate parts in the dinner parties. "Look at him," the President said to Fanny one evening, watching Holmes charm his elderly dinner partner, "the sex instinct is so strong in him as to make him talk to Mrs. ———. I wish I could do that. Do you suppose it is real or is he putting it on?"  

Nietzsche likewise learned to use sexuality as a creative stimulant through a series of intellectual ménages-à-trois where his infatuation (most probably celibate) with an intelligent wife would provide both psychological insight and accelerate his absorption of philosophical insight from the husband. Again, the privation of unmarried Nietzsche resulted in compensating theorization—ultimately, the masochistic consort as a paradigm of empirical inquiry—which Holmes took for granted as a graceful social participant.

The total effect is that Holmes's style has an easygoing charm lacking in Nietzsche, whereas Nietzsche had an analytic depth lacking in Holmes and a tendency to rhetorical overstatement ("Why I am So Wise"). In other words, Holmes's writings are deceptively straightforward, taking much for granted, and he never did settle on a "place to philosophize and give reasons why." A Nietzschean map of that which Holmes took for granted is required to conceptualize the geological dynamics that generate the apparently self-contradictory Holmesian landscape.


78 Novick, 164.
On April 21, 1932, not long after retiring from the Supreme Court, Holmes wrote to Frederick Pollock:

...I am being happily idle and persuading myself that 91 has outlived duty. I can imagine a book on the law, getting rid of all the talk of duties and rights—beginning with the definition of law in the lawyer's sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts, and expounding rights as a hypostasis of a prophecy—in short, systematizing some of my old chestnuts.79

This thesis commences an attempt to do just that. From this perspective, this thesis can begin to measure the fidelity of the Holmesian landscape to the dynamic principles he sought. For example, Holmes's peculiar outbreaks of judicial activism against a backdrop of general conservatism80 can be seen as organically generated by his underlying understanding of the genius of common law.

Having examined Nietzsche and Holmes closely on genius and social instinct, the foundations of their understandings of justice become clearer. Theories of justice based on the grammar of logical form and maximizing the reciprocal tolerance of individual indulgence plainly have no interest to Nietzsche or Holmes. Nietzsche and Holmes envisaged a justice that creates dispositions toward, creates opportunities for, and may indeed demand cheerful self-sacrifice. Nietzsche and Holmes sought to re-establish justice as a fundamentally social-building logic to overcome the alienating effects of increasing individualism. Their logic of justice, however, is the grammatically unstable, incomplete logic of genius, and not a totalizing logic that purports to achieve all value comparisons at once. As Wai Chee Dimock has recently observed,

theories of justice that purport to establish a metric for a complete ordering of values—a common evaluative currency—presume a totality of cause and effect, whereas literary justice “brings to every act of judicial weighing the shadow of an unweighable residue.” Justice for Nietzsche and Holmes was a dynamic, evolving partial ordering—a common law, case-based, historical logic that only makes local, point-by-point comparisons and postpones broad decisions as long as possible until reliable patterns emerge from experience. Until local decisions are made, general rights are mere prophecies of the patterns that may emerge and will probably be revised by the “ripple effects” of future decisions—common law’s apparent completeness is a grammatical illusion, a gestalt effect. The nuance of causality requires Holmes’s generous skepticism and does not permit the hubris of a totalizing grammatical account of the world. Nietzsche and Holmes, then, derive justice from the interplay of social instinct and genius—magnanimity and scientific method.

Nietzsche’s and Holmes’s theories of justice are not inconsistent with enduring notions of justice such as the greatest good for the greatest number tempered by a desire to assist marginalized persons or groups. These are macro-level principles that, for present purposes, can be summed up in the words economize and empathize. To be sure, Nietzsche and Holmes’s dynamic theories of justice should, over time, produce macro-level effects such as economize and empathize. Nevertheless, these macro-level effects do not convert directly into operational micro-level decisions. To expect so would presume a reductionist rationalism that Nietzsche and

81 Wai Chee Dimock, Residues of Justice: Literature, Law, Philosophy (Berkeley: University of California Press, 1997) 10. See also pp. 9 and 57-58. Dimock’s passing discussion of Holmes unfortunately relied on commentary that attempted to place Holmes within a totalizing concept of justice.
83 Nietzsche was unimpressed by pity and saw it as a danger to the psychic hygiene of creative types. Nietzsche’s empathy was more that of a physician’s to a patient.
Holmes would forcefully reject as antithetical to their understanding of causation. To put forth an analogy, the postulate economize-empathize would correspond to the observation that most earthquakes are modest most of the time. It says very little about the dynamic principles that produce the macro-effect. Similarly, saying that most scientists make modest discoveries most of the time does not say much about how to do science. Macro-level goals do not grammatically translate into micro-level values or dynamic principles. Holmes was fond of saying, “you can’t legislate bliss” and often referred to legislative optimism in this respect as “rot”:

There is no short cut to fame or comfort and all there is to bore into it as hard as you can. But many of our friends seem to believe that they can legislate bliss.  

Or as Nietzsche would put it:

[Plato] wants the flower without the root and stem: consequently he wants it in vain.

Indeed, the phenomenon applies in both directions, so that change to traditions always risks undermining macro-level goals already achieved.

The present time is experimenting in negations—an amusing sport if it is remembered that while it takes a few minutes to cut down a tree it takes a century for a tree to grow.

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Nietzsche and Holmes prefigure Friedrich Hayek and James Coleman on the significance of the causal divide between macro-level and micro-level phenomena, but would not share the degree of Hayek’s pessimism as to the prospects for incremental social engineering. In his early essay “Richard Wagner in Bayreuth”, Nietzsche described the task as follows:

To me, on the other hand, the most vital of questions for philosophy appears to be to what extent the character of the world is unalterable: so as, once this question has been answered, to set about improving that part of it recognized as alterable with the most ruthless courage.

Nietzsche and Holmes sought a dynamic logic to evolve micro-level values experimentally to achieve desired macro-level goals without sabotaging useful values and goals implicit in traditions that are taken for granted. Nietzsche and Holmes posited and sought to demonstrate the existence of dynamic principles for justice similar to those recently posited for models of earthquakes and other macro-phenomena based on self-organizing criticality. Nietzsche and Holmes sought to make justice an empirical science.

Nietzsche and Holmes did not challenge an assertion that capitalism best captured the “economizing” element of the dynamic. More problematic was the “empathizing” dynamic. Each of Nietzsche and Holmes built into their dynamics operational micro-level concepts of cheerful masochism and “soldier’s faith” duty as stronger forms of subversion to collective purpose than liberal notions of empathy. A difficulty is that the degree of magnanimity must depend on macro-level observations of how generous society could afford to be from time to time. Here Holmes seems to have run aground with Malthus, whom Nietzsche ridiculed. Nietzsche’s duty to

accommodate was more generous than Holmes’s was, but then Nietzsche was never called upon to make social decisions with immediate consequence. Nonetheless, both Nietzsche and Holmes made an attempt to integrate magnanimity into the operational dynamics of their theories of justice, leaving the degree of magnanimity to be adjusted in the on-the-fly fashion of common law legal reasoning generally. In other words, Holmes might have reversed his infamous “Three generations of imbeciles are enough” ruling in *Buck v. Bell*, \(^8^9\) in which the U.S. Supreme Court declined (8-1) to find state sterilization laws unconstitutional, had he made a different empirical conclusion as to how much of a drain society could withstand before calling on a duty to sacrifice that reversed the direction of the call-to-magnanimity. Indeed, as if to make Nietzsche’s point regarding the need for psychological hygiene, one feels compelled to seek biographical roots to account for Holmes’s unsatisfactory performance in *Buck v. Bell*. One might seize on the presence of Malthus in Holmes’s writing or similarly suggest Holmes’s Civil War experience would dispose him to romanticize mothers sacrificing their children for the common good. Indeed, one might add the fact that Holmes and Fanny Dixwell were an infertile couple, which might account for his resentful tone in the *Buck v. Bell* opinion. Nonetheless, the anti-individualist principle that self-sacrifice is expected of geniuses—and on occasion of all citizens—is a core aspect of Holmes’s philosophy, which he probably nurtured during his intellectual engagement with Plato and Emerson even before his Civil War experience. Holmes’s reactions to Malthus and the Civil War were probably effects of his view that “economize and empathize” were conflicting principles that could only be dynamically mediated according to a principle of noble self-sacrifice. As Nietzsche observes in his early essay “The uses and disadvantages of history for life,” historical biography tends to lack causal nuance for inventive

genius and strips thinkers of original invention by purporting to explain the thinker according to insufficient causes. As Nietzsche observes generally in *Twilight of the Idols* and more specifically in *Ecce Homo* about his early essays on Schopenhauer and Wagner, a writer’s reaction to another thinker may be principally evidence of the writer’s prior psychology—the other thinker as *effect*—as opposed to the prior thinker being a source of the writer’s thought—the other thinker as *cause*.

Finally, to the economize-empathize macro-level conception of justice, Nietzsche and Holmes would add “enculture.” Both understood the need to resist the eroding effect of capitalism on the nurturing of genius capacity and to restore a sense of meaningful social participation in all citizens. Both Nietzsche and Holmes were reacting strongly against what they perceived as the socially alienating logic of individual rights. The difficult problem, again, is to determine the degree and manner that each aspect of the irreducible enculture-economize-empathize imperative should be expressed within the dynamics. Again, for Nietzsche and Holmes this must be done through a process of progressive partial ordering based on a history of point-wise comparisons that generates a dynamic set of prophecies—in short, a systematization of Holmes’s chestnuts. As always, Nietzsche and Holmes throw the burden of solving hard problems on the dynamics of creative genius. The dynamic principles of justice themselves become a self-subverting logic and cannot be directly expressed in stable concepts within a grammar-based model. It would be like attempting to describe the running of a computer program with a single mathematical equation—only in exceptional cases would a static formula capture the full information content of the historical dynamics. Nietzsche in *Zarathustra* and Holmes in “The Path of the Law” resist the idealist temptation by using the same dynamic

89 274 U.S. 200 (1927).
rhetorical device of presenting a series of incomplete partial solutions—which are shown to err badly if completed or made total according to grammatical logic—in the context of an overarching need to attempt completeness. Justice, then, is not the receding ideal-void, which is constructed as a grammatical gestalt effect in the mind’s-eye of the reader, but rather, the dynamics that produce this effect. To discover the dynamic principles, one must cultivate the same intuition for causality as Nietzsche and Holmes. Lacking the historical-biographical accidents that educated Nietzsche and Holmes, we must turn to the modern sciences of chaos theory, non-linear dynamics, self-organizing criticality and complex adaptive systems for assistance.

This thesis will apply Nietzsche, Holmes, recent science and some current legal theory to begin to conceptualize a dynamic logic to evolve micro-level values experimentally to achieve desired macro-level goals without sabotaging the values and goals already implicit in tradition that are taken for granted. This thesis responds directly to John Dewey’s call in “Logical Method and Law” for a logic to bridge the gap between antecedent and consequent styles of reasoning. The recent sciences spawned from chaos theory provide ready-made concepts that do not presume a priori the causal reductionism of grammatical subject-object syntax. Indeed, the causal presuppositions of subject-object grammar in effect extinguish causal nuance in social relationships, such as trust, through a concealed imposition of onus or burden of proof. This is no flaw—wilful blindness is necessary for action. The genius of law is to exploit doctrinal and opinion forms to accumulate the causal residues of applying antecedent reasoning and, as causal knowledge improves or political pressure alters priorities, to use this equitable or “emotional” experience to drive periodic transformations of doctrinal form. This style of combined reasoning

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and knowledge building follows from the nature of micro-to-macro causal emergence and self-organized criticality. Working under the watchful eye of Holmes and Nietzsche, this thesis can use science and logic to go far beyond their performative rhetoric to create a conceptual model that can draw on these recent sciences. This model could then be used to design an empirical research program eventually to test whether these dynamic principles do in fact improve system learning and are therefore desirable constitutional features of a theory of justice. This new model of legal reasoning and rhetorical persuasion could also be used to re-conceptualize much of judicial and legal practice.

1.5 Paths to Holmes and Nietzsche

Supposing for present purposes the preceding summary is correct, the rhetorical strategies crafted by Holmes and Nietzsche and the predisposition of familiar methods to rely on a conception of causality they rejected, together would create difficult methodological problems for this thesis in discerning and defending this reading.

Examining the mutual influence between Holmes and Nietzsche produces little. Though Holmes was born in 1841 and Nietzsche in 1844, neither was widely known prior to Nietzsche’s breakdown at the beginning of 1889. The two appear neither to have met nor shared acquaintances. Holmes did read a few works by Nietzsche in the summer of 1902, but Holmes’s assessment did not betray either a high opinion or deep understanding of Nietzsche. To Lady Pollock he wrote on July 31, 1902:

I have been reading philosophy which I don’t believe by Wm. James and Royce and which I do by Tarde—and which I don’t feel bound to take too seriously by Nietzsche, although the last named gent said some things worth remembering. On the whole I am on
the side of the argument who affirm the worth of life as an end in itself as against the saints who deny it. 91

Mark Howe’s editorial footnote says Holmes’s journal indicates he had recently read the *Case of Wagner*, the *Anti-Christ*, the *Genealogy of Morals* and Nietzsche’s poems, perhaps an awkward first sampling of Nietzsche.

Nonetheless, Holmes must have been intrigued enough to consider his understanding of Nietzsche incomplete, as he later read commentary on Nietzsche. Interestingly, Holmes sensed enough similarity in Nietzsche to himself to consider him redundant. To Harold Laski he wrote on August 31, 1924 (Holmes now 83 years old):

... I have read a careful study of Nietzsche by W.M. Salter (question, is he a gentleman mentioned in philosophical circles?) which, without changing my conviction that he made too much row about himself, and that he tells me little that I didn’t know, nevertheless moves some sympathy in me. Before I knew him if not before him I used to say that equality between individuals, as a moral formula, was too rudimentary. ... I suppose Nietzsche wrote in or at least came from a more theological atmosphere than ours—and so got that tiresome tone of fluttering the dovecotes and was himself so fluttered. I think he might have died silent and the world not have been been appreciably worse off. 92

To which Harold Laski replied:

I add my conviction that it is in those moments when, for instance, you become so much one with your job that you do not realise that you are doing your job, that the best work is done; and you can, I think, multiply the power to become one with it by insisting to yourself on the duty of doing it fully and conscientiously. Salter’s Nietzsche is much the best thing about that queer, tortured soul, a great poet who could not resist the impulse

nonconformists sometimes give way to when they are approached by ladies of easy virtue in Leicester Square.93

This seems to have closed Holmes’s book on Nietzsche.

Another approach would be to compare their respective intellectual, biographical and social influences. Numerous similarities make this somewhat fruitful. Emerson, for example, was a major influence on both. Emerson was a friend to the Holmes household. Holmes gave essays to Emerson, including one on Plato he wrote as an undergraduate. An Abolitionist, Holmes eagerly volunteered and, between wounds, served three years in the Civil War. It seems his Civil War experience, in which he was near fatally wounded twice, almost died of illness and witnessed horrific carnage, cured him of Idealism and notions of absolute truth. At a post-Civil War address Emerson gave at Harvard, which Holmes attended in uniform, Emerson developed Heraclitus’s maxim that “War is the father of all things.” Nietzsche had war experience in 1870, as an orderly, which cured his youthful, idealistic enthusiasm for German political ambitions. Heraclitus was the one philosopher Nietzsche claimed to have respected,94 and Nietzsche often praised Emerson. Indeed, Nietzsche was an enthusiastic reader of Emerson even in his youth. Posner, again, refers to Nietzsche as Emerson’s “European counterpart.”95

Each of Holmes and Nietzsche from his first conscious moments enjoyed unusually active parental involvement to encourage and help him to take his self-development seriously and achieve greatness.96 Each of Holmes and Nietzsche was disposed in youth to write poetry—

93 Ibid, 657.
95 Richard A. Posner, Overcoming Law (Cambridge, MA: Harvard, 1995) 390. Not that Posner is an authority in these matters; Nietzsche’s indebtedness to Emerson has been widely noted.
96 Nietzsche’s father died when Nietzsche was four-and-a-half but had an important early influence. See Carl Pletsch, Young Nietzsche: Becoming a Genius (New York: The Free Press, 1991).
Holmes was poet laureate of his graduating class at Harvard—but each ultimately favored prose and claimed to have been inspired by Romans (Holmes, Tacitus; Nietzsche, Sallust) to develop a clean, compact style. Both were “untimely” in the sense of forcefully rejecting the trend of rising economic individualism and its disintegrating effect on social cohesion, but also rejecting socialism or reactionary conservatism as a viable solution. Rather, each sought to restore a sense of profound meaningfulness to sacrificing for the common good in a post-religious world that views all knowledge claims skeptically. Holmes read Hegel closely; Nietzsche’s intellectual milieu was Hegelian Germany—and both confidently rejected Hegel. The Darwinian bug to find developmental principles for society infected both Holmes and Nietzsche, and both are often labeled Social Darwinists who cynically view society fundamentally in terms of the struggle among social forces. Both saw themselves as scientists, self-evaluations that commentators often judge as misplaced. Though vehement anti-idealists, both found much to admire in Spinoza, a philosopher generally associated with Idealism.

This last commonality demonstrates the indeterminacy of comparing Holmes and Nietzsche by similarity of origin and influence—their use of sources is highly original, idiosyncratic or eclectic, depending on one’s opinion. The Emerson of Holmes and Nietzsche is plainly different than the Transcendentalist one finds described in philosophical summaries. Moreover, their use of Emerson is not straightforward—to Franz Overbeck on December 22, 1884, Nietzsche wrote:

I do not know how much I would give if only I could bring it about, *ex post facto*, that such a glorious, great nature, rich in soul and spirit, might have gone through
some strict discipline, a really scientific education. As it is, in Emerson we have lost a philosopher.\textsuperscript{97}

In the parallel, Holmesian universe is a letter to Patrick Sheehan October 27, 1912:

You put it much too strongly when you say that I had no sympathy with Emerson. When he was breaking and I was still young, I saw him on the other side of the street and ran over and said to him: “If I ever do anything, I shall owe a great deal of it to you,” which was true. He was one of those who set one on fire—to impart a [thought] was the gift of genius. My qualification is that I don’t regard either him or Carlyle as thinkers. They are at the opposite pole—poets—whose function is not to discern but to make us realize truth.\textsuperscript{98}

Indeed, according to the basic genealogical method that Nietzsche and Holmes each developed independently, development entails the reinterpretation or commandeering of old forms for new uses. Nietzsche wrote: “the cause of the origin of a thing and its eventual utility, its actual employment and place in a system of purposes, lie worlds apart; whatever exists, having somehow come into being, is again and again reinterpreted to new ends.”\textsuperscript{99} The bulk of Holmes’s \textit{Common Law} is an extended dissertation on precisely this phenomenon in common law. It would be perverse and question begging to rely exclusively on a methodology to interpret Holmes and Nietzsche that they themselves rejected as a core tenet of their thinking.

The common reliance of Holmes and Nietzsche on Spinoza, about whom neither wrote much, demonstrates other potential shortcomings of a historical-biographical approach. Plainly,


Spinoza was an important source for each. Deleuze, in apparent agreement, notes that apart from the pre-Socratics, Nietzsche recognized only one predecessor—Spinoza. Similarly Holmes read Spinoza’s *Ethics* several times and found him singular.

Spinoza is the boy. He is rather tiresome—I don’t believe his premises and think his reasoning falls with or without them. But he sees the world as I see it and he alone of all the old ones I know.

However, turning to received wisdom on Spinoza is hardly a helpful strategy. As is the case with Holmes and Nietzsche, Spinoza’s landscape has become polyvalent and has generated an explosion of recent scholarly attention. This is not surprising as causation is a central issue in Spinoza—his holistic notion of causation was reduced to Idealism in the vulgar causal paradigms of modern materialism and subject-object grammar. Spinoza’s “Idealism” sounds more appealing in the wake of recent chaos theory and “holistic” causal phenomena such as self-reinforcing feedback loops and self-organizing criticality. In the end, because causation is the root of the difficulty, getting to Holmes and Nietzsche through their sources merely shifts the burden to another forum with no greater prospect for straightforward resolution.

Furthermore, as noted already concerning Nietzsche’s use of Schopenhauer and Holmes’s use of Malthus, an apparent source might in fact be an *effect* rather than a *cause*. Such sources must be examined with extreme care. For example, if, as Nietzsche advised in *Ecce Homo*, one

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should substitute the word “Nietzsche” for “Schopenhauer” wherever it occurs when reading his early essay “Schopenhauer as Educator,” then by analyzing Schopenhauer one is apt to distort Nietzsche’s distortion of Schopenhauer. To negotiate the causal nuances of Nietzsche’s relationship to Schopenhauer would require a profound understanding of Schopenhauer and an equally profound understanding of Nietzsche. However, this begs both the questions of understanding Nietzsche and appreciating causal nuance in a general sense. Poets have long sensed this problem.

One of these men is genius to the other:
And so of these, which is the natural man,
And which the spirit? Who deciphers them? 103

*The Comedy of Errors*, Act 5, scene 1, lines 334-336

Indeed, Nietzsche specifically addressed inadequacies of historical-biographical method in his early essay “On the uses and disadvantages of history for life.” Anticipating his genealogical method, Nietzsche sharply criticized the tendency to reduce an event or work to a set of insufficient causes and thereby extinguish the causal genius or originality of the event or work itself.

... good and right things may be done, as deeds, poetry, music: the hollowed-out cultivated man at once looks beyond the work and asks about the history of the author. If he has already several other works behind him, he is at once obliged to have explained to him the previous and possible future progress of his development, he is at once compared with other artists, criticized as to his choice of subject and his treatment of it, dissected, carefully put together again, and in

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general admonished and set on the right path. ... The echo is heard immediately: but always as “critique,” though the moment before the critic did not so much as dream of the possibility of what has been done.\textsuperscript{104}

Plainly Nietzsche was annoyed everyone mistook the main point of his first book, \textit{The Birth of Tragedy}, and overlooked what he thought was its originality. In a subsequent early essay “Richard Wagner in Bayreuth,” Nietzsche made it clear that a different concept of causation is the root of the problem (remembering to substitute “Wagner” with “Nietzsche” as per instructions in \textit{Ecce Homo}):

The poetic element in Wagner [read: Nietzsche] is disclosed by the fact that he thinks in visible and palpable events, not in concepts; that is to say, he thinks mythically, as the folk has always thought. The myth is not founded on a thought, as the children of artificial culture believe, it is itself a mode of thinking; it communicates an idea of the world, but as a succession of events, actions and sufferings. \textit{Der Ring des Nibelungen} [read: my subsequent oeuvre] is a tremendous system of thought without the conceptual form of thought. Perhaps a philosopher could set beside it something exactly corresponding to it but lacking all image or action and speaking to us merely in concepts: one would then have presented the same thing in two disparate spheres, once for the folk and once for the antithesis of the folk, the theoretical man. Thus Wagner [read: Nietzsche] did not address himself to the latter; for the theoretical man understands of the poetical, of the myth, precisely as much as a deaf man does of music, that is to say both behold movement which seems to them meaningless. From within one of these disparate spheres one cannot see into the other: so long as one is under the spell of the poet one thinks with him, as though he were a being who only feels,
sees and hears; the conclusions one draws are the linking together of the events one sees, that is to say factual causalities and not logical ones. The poverty of “logical” causality strips factual causality of its nuance. Nietzsche, like Holmes, finds factual causality in drama. Nietzsche spends the rest of this essay announcing a search for “stylistic laws of dramatic performance” by which a philosopher can create “performers as transmitters” of “fundamental impulses” “directly to the soul of the listeners…” The preceding passage continues:

Now, if the gods and heroes of such mythological dramas as Wagner [read: Nietzsche] writes are to communicate also in words, there is no greater danger than that this spoken language will awaken the theoretical man in us and thereby heave us over into the other, non-mythical sphere: so that in the end we should not through the employment of words have understood more clearly what is taking place before us but, on the contrary, have failed to understand it all. That is why Wagner [read: Nietzsche] has forced language back to a primordial state in which it hardly yet thinks in concepts and in which it is itself still poetry, image and feeling.

Unlike Wagner, Nietzsche was a writer, so the stylistic challenge of writing philosophy to confound the tendencies of theoretical man was immense. Nietzsche’s concepts are notoriously unstable and are vulnerable to superficial criticism on that account. In the end, Nietzsche only wrote for initiates with a capacity for appreciating factual causality and mythic sensibility. The modern writer fares no better. The poet Ted Hughes, in the Introduction to his Shakespeare and the Goddess of Complete Being (his analysis of the consort-and-Goddess mythic foundations of

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106  Ibid., 237.
Shakespeare's dramatizations of personal self-transformation—i.e., genius), simply advises “realists” and “logical positivists” to close the book and not bother.¹⁰⁷

An alternative to Hughes's defiance is to invoke chaos theory as an aid to opening a field that encompasses both logical causality and factual causality, in the senses Nietzsche meant. This approach is attractive for at least three reasons. First, Nietzsche's examples of causal nuance are virtually identical to Hughes's. Hughes presents a moving account of how Sylvia Plath was drawn to particular myths as effects of prior psychological developments but then integrated the organizing effect of the mythic drama—a looping feedback effect that effaces distinctions of cause and effect—so as to influence the subsequent trajectory of the creative genius in the developing self without determining it. Hughes uses the image of a magnetic field. Of course one cannot know anyone's biography in infinite detail, so any "historical" explanation that purported to disentangle cause and effect fully would have to be a vulgar simplification of unknown degree. Thus, the mythic causality that Hughes identified as confounding contemporary realist and logical positivist interpreters of Shakespeare corresponds to the source of the interpretive blind-spot that Nietzsche himself saw as the rhetorical hurdle he faced. In other words, one's understanding of causation is still the root of the problem. Second, Nietzsche felt quite strongly that thermodynamics and mathematics held the key to a conceptual account of his understanding of causation. Third, an external perspective is required in order to get around Nietzsche's esoteric technique by a sort of rhetorical-biographical-causal triangulation, the method of which will be discussed in detail later in the thesis.

Nonetheless, even though invoking chaos theory is helpful to expand the space of causal nuance and interpretive possibilities for understanding the creative originality that Nietzsche

feared would be snuffed out by historical criticism based on logical causality, a topical focal point is still required, one that will lead most directly to the concept “genius” as understood by Nietzsche and Holmes.

In hindsight, the obvious solution is to follow Holmes and Nietzsche to investigate engaged agency and the recursive self-application of the theory to one’s own development. Holmes and Nietzsche were each, in ways that on the surface appear quite different, elite psychologists and saw this as the focus of their professional and personal endeavors. This thesis will argue that Holmes’s decision to seek to understand the developmental principles of law by focusing on the results of legal decisions was his fundamental link to Nietzsche. In effect, Holmes sought to discover the post-Darwinian, post-Hegelian principles of law’s development in the unconscious psychological processes of judicial action.

The common law is the largest database of empirical evidence of psychological events that exists. Holmes trained himself through assimilation. His early work on Kent’s Commentaries had him digesting thousands of cases from all areas of law—the “strict discipline” Nietzsche found lacking in Emerson. Because of his inexhaustible diligence, integrity and ambition, he was able to thoroughly develop, test and reject numerous approaches to explaining the principles of law’s development. His theory of law continually reinvented itself. Indeed, Holmes likened himself to Prometheus, bound to the rock of ambition. Holmes was not just discovering the law, by viewing himself as Prometheus Holmes was probing the contours of the developmental psychology of how judges creatively integrate history, logic, politics and policy from precedent. While each rival theory of jurisprudence vies to make its perspective the sole foundation of inquiry, Holmes made them all secondary, contributory and merely constraining, with the

\[108\] Novick, 130.
unconscious embodiment and processing of the judge being the open variable to be explored. For Holmes, the self-development of the judge through training and assimilation of precedents was integral to the development of the law. By making the case outcome primary, Holmes believed his method was scientific, empirical and non-reductive. This claim has some force once Holmes’s task is seen as an investigation into developmental psychology and distributed learning systems rather than an attempt to supplant either sociology of law or substantive investigation of social phenomena.

Nonetheless, Holmes saw this aspect of his profession as exemplifying universal processes of deep philosophical significance. Sending Emerson a copy of an article (Primitive Notions in Modern Law) in 1876, Holmes wrote:

> It seems to me that I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die.¹⁰⁹

Though Holmes was a productive jurist into his nineties, he failed to articulate this path from law to philosophy. The ambition remained at the level of confident assertion earned from self-directed mastery of his calling.

Nietzsche was less systematic and more holistic than Holmes was, attacking the problem of self-development from every front imaginable. Nietzsche’s eclecticism revealed deep parallels between psychological processes and thermodynamic processes in general. Nietzsche, who like Holmes was profoundly influenced by Emerson, could have written a similar note to Emerson in 1876 as he began writing Human, All Too Human, in his case promising to find the philosophical universal in psychology. In Beyond Good and Evil Nietzsche wrote: “For psychology is now
again the path to the fundamental problems.”¹¹⁰ Nietzsche, like Holmes, lacked no confidence to assert without proof. Nietzsche’s ambition to write *Will to Power* was his overly optimistic expectation that he could explicitly link thermodynamics to self-development to social development as a general philosophical insight. Indeed, he began *Human, All Too Human* with “Chemistry of concepts and sensation”—posing a fundamental developmental process common to thermodynamics, morality and psychology.¹¹¹ Near the end of Nietzsche’s productive life, however, he threw a working draft of *Will to Power* into a lake and would describe his achievement as primarily psychological. *Twilight of the Idols* begins and ends with references to psychology (“Idleness is the start of all psychology” and “The psychology of the orgiastic as an overflowing feeling of life and energy, where even pain works as a stimulant, gave me the key to the concept of *tragic* feeling…”)¹¹² and in the preface Nietzsche refers to his book as a psychologist’s idleness, the penultimate working title of the book.¹¹³ In *Ecce Homo*, his last work, Nietzsche is blunt: “Who before me at all among philosophers has been a *psychologist* and not rather its opposite ‘higher swindler’, ‘idealist’? Before me there was no psychology.”¹¹⁴

Where Holmes and Nietzsche differed greatly was that Nietzsche was more self-consciously aware that the psychology of creativity was the focal point of his inquiry. From an early age, Nietzsche was fundamentally concerned about his own creativity. At twelve, he wrote his first autobiography, patterned after Goethe. The young Nietzsche, like Holmes, described

¹⁰ Novick, 149.
¹⁴ Ibid, 3.
himself as a Prometheus and made a career of studying the dynamics of his self-transformations. Nietzsche studied specific exemplars of genius, especially Wagner. Holmes studied the psychology of creativity less biographically but more systematically in the database of judicial decisions, and was much more modest in applying his own self-creation as an exemplar of general psychology. Indeed, Holmes’s comments on Nietzsche quoted above show that he considered such an attempt distasteful, unnecessary and misguided. Holmes’s professionally circumscribed data on creativity seems to be the reason for his deeper understanding of collective dynamics which is under-developed in Nietzsche’s work. On the other hand, Holmes’s limited outlook overlooked important psychological dimensions not featured in law that Nietzsche saw as fundamental to the problem of justice, such as sexuality and gender politics. Again, privation and provision are two-edged swords, but Emerson’s twins complement each other and offset strengths and weaknesses.

The great danger this thesis must negotiate is to present Holmes and Nietzsche’s thinking as coherent and compelling without falling into systematization. Indeed, as noted above regarding Holmes and as Nietzsche stated in *Twilight of the Idols*, the tendency to seek systems is the methodological error they sought to overcome.

I distrust all systematizers and stay out of their way. The will to a system is a lack of integrity.\(^{115}\)

The integrity of which Nietzsche writes is integrity to hold open the open variable Holmes pursued, without seeking the comfort of an approach that promises the tranquillity of equilibrium and closure. For Holmes and Nietzsche, reality is a system of permanent disequilibrium that
changes according to developmental principles. They viewed “becoming” as primary and “being” as secondary, so that any “system” would either be merely static constructs (interaction of beings), or developmentally closed in seeking an equilibrium of teleological satisfaction (development toward ideal beings). The model Nietzsche and Holmes sought was one of “self-organized criticality” which develops as an intermittent sequence of temporary stabilities of interacting forces and episodes of radical reorganization as power centres rapidly adapt until a new stable configuration is achieved. Much can be said about the principles of stability and reorganization, but not much can be said about what the next stable configuration would look like. The next reconfiguration is no more predictable than the next stable configuration of species after the current rash of extinction has stabilized—dinosaurs could not have predicted mammals; therefore, Nietzsche could only announce the “over-human.” This is the reason neither Holmes nor Nietzsche could state a traditional form of theory of justice—the form of the theory of justice would be contingent on unpredictable developments. Justice must be located in the principles of change.

Writing about Holmes and Nietzsche on justice is also problematic because neither uses the concept in the traditional sense—how does one locate “justice” in their thinking? Holmes, for example, does not even use the word in either of his two major speeches on law, “The Path of the Law” or “Law in Science and Science in the Law.” Did Holmes even have anything to say about justice?


117 Again, Holmes and Nietzsche were extremely prescient in their understanding of physics. See, for example, Per Bak, *How Nature Works: The Science of Self-Organized Criticality* (New York: Springer-Verlag, 1996).
With Nietzsche, it is the opposite problem. Nietzsche overloads the term “justice” with numerous distinct meanings, both good and bad. No first or second-time reader can keep them all distinct—they are nowhere expressly defined and occur haphazardly. This style is consistent with Nietzsche’s strategy of confounding the concept-thinking of the theoretical reader: the conceptual hiatus the reader experiences in attempting to resolve meaning from the deliberately insufficient context is the window Nietzsche creates to engage the reader emotionally in a different register of thought. As well, the reader’s experience of a cascade of meaning shifts for the same concept was probably meant to induce the reader to experience “justice” as a genealogy of genius events, and thereby gain non-conceptual understanding of justice through a type of conceptual-gestural mimesis. Nonetheless, aside from their rhetorical functions, his conceptual uses of justice do fall into patterns that can eventually be discerned. “Bad” references to justice generally mean the factual institution of law or its product. Nietzsche primarily used the term “justice” in positive ways.

In some contexts “justice” means a treaty-building methodology to negotiate the needs of inconsistent interests that, in some ultimate sense, depend upon each other but cannot be reduced to a fixed set of rules. Nietzsche, again, haphazardly varied the generality of the application of the concept, from general causation to political interests to friendship to conflicting psychological needs. For this meaning of justice, Nietzsche appears heavily indebted to Aristotle’s notion of proportionality. Holmes and Nietzsche both treat this process as fundamental to human decision-making and creativity, whether in law (Holmes) or in ethics (Nietzsche), but Holmes does not call it justice.

In some contexts, “justice” means the issue of how society should treat those who commit asocial behaviour. For Nietzsche, the response should range on a scale from severe punishment—
most often a bad justice—to providing health care to treat the obvious presence of decadence—
most often a good justice—depending on the extent of surplus means available to the society.
Nietzsche’s distributive justice for most circumstances is quite generous to the weak and
Nietzsche’s psychology shapes his views on what measures society should take to remold culture
to reduce the degree of decadence (psychological/physiological weakness) within individuals.
Nietzsche’s prescriptions regarding decadence are subtle because his theory of psychology holds
that command moralities generate asocial sentiments (resentment) that, in the past, have been
politically exploited to the advantage of certain social institutions and those who gain power
from them. Nietzsche’s prescriptions do not translate into hard rules and processes to discipline
society; rather, they set goals to be achieved through contingent strategies of rhetorical
persuasion. As noted above, Holmes’s magnanimity differed somewhat from Nietzsche’s.
Indeed, Nietzsche’s is an uncanny echo of “each according to his ability, each according to his
need.”

Nietzsche’s most extended treatment of “justice” is in terms of principles to provide
conditions for the creative growth of individuals. Both Holmes and Nietzsche dwelt on the
training of reliable creative types. Holmes pondered the role of the individual judge in driving the
evolution of common law, Nietzsche the “great person” in social evolution. Developing on
Emerson, both saw “great people” as necessary to creative growth at the collective level (though
far from sufficient), and for this purpose considered the collective interest to be primary over the
individual—individuals have a social duty to become great. The hard issue is the degree to which
the collective, and the efforts of the great persons toward that end, can justifiably compel non-
voluntary sacrifice. For Nietzsche, great well-trained individuals would give great expression to
collective-oriented virtues and voluntarily self-sacrifice to the common interest. Nietzsche,
however, failed to generate clear criteria to gauge the degree to which the collective interest in cultivating great individuals could justify intrusions or could justify faith in the intuitions of great individuals.

For Nietzsche “justice” entailed protecting the task of cultivating great individuals from a tyranny of the weak. For example, much of the morality aimed to protect the freedom of the individual Nietzsche deconstructed as the weak politically combining to establish refuge to placate their decadents needs—they lacked capacity to suffer for collective purpose. Thus their desire for religion, “rights,” “freedoms” and “equality” manifest a tyranny of decadents seeking refuge from suffering, which distracts from the health and growth of culture—selection is crossed; the species suffers; Darwin failed to perceive the full dynamics. Again, the dangerous issue is the degree to which conscription of decadents is justified—how can society decide whether it can afford to attempt to transform decadents through rhetorical persuasion rather than conscription?

Finally, Nietzsche’s conception of “justice” included an underdeveloped critique of capitalism and political institutions and their tendency to erode cultural development. Again, the nagging issue is how to decide the trade-off, in this case, between commerce and culture. Nietzsche’s thoughts remained uncategorical and lacked instrumentality regarding how to arrive at just trade-offs. Indeed, Nietzsche’s self-perception was that society would have to be harsher than he personally could be.

How are these diverse, partial conceptions of justice to be unified without falling into the systematization trap each of Nietzsche and Holmes sought to avoid? The solution would appear to be to retain a clear distinction between justice as a macro-level concept, justice as various micro-level dynamic principles, and justice as the overall dynamic task of developing rules of
conduct for society. Nietzsche and Holmes focus on the micro-level dynamics and implicitly rely on the micro-to-macro transition to come out well as an article of faith. The justification for such a move must ultimately depend on empirical investigation, which is why this thesis has gone on to develop a conceptual model as an extension of the thinking of Nietzsche and Holmes.

There are serious dangers in making a micro-to-macro level transition. Nonetheless, both Nietzsche and Holmes were intuitively well equipped to avoid the vulgar reductionism characteristic of bad socio-biology—their genealogy viewed development as the historical interplay of accidental configurations and relatively autonomous causalities at both higher and lower levels. Holmes’s narrow professionalism enabled him to link self-development more adequately with the collective development of embodied expertise. However, both thinkers continually struggled with how much to apply developmental truisms from the individual level, where creativity celebrates suffering and destruction, to social development.

In Emerson’s address at Harvard referred to above, he elaborated on Heraclitus’s insight that “War is the father of all things” and described war as dissolving adhesions, thus enabling the reorganization of social forces. War was thus good not in spite of, but because of the killing.\textsuperscript{118} The danger of this thinking, however true from a developmental perspective, is manifest. Little wonder Nietzsche and Holmes have been both described as fascist. The issue they did not fully develop to satisfaction is to what extent the necessary and justifiable suffering and sacrifice as part of individual development could be validly projected to the social level. This is no simple matter. Richard Rorty, for example, opts out and considers Nietzsche valid only as an exemplar of personal development.\textsuperscript{119}

\textsuperscript{118} Novick, 101
Despite Emerson, Holmes’s Civil War experience showed him that tremendous collective harm could result from pressing an idea too hard before its time. The range of solutions is constrained by the historical alignment of social forces. Experience, guided by seduction, prepares the way for significant transformations. Nietzsche too understood the importance of timeliness and seduction. The problem of decadence admits of no false optimism. Effective psychotherapy is contextual and cannot be accomplished by legislative fiat, much less principles of distributive justice purporting to be categorical imperatives. Nietzsche and Holmes therefore had to recede into a “common law” approach to negotiating the micro-to-macro level aspect of justice, guided by the collective effort of highly trained, mutually rhetorically-persuading individuals that accomplishes the collective, meta-rationalist system learning Holmes identified for law. The aim of their justice is to promote social development through a strategy of promoting the reorganization of social forces in response to social stress. A major aspect of this strategy is promoting the conditions for individual growth and working to erode decadence and its political manifestations. Justice is a health-care issue. Indeed, the title of one of Nietzsche’s early essays was The Philosopher as Cultural Physician.

What Nietzsche does make accessible is the means for radical critique of metaphysical approaches to a theory of justice. The rationalist theories of justice of Rawls and Habermas can be forcefully criticized from Holmes and Nietzsche’s perspectives as locking society into a decadence-reinforcing and socially debilitating constellation of rights and freedoms. One strategy for understanding justice in Nietzsche and Holmes would be to show how they are inconsistent with Rawls or Kant. A similar strategy to define “literary justice” is successfully employed by Wai Chee Dimock in Residues of Justice: Literature, Law, Philosophy; however, the residues of
her critique are ineffable by assumption and give little guidance to develop the constructive and empirical aspects of justice in Nietzsche and Holmes.

The methodology of this thesis in dealing with justice in Holmes and Nietzsche must therefore keep open a rich enough concept of justice to accommodate the various aspects they cover. The working concept of justice must be expansive enough to accommodate justice as a set of dynamic principles of rule modification that applies to itself. Equilibrium models of justice can then be accommodated as a special case—the end of history once the flame of genius has been extinguished.

1.6 Outline of the Thesis

The subject matter of the thesis defies linear development and presentation. The holistic nature of the subject matter makes this inherently difficult. Neither Holmes nor Nietzsche ever produced a systematic presentation of his thinking—Nietzsche abandoned or failed an attempt to do so, Holmes was busy living his philosophy. Holmes and Nietzsche tended toward either fragment-based works—such as aphorisms and cases—or single-theme essays or speeches. However, each essay or speech refracts all themes, either through presumed background context, through dense, undeveloped assertions (aphorisms), through multiple levels of extended metaphor, or through architectural principles that organize the stylistic elements of the work. To interpret their work, a reader must inductively reconstruct all the themes holistically from the diverse fragments within the essay, much as one would infer a magnetic field from holistic patterns of iron filings on a piece of paper placed over magnet.\textsuperscript{120}

\textsuperscript{120} The metaphor is from Ted Hughes, \textit{Shakespeare and the Goddess of Complete Being} (London: Faber and Faber, 1992).
The presentation of the thesis shall be as follows. Each chapter develops a sustained argument on one theme that is particularly important to the main task—constructing Holmes and Nietzsche’s theories of justice. All other main themes will be refracted through each essay and displayed in different contexts. Self-organized criticality, for example, is a main theme and appears in the contexts of creative psychology, rhetoric and education, legal reasoning and social theory. Ideally, the reader’s image of self-organized criticality will sharpen holistically with each perspective in the manner of a holographic image. The themes of the chapters are as follows.

2. — The second chapter—“Legal Reasoning”—develops a model of legal reasoning and legal argumentation by applying principles of computational complexity to clarify conceptually parallel themes in Nietzsche and Holmes. Self-organized criticality will be seen to have both critical and constructive significance for legal reasoning. By analyzing decision-making and advocacy in terms of creativity and rhetorical persuasion instead of justification and argument, the chapter will present a new model of legal reasoning.

The chapter is in three sections. The first section embarks from the observation that computational modeling of legal reasoning has isolated problems of computational complexity that exceed the capacity of computers and conscious, rational deduction. Specifically, adding new factual dimensions into the scope of precedential comparisons is computationally hard. This difficulty can be attributed to what social theorists call the micro-macro problem. In effect, to infer a micro-level rule to produce a macro-level goal is a problem of sufficient computational complexity that macro-phenomena appear to emerge holistically. In particular, one cannot logically deduce micro-level rules from desired macro-level goals. Similarly, one cannot deduce to what degree micro-level rules could robustly endure transgressions in favour of conflicting values without collapsing established emergent goals, such as trust. The judicial mandate is to
exploit continually the robustness of established rules to enable transgressions to explore for new micro-level rules that achieve new emergent goals without collapsing existing goals. In general, complex systems that adapt in this way go through a four-stage, systole-and-diastole cycle. For a time, new rules are rigorously enforced at the expense of established values, until the new value is sufficiently entrenched that the new rules can be less rigidly enforced. The suppressed, competing equities will be called “residues.” This section of the chapter sets out a logic of how doctrine and case narratives interact to generate, collect and use residues to adapt the law in response to the computationally intractable micro-macro causalities. Residues are captured in doctrinal distortion, equitable discretion or dissent, depending on the stage of the doctrine in its developmental cycle. By examining decision narratives as factual outcomes without regard to doctrine (as would the Holmesian “bad man”) from the perspective of the previously subordinated value, residues can be inductively discovered from patterns of distortion, discretion and dissent in the cases. Legal reasoning constructs new doctrine (micro-level rules) using a large base of fact-specific decisions that each closely examines causalities within the limited context of a specific dispute. The system generates “bottom-up” knowledge with greater assurance that the inductive generalizations and doctrinal inventions will continue to capture causalities not previously understood but taken for granted. Presumably, such bottom-up knowledge would be less likely to impair existing, emergent macro-level goals catastrophically.

The inductive-creative step of transforming doctrine to satisfy a set of conflicting goals each beyond a minimum threshold is computationally hard. The second part of the chapter explores a psychological explanation as to how this computationally hard aspect of legal reasoning could be biologically possible despite it being too complex for computers or conscious, deductive reasoning. The intuitive explanation is that creative legal reasoning exploits to
advantage emotional bias—the same bias that subconsciously taints decisions made in conflict of interest. Judges emotionally attune themselves to established values and precedents. The "logical" residues identified above reside within the judge as unresolved emotional stresses—"emotional" residues. Legal argument is rhetorical persuasion as the art of inducing, activating or strengthening emotional residues within the judge. An act of creative legal reasoning invents doctrine that minimizes the emotional distress within the judge at the moment of decision when all competing values applicable to the dispute should be fully activated. The model proposes that judges, by having emotionally absorbed values, doctrine, precedents, factual elements and the underdog's perspective, as they all relate to the case, can stage a process of self-organizing criticality at the neural level that generates doctrine from residues. Moreover, the exponential number of energy transactions implicit in the physics of neural self-organizing criticality effectively creates an information-processing capability of a higher order of complexity. The model of legal reasoning, therefore, is psychologically plausible.

The third section of the chapter examines the communal process in which judges create dramatic narratives as residue-containing precedents for the use of subsequent judges. The requirements for staging self-organizing criticality within a judge will be shown to explain many of the characteristics of formal doctrine and precedent rules, and also suggest new criteria for the critique of legal process. The process is capable of generating a system-wide intelligence that exceeds the cognitive capacity of any one judge. This model gives operational content to Holmes's attempt to describe the development of common-law doctrines using evolutionary concepts.\(^\text{121}\) The model shows how case-based reasoning relies only on case-specific decisions made within a decision budget minimal to resolve the dispute at hand and makes generalizations

that can produce empirically plausible bottom-up knowledge. The model therefore responds to John Dewey’s plea for a logic capable of deriving antecedent rules (if A then do B) from consequential goals (avoid C) in a way that accounts for the holistic causation implicit in the micro-macro problem.\textsuperscript{122}

3. — The third chapter—“Cultivating Justice”—contains the crux of the justice theme. Justice is continual adaptation to how the incompleteness of language constrains personal development and the architecture of social institutions. Nietzsche framed the issue as a study of the relationship between genius and state. Justice, for Nietzsche, is the constructive task of cultivating self-imposed partial restrictions to enable greater units of social power (institutions) without living in the present at the expense of the future. Opportunity for personal development requires the support of enduring cultural institutions; conversely, the adaptive development of cultural institutions requires highly creative individuals. Nietzsche applied principles of self-organizing criticality to cast justice as the dynamics that, like common law, simultaneously promote enduring order and flexible adaptation.

The first part of the chapter examines Nietzsche’s \textit{On the Genealogy of Morality} to analyze the problem of institutional over-discipline. New social institutions require a period of enhanced discipline and extraction of surplus from other goals until its requirements become encultured within individuals as habitual and unreflective, after which the discipline can be relaxed. This creates a systole-and-diastole pattern as society addresses a new social goal. However, Nietzsche claims that human psychological desire for certainty from fear of suffering manifests itself in implicit completeness assumptions that tends to lock development within the over-disciplining stage of development. This, Nietzsche claims, causes individuals to self-limit

excessively, which undermines the potential for individual development and, consequently, social development. Nietzsche's eternal recurrence doctrine based on the sceptre of death potentially resolves the problem on the individual level by spurring individual self-sacrifice for community values. Institutions, however, are not so biologically compelled to honour values external to themselves. The problem of justice, then, is to design and make psychologically enduring a great logic of institutional self-limitation.

The next part of the chapter outlines Nietzsche's critique of how institutional over-discipline uses concepts of morality such as guilt, free will, and pity within a metaphysics of completeness of language. The conceptual scheme falsely proclaims the principle of sufficient reason to be complete and thereby makes all suffering have a guilty (identifiable and avoidable) antecedent cause, which makes all individuals suffer from guilt. Institutional morality then administers to this suffering with palliatives by justifying opportunities to exercise power over others in the name of ideals that serve the over-discipline of the institution. Individuals are thereby encultured to seek power by reinforcing the institution rather than through transformative self-development that could destabilize the institution.

The chapter then sets out Nietzsche's solution to the institutional over-disciplining problem at the individual level. The individual regulates self-development by at some stage broadly shifting from self-empowerment (ego values) to self-application (eros values). Nietzsche locates eros values in sexuality as the masochistic desire to endure suffering to provide a robust community for one's children's children to do the same, all without living in the present at the expense of the future. Nietzsche's eternal recurrence doctrine exploits sexuality and fear of death to manage this transition.
The next part of the chapter sets out Nietzsche's "common-law" solution to the problem of managing the systole-and-diastole cycle of social institutions. The most encultured persons with great powers of creative self-development would ensure that institutions self-limit instead of blindly reinforcing their own maintenance requirements at the expense of external values. Abuse of power would be safeguarded through a court-like college of cultural physicians who would advance their know how in the manner of residue-based common-law legal reasoning as developed in the previous chapter. For Nietzsche, there would be an inherent vulnerability of the system to instinctive windfall opportunism by males. Nietzsche traced this instinctive disposition toward negative-sum social behaviour to male uncertainty over the parentage of their children. For Nietzsche, because females are certain of their genetic contribution to their children, they are less disposed to instinctively seek windfalls and fear uncertainty. Although Nietzsche counsels means to discipline and manage male demonism, Nietzsche apparently thought that ultimate disciplining authority must reside within the female elite to increase the reliability of the college of cultural physicians.

The final part of the chapter compares this dynamics theory of justice to recent approaches that share many features, including Wai Chee Dimock's law-and-literature approach, Richard Weisberg's reading of Nietzsche on justice and his law-and-literature approach to the role of great text, Drucilla Cornell's postmodern approach and Robin West's approach that emphasizes the importance of nurturing relations. This part will consider in some detail whether Nietzsche's approach is socio-biological. It will argue that by focussing on both biological and cultural constraints, Nietzsche's approach aims to maximize individual potential for self-development that overcomes the contingencies of biology and culture and is therefore fundamentally democratic.
4. — The fourth chapter—"Joy in Duty"—addresses the life philosophy that Holmes and Nietzsche viewed as integral to their understanding of justice. For them, the good life embodies and does the dynamics of justice. A skeptic can suffer and self-sacrifice to become part of the dynamics of justice without knowing with certainty that the result of his or her deeds would redeem the suffering they entail. The skeptic would continually evaluate critically his or her social situation and develop powers and a task that intuitively seem likely to produce deeds that spur social growth. When the moment of deed presents itself, the task is pursued with blind resolve and faith in justice. For Holmes and Nietzsche a just life is not only possible for a skeptic, it is the most compelling and satisfying life. Nietzsche calls this state Dionysian Joy; Holmes calls it the Soldier's Faith.

The first part of this chapter examines how Nietzsche finds faith in justice (Dionysian Joy) to be both conceptually plausible and psychologically plausible. For Nietzsche, justice extends thermodynamic complexification into the realm of psychology and society. Nietzsche uses metaphysical and mythic concepts to map thermodynamic principles to psychological mechanisms to regulate the seeking of suffering or repose as means to complexification. Nietzsche identifies three principal psychological regulators as the repose of the illusion of rational certainty, the power-creating gaiety of creative deed, and the love of fate (masochistic self-sacrifice) implicit in comic sexuality. Rational illusion purchases repose at the expense of the future. Gaiety creates power for future growth. Love of fate is faith that the creative force of nature will eventually make use of one's deeds and is expressed through the comedy of attempting to lift completely the veils of the mystery of sexuality—golden laughter.

For Nietzsche and Holmes, an emblem of justice is the chivalrous knight who endures any fate for the romantic honour of a woman. The second part of the chapter reviews Holmes's
speeches to find within Holmes the same constellation of task, sexuality, laughter and faith shaping a life of just deeds. Guided by Nietzsche, the chapter will analyze Holmes’s greatest work, *The Soldier’s Faith*.

5. — The fifth chapter—“Nietzsche’s Horrific Thought”—addresses the problem of Nietzsche having a hidden political agenda and covertly using manipulative rhetorical techniques. From one perspective, this issue is preliminary to any interpretation of Nietzsche’s writings. However, from the perspective of the previous chapter, Nietzsche’s esoteric writing manifests his faith in justice and the eternal creative force:—he could die silent in faith that his greatest deed lay buried as a treasure for subsequent discovery and use for creative growth. Nietzsche’s esoterism is his critically informed strategy to do justice as a life philosophy.

Nietzsche’s esoteric agenda is a preliminary issue that conditions how one reads Nietzsche, but it involves reading Nietzsche. The methodological problem can be illustrated as follows: how does one interview a hypnotist to assure oneself his intentions are good? Reflecting on the interview, one never knows if one’s impressions are the result of hypnosis. To escape Nietzsche’s sphere of rhetorical manipulation, this chapter uses a triangulation method to isolate the hidden agenda. Briefly, the essay presents concepts from modern sciences, including self-organized criticality and evolutionary development, that match Nietzsche’s exoteric writing—the apparent Nietzsche. Nietzsche’s biography is the second point of the triangle. The third point of the triangle, the esoteric content, will be inferred by matching implications of the modern concepts to notable aspects of Nietzsche’s biography that indicate that he accepted these implications.

The chapter has two main parts. The first part will use concepts from current theories that correspond to Nietzsche’s apparent account of the psychology of non-decadent creative growth.
The chapter consolidates current scientific concepts that were introduced piecemeal in previous chapters and links them to Nietzsche’s pre-chaos theory understanding of them evident in his exoteric writing.

The second part of the chapter examines Nietzsche’s biography and writing to argue that the esoteric Nietzsche applied sociobiology to infer the presence of flaws in the male psyche generated by the dynamics of competing reproduction strategies. In Nietzsche’s esoteric view, these flaws spawned negative-sum male strategies that are decadent from the perspectives of both individual and collective development. It will be argued that esoteric Nietzsche anticipated recent developments in evolutionary biology such as Richard Wrangham’s and Dale Peterson’s *Demonic Males: Apes and the Origins of Human Violence*. The chapter argues that esoteric Nietzsche experimented with possible solutions and settled on some form of developmental matriarchy. The chapter argues that esoteric Nietzsche believed he had to seduce his elite readers to accept this unconsciously and that this is the hidden elitist political theory that Geoff Waite argues is embedded in Nietzsche’s works.

6. — The sixth and final chapter—“Para-Conceptual Rhetoric”—addresses how Nietzsche uses his developmental theory to produce a theory of educative esoteric rhetoric. As Holmes observed in *The Soldier’s Faith*, a writer cannot explain faith in justice to a reader who has not experienced it. Nietzsche likewise observed that *The Birth of Tragedy* was a book for initiates. Consequently, Nietzsche sought to “educate” his readers by writing in a way that could induce them to *experience* his understanding of joyous science as an effect of struggling to make sense of his texts.

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Whereas the previous chapter closely examines Nietzsche's biography to discern what he was trying to accomplish, this chapter closely examines passages of Nietzsche's text to understand how he sought to accomplish it. In so doing, the sixth chapter examines the significance of the self-organized criticality view of causation for the methodology of theory development and rhetoric. In particular, Nietzsche's psychology of creativity generates rhetorical strategies for inducing creative learning in oneself and in others. Nietzsche's works both contain a theory and practice of esoteric educative rhetoric and comprise a student workbook for a new methodology of inductive science—one educates oneself in Nietzsche's inductive science by struggling to interpret his works. This empirical science becomes the "science" aspect of the formulae "legal reasoning is science in action," "justice is science in action for life," and "justice is joyous science." Nietzsche's insights into rhetoric are then applied to closely analyze Holmes's speech "The Path of the Law" to show how the same themes about inductive science are holographically projected into the rhetorical structure of that speech.

Once the rhetorical practices of Nietzsche and Holmes are seen as demonstrations of their understanding of justice as a life philosophy, it will become apparent that both Nietzsche and Holmes, through their writings, were great practitioners of justice.
CHAPTER 2
LEGAL REASONING

2.1 Introduction

Suppose we asked architects to build us a palace of justice. By chance we first retained a visionary “modern” firm where the architects define justice from first principles of language, logic and natural laws of equality and so forth. These visionary architects then render these principles into grand design motifs—soaring spans, vast windows, grand symmetries...an awe-inspiring design that conjures faith in the majesty of law. But after years of failed construction, skepticism sets in—perhaps this palace cannot be built from mud and straw. The architects respond, “The palace would be complete if only your builders were less corrupted from their ‘natural’ construction faculties. We can prove these faculties from the principles that define justice.” Disillusioned, we chance upon a more pragmatic, “postmodern” firm of architects. This firm recommends we toss out the designs—“We only have crude bricks. Ideal designs divert you from the primary task—making better bricks—and so impede the task of justice. We’ll build a palace of crude bricks and rebuild it every few years as our bricks improve.” “Nihilists!” the modernists retort—“How amoral to design the palace of justice based on something as mundane and temporary as the available building materials from time to time—even if we cannot build our design yet, we need ideals to inspire our building efforts.”

Suppose these bricks were legal reasoning. Wouldn’t we want our architects of justice to prove that their presumed faculties of reason are psychologically and computationally sound before paying them for their grand designs? Suppose the ideals of justice in traditional
jurisprudence presumed powers of computation that could not, in principle, exist. How useful are those designs? Or more critically, who profits from them?

2.2 Heretical Jurisprudence

Traditional legal theory has yet to produce a computationally and psychologically plausible model of legal reasoning. Recent attempts to model legal reasoning with computers have exposed this shortcoming. Indeed, the lack of a computationally plausible model of legal reasoning has been a major roadblock to significant breakthroughs in the discipline of law and artificial intelligence.

Scholars in the area of law and artificial intelligence have come to acknowledge that modeling legal reasoning is fundamentally an issue of jurisprudence.¹ However, it has been accepted as an article of faith that a computational examination of legal reasoning would add nothing to existing jurisprudence. Richard Susskind claims “it is difficult to imagine that any subsequent contribution of expert systems to jurisprudence could be of such import to overshadow the latter’s initial endowment.”² Susskind advises computational jurists to be content to articulate their systems in terms of “the relevant works of seasoned theoreticians of law.”³

Computational jurists should not let this advice divert them from their task, which must be more critical, more constructive and more concerned about legal reasoning than traditional legal theory has been. Traditional legal theory has treated legal reasoning as an afterthought. For example, the tradition of legal positivism has produced a self-admittedly incomplete account of

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² Susskind, *ibid*, 20.
legal reasoning, using simple deductive logic supplemented by ineffable, discretionary acts of human will that are left unanalyzed.\textsuperscript{4} Ronald Dworkin's important variation on positivism enticingly offers a complete account of legal reasoning, asserting that a correct, reasoned answer exists for each case. A litigant thereby enjoys a "right" to a result that might trump the political discretion of the elected legislature and provides legal process with a justification and political legitimacy to enforce the result.\textsuperscript{5} Requiring so much more from legal reasoning, Dworkin has produced a more satisfactory description of its actual practice, but ultimately, he presumes an ineffable mental faculty that applies principles and constructs interpretations sufficient to achieve the strong legitimacy requirements of his theory of justice. Dworkin has been unable to specify in detail how the legal reasoning is done, or even prove it could be done. Certainly, Dworkin has not specified sufficient detail to assist the task of constructing expert systems.\textsuperscript{6} Indeed, critical and realist approaches to jurisprudence have exposed serious shortcomings in positivist models of legal reasoning as either a description of or restraint upon actual practice;\textsuperscript{7} however, no satisfactory constructive alternative has been developed.

Critical approaches in law have yet to shift from critical mode to constructive mode with respect to legal reasoning. Computational theory can contribute significantly to legal theory in this regard. To appreciate this possibility, it is helpful take a broad view of the progression of

\textsuperscript{3} Susskind, \textit{ibid}, 20. 
\textsuperscript{6} Stamper, \textit{supra} 238. 
computational theory, from purely critical modes of analysis to jointly critical and constructive modes of software development. Beginning in the fields of mathematics and logic, Georg Cantor and Kurt Gödel developed new critical techniques to expose ill-defined concepts that cannot be logically constructed, such as "infinity" and "true means provable." By applying these methods of critique within computer theory, it has been proven that programs for reasonable-sounding tasks, such as being able to decide whether a computer program would halt, cannot be logically constructed. Indeed, computer theory has refined its critical self-deprecation even further with theories of computational complexity that identify which tasks are simply not feasible in terms of the computational resources they would require—principally time. Determining the effective computational capability of the tools of reason has become an essential element of critical analysis in computer theory. Conversely, complexity analysis has informed software design efforts, which seek to construct efficient and adaptive formal structures to improve effective computational capability. Critical awareness of how the ambitions for a reasoning entity must be limited by its computational capability—a computational bottleneck—has even inspired computer theorists to evaluate biological processes in search of means to achieve even greater computational capability. Although legal decision-making, like a computer program, is principally constrained by time, the critical rigor and constructive ingenuity of computational analysis has yet to be fully applied in jurisprudence. Legal realists, critical legal theorists and

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postmodernists have exposed or deconstructed doctrinal or political essentialisms, such as the "location" of a corporation or the presumed completeness of the rule of law. Nonetheless, such jurists have overlooked important tools for more precise critical analysis—to distinguish which ideals are not computable at all from those that are merely too difficult for rational derivation—and constructive synthesis.

Legal theorists might have achieved the same progression as computational theory by empirically analyzing legal reasoning in practice, which has been a fruitful strategy in computer science. Within jurisprudence, however, the desire for a model of legal reasoning derived from the pragmatic needs of legal practice has been anathema. As both a practising lawyer and a legal theorist, I have observed that traditional jurisprudence is irrelevant to legal practice and lawyers ignore it. Indeed, one might claim traditional jurisprudence blinds one to important aspects of legal practice and successful lawyers wisely avoided it.

In addition to enhancing critical rigor and constructively improving the effectiveness of legal process, a feasible model of legal reasoning is important for a third reason—empirical verification. If legal process is a communal learning effort that adapts better when legal reasoning follows certain dynamic principles, then those principles have normative status to the extent their utility is demonstrable. Computer simulation of dynamic systems and evolutionary processes is proving to be an extraordinarily powerful laboratory tool to confirm the value of various approaches of Esther Thelan and others. See Esther Thelan and Linda B. Smith, *A Dynamic Systems Approach to the Development of Cognition and Action* (Cambridge, MA: MIT Press, 1994).

strategies of adaptive change. An empirically and computationally plausible model of legal reasoning can lead to scientific evaluation of the dynamic principles presumed by legal reasoning. Again, the ambition to generate normative claims about how to go about legal reasoning based on empirical evaluation of reasoning itself has been anathema to methods of legal theory. Holmes’s injunction to view legal decision-making as does a “bad man” has been disdainfully understood as extreme amoral positivism or doctrinal skepticism, and his ambition to transform jurisprudence into an empirical science in the spirit of evolutionary sciences has rarely been taken seriously.

One senses that legal theorists think it vulgar—even heretical—to begin with legal reasoning before considering the “more important” issues of jurisprudence. Yet, it is simply pragmatic common sense that, when faced with a task, one evaluates the capability of the tools, materials and other resources at one’s disposal. Indeed, lacking adequate means, one might have to temper the idealism of one’s ambitions—perhaps “justice” is an ill-defined concept that cannot be logically constructed. Perhaps justice is better achieved by exploring means of improving the tools of reason, rather than rationalizing failures and deconstructing rationalizations of failures ad infinitum. Indeed, a utopian vision might paradoxically distract us from the means to its fulfillment.

This chapter presents a heretical approach to jurisprudence. Legal reasoning is the primary focus. The attitude of computability and computational complexity analysis will inform an analysis of legal reasoning as used in the common law process. The analysis isolates capabilities of legal reasoning that would be too time-consuming computationally to achieve with

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simple deductive logic. Once computationally hard legal reasoning skills have been isolated, psychological mechanisms that could account for such skills can be sought.

The heretical result: legal reasoning harnesses a non-conscious biological process familiar to all practising jurists as a pervasive element of legal process—emotional bias. The power of common law legal reasoning is constrained by the degree it manages to exploit to social advantage a skill that jurists have only consciously recognized in its negative form—the subliminal intelligence for protecting self-interest in situations of conflict of interest. An important conjecture of this thesis is that emotional bias exploits preconscious perceptions and a biological process of “self-organized criticality” that creates new conscious representations from such perceptions, achieving a degree of computational complexity beyond what is generally thought to be feasible using computers. This thesis claims that legal process should be engineered to cultivate within its judges and practitioners a capacity for emotionally driven self-organized criticality outside conscious deliberation as a means to generating adaptive decisions and creating doctrine. Additionally, this thesis analyzes legal process as a set of social practices to propagate situational decisions into the emotional biases of other jurists and organize the results into flexible, hierarchical formal structures to achieve a collective, bottom-up intelligence.

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13 Antonio Damasio has introduced social science to the possibility of serious inquiry into the constructive role of emotions in decision-making. See Antonio Damasio, Descartes’ Error: Emotion, Reason, and the Human Brain (New York: Putnam, 1994).


15 Locating pre-linguistic knowledge within emotional bias accords with recent cognitive developmental psychology in which, to analyze the emergence of conscious representation, a representation is defined as a “functioning isomorphism” so that a representation is not a copy of reality and does not imply consciousness. See Katherine Nelson, Language in Cognitive Development—The Emergence of the Mediated Mind (Cambridge: Cambridge University Press, 1996) 11. This thesis goes beyond Nelson by identifying self-organized criticality as a key process in the emergence of representation.
Consider again a structural comparison of computer theory and jurisprudence, which the following diagram makes more vivid. (Figure 2.1.) The broad task of computer science relevant to present purposes is to make computers more capable of modeling human intelligence. Computability critique steers designers away from impossible tasks that have been wrongly thought to be skills of human intelligence. Nonetheless, relative to what can be achieved currently by software engineering, there plainly remains a “surplus” in the domain of human skill and intelligence. Artificial intelligence seeks software engineering to reduce the human surplus to nil, amid philosophical debate as to whether this is possible. Still, human creativity seems to elude software engineering. Expert system designers finesse the creativity problem by articulating the functional results of creativity already achieved by experts, and offloading the task of ongoing creativity onto the human experts. Complex adaptive system designers attempt to construct creative computer processes as the means to reduce the human surplus to nil. Complexity critique steers designers toward computationally efficient and away from computationally infeasible tasks, and suggests that certain supposed human skills might be computationally implausible. DNA computing changes the whole perspective because it provides an existence proof that biological processes can achieve a degree of computational complexity and creativity that has been widely accepted as infeasible for computers. Consequently, the human surplus might never be fully reducible to nil, unless we learn to exploit biological computers.
Figure 2.1  Computer Theory and Heretical Jurisprudence

This thesis conjectures that emotional creativity beyond conscious deliberation is such a biological computer and accounts for a surplus in judicial decisions. Legal doctrine—or any external, reductive explanation of the decision database, such as economic theory—is necessarily incomplete and contingent, or must use concepts that are not computable and assume ineffable powers of reason. Positivism asserts the former—doctrine is incomplete—and skirts the problem of judicial legitimacy by claiming that hard cases that expose the incompleteness are rare. In contrast, Dworkin relies on “principles” that might not be computable and asserts ineffable powers to interpret sources of law to find principles, to decide when to trump rules, and to “weigh” competing principles. Legal realism and critical legal studies expose some of the weaknesses of both approaches, but ultimately fall into the latter approach, reducing law to some theory external to legal process. Within heretical jurisprudence, every case is potentially a hard
case, the surplus does not disappear by reduction to the meta-language of an external theory, and
the legitimacy problem does not go away—the unthinkable for traditional jurisprudence.
Moreover, judging is presumed to be an emotional skill that, if trained carefully, can outperform
conscious reason and justification. Resisting the temptation to seek refuge in ideals when faced
with the unthinkable is the only method to psychologically analyze, constructively enhance, and
critically evaluate this presumed emotional skill.

An existence proof that such a skill exists is required. This thesis presumes this work to
have been done by Dworkin, J.C. Smith and the whole law and economics tradition of showing
that common law judges continually gravitated intuitively to economically rational decisions
despite couching their decisions in terms of invented doctrine. Economic omniscience need not
be assumed. Emotional bias is much more complex and vulnerable to distortion than the
idealized mental faculty assumed by the rational actor hypothesis. Indeed, the vulnerabilities of
emotional bias suggest new perspectives for critique and new criteria to construct safeguards in
legal process.

Heretical jurisprudence accords well with the results of critical legal studies, apart from
their nihilistic attacks on legal reasoning and formalism. With a more fully specified model of the
adaptive use of formalism (along the lines of object-oriented software design principles), critical
theorists can attack the misuse of formalism in common law legal reasoning rather than

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16 This is not to say decisions should be wholly emotional, but one has to overcome the modern bias of treating ideal
decision-making as wholly rational. The holistic, bi-directional causation between emotion and reason is discussed at
length in the middle part of this chapter: "Creative Persuasion—Causal Residues and Self-Organized Criticality."
17 J.C. Smith, "Machine Intelligence and Legal Reasoning" (1997) 73 Chicago-Kent Law Review 277; J.C. Smith,
"Action Theory and Legal Reasoning" in Tort Theory, Ken Cooper & Elaine Gibson eds. (North York, Ontario:
Captus Press, 1993) 104; Cal Deedman & J.C. Smith, "The Nervous Shock Advisor: A Legal Expert System in Case-
26; Cal Deedman, "The Nervous Shock Advisor: A Legal Expert System in Case-Based Law" in Proceedings of the
18 Richard Posner, Economic Analysis of Law, 4th ed. (Boston: Little, Brown, 1992). One need not accept that the
law and economics approach is beyond debate to accept that they have shown prescient economic intuition in enough
formalism *tut court*. In other words, critical legal studies have identified symptoms, but have lacked precision as to cause.

Heretical jurisprudence might seem to confirm an old-fashioned, Holmesian notion of common law. It does. The same structural comparison of computer theory and heretical jurisprudence shown graphically above can be extended to Holmes’s jurisprudence. Indeed, there is a progressive pattern from computer theory, through Nietzsche, through Holmes to heretical jurisprudence.

Figure 2.2 Nietzsche and Holmes

The common theme governing the philosophies of Holmes and Nietzsche is the inadequacy of reason due to the incompleteness of any language to model causal relationships completely. Our ability to learn collectively using reason lags far behind our ability to instances to preclude dumb luck as a satisfactory explanation. All that is required for present purposes is evidence that judicial intuition *can* outperform conscious rationalization.
conceptualize ideal outcomes. The overriding task is to reduce this gap by finding dynamic principles that improve the performance of the tools of justice—creative discovery and reason. This entails examination of the psychology of creativity and decision-making. Holmes and Nietzsche went some way down this path. Holmes tells us the following about law:

1. Judicial decision-making is an unconscious and emotional process.
2. How values come into play in the context of a specific decision—the point of contact—cannot be reliably anticipated by general rules available to consciousness because causalities are too complex for grand, top-down theories to be empirically reliable. Conscious general rules should be generated from the bottom up, from numerous cases of real-world experience.
3. A dramatic description of the facts of a case and the decision outcome is the most reliable indicator of the empirical content of unconscious judicial deliberation.
4. Judicial opinions should be written so as to provoke an emotional response with regard to all the competing values at play in the unconscious when the decision was made.

Nietzsche tells us the following about creativity:

1. Every set of conscious rules of action simplifies reality and is incomplete—it necessarily generates residues of recalcitrant effects that will eventually haunt the rule system with stressful experiences.
2. Creative transformation of the rules is a product of self-organized criticality in an unconscious neural process that uses emotions and gestures.
3. To achieve a creative transformation one must seed one’s unconscious with numerous emotional experiences that cannot quite be adequately explained under the conscious rule system—the incorporation of small doses of “irrational” experiences.

4. Because the efficacy of the conscious rule system as a code of action requires faith in the soundness of the rules from time to time, the conscious rule system must be persuaded to magnanimously accumulate data that might undermine the rules.

5. When enough irrationalities have been accumulated to display a pattern of causality hitherto invisible to conscious perception using the rule system, a transformation may be induced that exploits properties of self-organized criticality in order to vary and transform the rules. The transformation process generates and tests variations until a new rule-form is found that both accounts for the new causal pattern and stabilizes the new set of value-relationships to which one’s emotional unconscious is disposed.

This chapter will attempt to make these observations more precise and discern how common law reasoning has evolved toward a solution that exploits creative emotional decision-making to improve its adaptability. This chapter is the result of cross-comparison of computer theory, Nietzsche and Holmes to generate a persuasion model of legal reasoning as the foundation of what I have called heretical jurisprudence. The process was one of progressive image enhancement, using the articulateness of one to clarify the vagueness of another. Recent scientific theories—self-organized criticality and the psychology of emotional decision-making in particular—helped this image enhancement. This chapter presents the results of this inquiry, rather than the labyrinthine route it followed. A succinct statement of the persuasion model in legal context must await development of some fundamental concepts in this chapter.
The chapter consists of three main sections. The first section—"Computational Critique"—will apply computability and complexity critique in general terms to isolate hard, time-constrained tasks in legal decision-making. The second section—"Creative Persuasion"—will develop a model of emotionally based self-organized criticality. Of particular concern will be to examine the interaction between self-organized criticality and the evolution of doctrinal forms. The third section—"Collective Persuasion"—will move from the psychology of the individual to the cultural context of legal process in terms of enhancing the effectiveness of judging as a communal process.

2.3 Computational Critique—Hard Cases and Residues of Justice

As indicated, this section will apply computational critique to isolate hard tasks of legal reasoning. Finding the limits of an expert system design is one way of doing this. A significant innovation in the discipline of law and artificial intelligence was the argument-generating expert system designed by Kevin Ashley, which he called "HYPO". Ashley's approach shrewdly looked to the practice of lawyers and only sought to generate argument from case precedents, rather than attempting to provide juridical decisions.

Briefly, the HYPO system works as follows. An expert system designer using HYPO would identify several factual "dimensions" the courts and legal scholars had considered relevant to a legal issue. The designer would then classify precedent cases along each of the dimensions, with the range of values in each dimension favoring the plaintiff or defendant on either extreme. To consult HYPO, an inquirer would provide a hypothetical factual situation. HYPO would then locate within the case database the cases that best matched the hypothetical along its various

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dimensions. Failing an exact match on all dimensions of the hypothetical, HYPO would automatically generate legal argument by citing best cases for plaintiff and defendant, and corresponding counter-cases that would be cited in response to distinguish the opponent's cases as not fully determinative of the matter.

As the precedent database fills up with a variety of cases spread across the range of each dimension, the frequency of determinative precedents and the quality of argument would presumably improve. However, one might eventually find conflicting precedents that appear as overlapping plaintiff cases (clear dots) and defendant cases (dark dots) along the same dimension. For example, the following one-dimensional diagram places the hypothetical case (half-moon dot) within a zone of conflicting authority. (Figure 2.3.)

One might visualize the system as creating a multi-dimensional space. The extremities of each dimension are plainly plaintiff zones or defendant zones. Cases are like survey monuments; each identified as plaintiff or defendant. The cases extend the plaintiff zone or defendant zone from the respective extremities. HYPO is most determinative when the hypothetical plainly comes within a plaintiff zone or defendant zone. Hard cases fall between zones. Harder cases fall in the plaintiff zone along one dimension and in the defendant zone along another. HYPO is perhaps
most useful for the practitioner in these circumstances, as the system identifies the strongest precedents for each side and identifies vulnerabilities.

The HYPO system exhausts the constructive limit of its model of legal reasoning when it generates conflicting precedent authority. Here is where one finds a hard task in legal reasoning. A skill every first year law student learns is to add a new relevant factual dimension—to let go of a case that previously seemed determinative and allow the introduction of a new degree of factual and causal nuance. Applied to the previous diagram, the addition of a new dimension reveals that the hypothetical falls within a neutral zone and that the apparent conflict of precedent was a symptom of a relevant dimension that had not been consciously perceived. (Figure 2.4.)

As mentioned above in the introductory comments to this chapter, the works of Posner, Dworkin and Smith demonstrate that judicial decisions generate much more apparent doctrinal conflict than substantive conflict. The doctrinal inconsistencies tend to disappear in hindsight once additional factual and causal dimensions are consciously articulated. In the area of

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20 A "strong" case in law means the logically weakest case in the sense of having the weakest set of presuppositions. That is, a case less extreme along the plaintiff direction of the dimension is a stronger precedent for the plaintiff.
remoteness of nervous shock damages, for example, J.C. Smith has found commonwealth cases to be over 90% consistent with dimensions not yet articulated in terms of legal doctrine.\textsuperscript{21} This percentage accords with my own experience as a research lawyer. This result accords with the claim of this thesis that pre-conscious perception and creativity outperform conscious deliberation and with Holmes’s methodological advice that judicial decisions should be read primarily in terms of fact and outcome—that is, as dramatic narrative.

To add new dimensions there must be a teleology that guides the process and determines factual and causal relevancy. Posner finds the teleology in economically rational behavior. However, there is much dissatisfaction with the rational actor hypothesis among psychologists and others.\textsuperscript{22} While many personal idiosyncrasies may cancel out in collective behavior, the emotional bias hypothesis suggests a potential for systemic vulnerabilities to distortion. Moreover, the economic model is too reductive of the relative autonomy of doctrine and non-economic values. Dworkin’s model of rules and “principles”\textsuperscript{23} is a compelling alternative, but his model is not very operational and seems to generate fewer “aha” experiences when analyzing lines of conflicting cases. Smith and S.C. Coval more successfully integrate rule-based and goal-based reasoning, identifying structural links between teleology (values and goals) and rules (doctrine).\textsuperscript{24} Smith has further developed this logic into a set of rules that articulate how courts mediate conflicting goals based on qualitative differences in the degree of impairment to each

\textsuperscript{21} Smith, \textit{supra}.
\textsuperscript{23} Dworkin distinguishes principles from policies. Coval and Smith refer to goals and values. Below it will be suggested that principles, goals and values are distinct from policies in the sense that policies are linearly impaired by incrementally less rule-following whereas principles, goals and values are at some point nonlinearly impaired by incrementally less rule-following.
goal and the relative importance of each goal. This refinement of the relationship between facts, rules and goals has guided the development of expert systems and led to Smith's claim that nervous shock remoteness cases were over 90% consistent. However, developing the expert systems revealed a new set of hard problems.

My own attempts to extend the Smith and Coval model of legal reasoning to improve the capability of expert systems have revealed two underdeveloped dimensions. The Smith and Coval model presumes rational agency and does not explore the role of emotional bias, and the model does not develop the causal implications of what social theorists call the micro-macro problem. Both these problems make the teleological aspect of adding factual dimensions to legal reasoning problematic for expert systems. The reason is that they are computationally harder processes than what is generally considered feasible with computers. To locate this claim within computer theory jargon—these processes are at least "NP-complete." 

This section of the chapter—"Computational Critique—Hard Cases and Residues of Justice"—will focus on the micro-macro problem. The following section of the chapter—"Creative Persuasion—Causal Residues and Self-Organized Criticality"—will focus on emotional bias and self-organized criticality as the response to the micro-macro problem, resulting in a model of emotional persuasion. The final section—"Collective Persuasion—Self-Organized Criticality and Legal Process"—will apply the persuasion model to legal reasoning to re-conceptualize it as a communal knowledge-building process.

Again, briefly, the Dworkin model of legal reasoning, as refined by Coval and Smith, mediates highly operational, micro-level, fact-driven doctrinal rules with more theoretically

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26 A rigorous definition of NP-complete is unnecessary for present purposes. Basically, NP-complete problems are a class of related problems that computer theorists consider to be not worth pursuing by programming computers. See
satisfying but vague principles. Put another way, legal reasoning seeks to evolve a set of micro-level rules in the form of an antecedent logic to achieve macro-level principles (goal and values) as a consequence. Legal positivists fixate on the antecedent logic, charmed by its operational certainty. Legal realists deconstruct the antecedent logic and argue for a purely consequential logic based on goals and values.

Applying Holmes and Nietzsche to our task, the transition from desired macro-level goal to operational micro-level rule is not fully describable in language—the causality has too many nuances. In terms of computational theory, it may not even be possible to construct the macro-level goal logically from operational micro-level rules—the ideal might not even be a well-defined, computable concept. Alternatively, the transition might be computationally too difficult for a computer and so too difficult for precise language and deductive logic—no total rational justification. In terms of the science of chaos theory, the transition may be chaotic and in principle beyond the reach of precise scientific modeling.

Chaos theory reveals features of causation that challenge our expectations for scientific knowledge. Put simply, non-trivial dynamic systems generate chaotic changes such that immeasurably small variations could cause disproportionate side effects. This implies that precise prediction of the behavior of such systems is impossible in principle—no matter how precisely one measured the state of the system from time to time—and so some knowledge about the system must be fuzzy or stochastic.


27 One might observe that NP-complete problems tend to be computationally hard to find but are relatively easy to verify. This raises the issue as to which ideals are NP-complete, and so within the realm of rational justification, and which are exponential, and so beyond effectively computable rational justification. It would appear legal decisions are not easily verifiable, meaning exponential rather than NP-complete processing is involved. This distinction is an issue to be explored in later work but is not necessary for the argument in this thesis that emotions are required for higher quality creative decision-making.
An example of a chaotic phenomenon is trust. Trust is illustrative for present purposes because much of social complexity and the efficacy of social institutions depend on trust. Trust only survives when autonomous agents follow rules often enough to generate and sustain stable patterns of expectation. Trust is a "catastrophic" function. This means that the level of one's trust in some person or institution tends to remain stable despite transgressions, until at some point the trust collapses. Moreover, it can be the most trivial transgression that eventually triggers the collapse. Then, the consequence is all out of proportion to the occasioning cause—the collapse is "nonlinear" with respect to local, observable events. The important point for present purposes is that one cannot predict with certainty at what point the collapse will occur—a science of surprises is doomed to uncertainty. The following diagram makes this effect more apparent.

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Zone of Chaotic Unpredictability

The collapse of trust could occur anywhere as one moves right within the shaded box. All scientific knowledge could ever achieve is a statistical prediction of the general probability of continuing trust.

This is an ancient insight. It is reflected in Aristotle’s recognition of four types of causation: material cause, efficient cause, final cause and formal cause. The "emergent" aspect of the formal cause, in this context, is a constructive nonlinear contingency rather than a catastrophic one as in the case of lost trust. The philosopher Martin Heidegger called the reduction of the Greek four causes to binary cause-and-effect “technological thinking” and identified it as characteristic of modernism, starting with Plato.31

What is “modern” is the ambition that science could eventually come up with a well-defined set of concepts and rules of logical causation to predict fully the behavior of the system. Of course, everyone acknowledges science cannot yet fully predict the outcome, but the
underlying assumption is that causal phenomena are linear. That is, continually improving calibration and theory using divide-and-conquer strategies would continually improve prediction.\textsuperscript{32} The assumption is that steady progress in science would lead to steady progress in predicting behavior, and therefore, steady progress in engineering the most socially useful laws. This “completeness” assumption is the foundation of non-heretical jurisprudence and, indeed, modernism in general. It originates from the logical assumption of the law of the excluded middle, a species of \textit{reductio ad absurdum}.\textsuperscript{33} The exclusion of the middle is the logical knife that cuts residues out of the knowledge-system, reduces the four causes to binary cause-and-effect, and underwrites utopian concepts of justice. However, chaos theory denies science the ambition of linear, monotonic progress in predicting the behavior of such systems. More seriously, as will be seen, the utopian ambition \textit{impedes} our ability to exploit chaos to constructive purpose to build a better palace of justice.

The dynamic phenomenon of “emergence” can now be modeled using computers. A paradigm example is computer simulation of bird flocking.\textsuperscript{34} There are two general strategies one might use to generate flocking behavior in a group of birds. One might regulate in a top-down, command-and-control manner. The other strategy is to have no central control, but a set of rules followed by autonomous agents who make and react to local observations. The researchers discovered that a set of three simple local rules could generate useful holistic flocking behavior.\textsuperscript{35} Even more remarkably, the bottom-up rules were robust in that the flock would reconstitute itself

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{33}] The law of the excluded middle forces propositions to be either true or false, such that the truth of the double negation of a proposition is logically equivalent to the truth of the proposition.
\item[\textsuperscript{35}] There are aerodynamic advantages to flocking that can reduce energy expenditure.
\end{itemize}
\end{footnotesize}
after encountering novel sorts of obstacles. Further, the macro properties could not be logically deduced from the local rules, and *vice versa*. This is a tremendously important point: *having a macro-level goal does not tell one what micro-level local rules would result in that goal as an emergent, macro-level property*. Moreover, starting from the macro-level goal and attempting to regulate individual bird behavior—using the divide and conquer strategy of concepts and logical causation—quickly became computationally implausible as soon as the flock encountered new types of obstacles and disturbances. Indeed, *a macro-level goal may not ever be empirically and computationally plausible*. This heretical possibility eludes traditional jurisprudence and theories of justice.

The interesting issue for post-chaos jurisprudence is how well can we manage emergence and chaos to constructive advantage. A leading thinker along this approach has been Friedrich Hayek. 36 Hayek argued that economic health comes from individual decision-making according to rational actor rule-following. Distributed decision-making avoids the computational bottleneck of top-down, divide-and-conquer regulation and is much more robust. This is because concurrent local observation with a high velocity of interactions and recursive feedback loops achieves an exponential explosion in the number of observations and adjustments. The presence of recursive feedback loops means that self-reinforcing tendencies might erupt into a “catastrophic” or “emergent” effect because of the slightest catalyst. 37 The emergence is nonlinear or chaotic. Hayek, in effect, argued that in the case of economic pricing, a market-determined price is a holistic emergence and it achieves a quantum jump in utility—the inverse of the loss of trust in the diagram above—that cannot be achieved by the divide-and-conquer ambition of top-down

regulation. As Holmes put it: “You can’t legislate bliss.” Just because you can create a concept of a macro-level ideal does not mean it exists, and it probably can only be achieved through experimental variation of rules for distributed, locally autonomous agents.

Herein lies the danger. An emergent phenomenon such as trust is hard to rehabilitate. Once one has lost the trust of someone else, regaining trust is a disproportionately difficult and costly endeavor. The situation is even worse with something as complex as a society—what patterns of unconscious, local rules are implicit in our behavior that are necessary to maintain emergent utilities that we now take for granted and do not consciously perceive or understand? Legislating new behavior may inadvertently precipitate the collapse of emergent utilities taken for granted and that are disproportionately costly to rehabilitate. As Holmes noted:

The present time is experimenting in negations—an amusing sport if it is remembered that while it takes a few minutes to cut down a tree it takes a century for a tree to grow.\(^{38}\)

This thesis, however, is no apology for the politics of Hayek. As indicated on the above diagram about trust, the degree of one’s risk aversion to the indeterminacy of the point of catastrophe makes one either a conservative (Hayek) or a liberal (Dewey). Hayek’s extreme antipathy to legislation fails to acknowledge that the local, micro-level rules necessary for emergence can tolerate a degree of transgressions—noise. Indeed, this robustness would have to


be the case or emergent systems would never have evolved. Furthermore, the rules for different emergent social utilities conflict. Improving social utilities in gross entails negotiating inconsistent goals and values. There is room for legislative experimentation, or ideological abuse. By refusing to acknowledge the robust “play” in the emergence, Hayek has left too much on the bargaining table in the tradeoffs of social goals, leaving an ideological agenda quite transparent.

Though the micro-macro problem could never be fully solved, continual progress can be achieved. The unique task of legal reasoning is to describe and improve an empirically and computationally feasible process to evolve micro-level rules (antecedents) to achieve macro-level goals (consequents). However, the social responsibility of maintaining a viable society constrains legal reasoning to evolve through plausible variation of existing rules to preserve the viability of the traditional system insofar as existing value-goal emergences are taken for granted and not understood. Drastic amendment of micro-level rules to improve the attainment of one goal or add a new goal might have catastrophic, nonlinear effects on the emergence of other trust-like goals taken for granted. The more prudent strategy is to amend incrementally and watch for unforeseen side effects that could be corrected before a catastrophic collapse. The power of experience-based precedent logic—case-based reasoning—is that it focuses on observable differences, which are perceptually most vivid, without having to fully articulate functional knowledge and goals taken for granted. Nonetheless, articulating and correlating goals better to

39 Otherwise, how could birds have ever evolved flocking rules? It begs the developmental question to say it is innate. Per Bak makes this point forcefully with respect to emergent systems of self-organized criticality. See Per Bak, How Nature Works—The Science of Self-Organized Criticality (New York: Springer-Verlag, 1996).
41 This thesis uses the term “goals” to refer to the macro-effect and “rules” to refer to the micro-level action. The term “value” is ambiguous, because it can be both. The reason is that the micro-level antecedents to a macro-level emergence might themselves be macro-level effects. A value or virtue is thus either a rule or a goal depending on which level of emergence is the subject of discussion.
micro-level rules enables plausible variations of greater increment. This chapter argues that micro-level knowledge and macro-level knowledge, though never fully reducible to each other, can reciprocally improve each other when mediated through evolving hierarchical forms.

Nietzsche’s concern in *Ecce Homo* was learning to live purposefully and selectively without full consciousness of goals taken for granted—living without a goal. This thesis claims common-law reasoning is well characterized as an unconscious or mythic projection of how an individual does risk-averse experience-based decision-making. Holmes’s task was to improve how courts achieved this as an institution. This is the prime focus of heretical jurisprudence. As with science, utopian theories might sometimes generate useful heuristics, but the discipline of building scientific knowledge is the incremental, accumulating process of adjusting theory to achieve the most coherent model that eliminates intolerable experimental error.

The nature of law’s task to mediate macro-goals and micro-rules can be illustrated by the ambition to maintain several friendships concurrently. The analogy is strong because the need to accommodate several catastrophic constraints creates a hard computational problem that must be dynamically negotiated using emotional intuition. The friendship analogy is also suggestive of other relevant characteristics of dynamic development. Here the chapter begins to apply the multi-level comparative approach to inductive empiricism, which the final chapter—Para-Conceptual Rhetoric—will discuss and attribute to Nietzsche. By finding the same characteristic pattern within other dynamic social systems, one might more easily discern a dynamic principle in the other system and then one can return to legal reasoning with a better intuition as to what

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dynamic mechanisms need to be found. For present purposes, these other systems will suggest what the residues of justice must accomplish and how they are manifest within judicial precedents.

Suppose, then, one wants to have many close friends. An ambition to maintain concurrently many emergent or trust-based goals, such as friendship, creates a set of conflicting demands. Adding trust-based goals—friends\(^{45}\)—increases the frequency of choices between actions that each pose costs to one friendship or the other.\(^{46}\) Occasional lapses in fulfilling the expectations of friendship etiquette would not undermine the trust required to sustain the relationship. Much of the goal-negotiating logic would evolve toward a negative logic of avoiding costs, simply because it is easier to perceive or predict actions that jeopardize trust than actions that build trust. The reasoning must also account for the historical context of each friendship and account for how near the trust underlying each friendship is to a threshold of a catastrophic collapse. Yet, always merely choosing the least risky cost in each particular case degenerates into act utilitarianism.

Act utilitarianism fails to account for the effects of emergence from communal rule following. Maintaining multiple trust-based goals requires negotiating a relativistic treaty code of micro-level rules. An individual internalizes friendships by emotional proxies—virtual virtues—which teleologically guide the genealogy of a functional treaty in the form of a set of personal rituals and habits that is highly contextual with respect to the peculiarities of each friend and the history of each friendship. This evolving set of rituals and habits is like doctrine in common law.

\(^{45}\) Using the example of “friend” consolidates and personifies the dispersed constituents whose general level of trust—such as “consumer confidence”—would be essential to the emergence of a social goal. The phenomenon of multiple friends would be the equivalent of the dispersed constituents having differing degrees of trust in different social institutions. The individual decision-maker desiring several friendships is the legal reasoning lawmaker.

\(^{46}\) The situation is more complex. Each action would have an immediate cost, but also a cost in terms of how the other agents universalize the isolated action into a general rule to predict future behaviour.
A functional code of behavior itself helps friends predict and adjust their reliance, which strengthens the friendship by reducing the instances of unanticipated transgressions. An important feature of friendship dynamics, then, is that while transgressions increase the probability of catastrophic loss of trust, the danger reduces by a significant quantum—a chaotic effect—if a new pattern is detected in the transgression behavior. The stability of the system has a systole-diastole dynamic as the friends become alternatively frustrated by new experiences, then reassured by detecting implicit patterns that enable them to adjust to each other.

An important element of legal reasoning is that law is always seeking to add more friends—law is magnanimous. Adding a friend entails a greenhouse period in order to nurture trust. To achieve this, the other friends must temporarily suffer a higher rate of transgressions as the new friendship is privileged. This suggests a fundamentally important practical question: are the existing friendships strong enough to endure a new friend? Misjudgment here may cause a collapse of trust in existing friendships with great cost to recover. An ultra-conservative such as Hayek would tend to perceive collapse of trust as immanent and so seek to reinforce the existing code and avoid adding friends. An ultra-liberal such as Dewey would tend to press for aggressive pursuit of new friends, with little fear of endangering friends taken for granted, as though all side effects would be linear and easily reversible.

Common law seems to have inadvertently engineered a solution between these two extremes. The systole-diastole dynamic is apparent in law at all levels of generality. For example, Anglo-Canadian contract law in the 19th century rigidly enforced formal rules at the expense of justice in the particular case. As common law evolved from the age of status to the age of contract, it added a new friend and so had to enforce contracts strictly in order to nurture the
reliance required to establish contract as an effective social institution. As the greenhouse period ended, equity increased the rate of experimental distortions and discretionary decisions to accommodate other values in particular instances. Equity could look back into the casebooks to find principles recognized even before the rise of contract—calling on the old friends a little more often. However, as the volume of equitable transgressions increases, the discretionary decisions begin to undermine faith in the certainty of contract. This danger increases until common law reinforces strict rules in a reactionary manner, or a Dionysian judge perceives and declares patterns of causality behind the discretionary decisions and crafts revised rules to restore a degree of contractual certainty. In this manner, Lord Denning dominated 20th century Anglo-Canadian contract law by achieving equity in the particular and in many instances transforming contract law with new equitable doctrines such as promissory estoppel and unconscionability. Some of Lord Denning’s doctrinal innovations in contract law gained judicial acceptance; others did not.

Henry Maine observed a similar general pattern of phases of development in law from ancient times: new code, fictions (distortions or disguised transgressions), equity (openly discretionary transgressions), then open legislation (dissents that reveal a discernable pattern of transgressions). This geological pattern is not unique to law. Nietzsche found this the basic morphology of “becoming” underwriting all genealogical development of forms. It is not

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48 For example, Lord Denning’s attempt to relax the doctrine of privity of contract in Beswick v. Beswick, [1966] 1 Ch. 538 (C.A.), did not gain judicial acceptance. Arguably, the attitude of the Supreme Court of Canada in London Drugs v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, in carving an exception to the privity of contract doctrine was influenced by Lord Denning, so Denning’s innovation was simply premature. Similarly, Lord Denning failed to gain judicial acceptance with his proposal for a general unconscionability test in contract law based on inequality of bargaining power in Lloyd’s Bank v. Bundy, [1975] Q.B. 326 (C.A.).

surprising, then, to find the phenomenon being "discovered" by more recent thinkers in various fields, such as the history of science, business environments, and societal development.

Thomas Kuhn, for example, found a similar cyclical pattern in the genealogy of scientific theories. After adopting a new paradigm, science undertakes productive research in a phase of "normal science." As the paradigm increasingly has to distort itself or contrive exceptions to accommodate recalcitrant experimental data, rival, logically incommensurable paradigms (dissents) begin to emerge. Eventually there is a paradigm shift as a de facto consensus begins to coalesce among the arbiters of opinion within the scientific community—like the doctrinal innovations of Lord Denning that earned subsequent judicial acceptance. This is not the forum to criticize Kuhn, but Douglas Hofstadter insightfully points out that such phases of development seem to occur on all scales of research, not just those grand enough to qualify as scientific revolutions. The same observation may be made concerning Henry Maine and legal development. Indeed, according to the principles of self-organized criticality, one should expect a power tree hierarchy of sub-discourses each in different stages of development. Large-scale transformations—revolutions, avalanches—occur rarely, as when the phases of related sub-discourses synchronize and transformations percolate to higher levels of generality. For example, Tamara Frankl has suggested an addendum to Maine, claiming we have moved from the age of contract to the age of fiduciary. Her observation has some force in Canadian law in view of the avalanche of recent cases that have used the fiduciary concept to reorganize doctrine in numerous areas of law. Criticisms of Kuhn for his concept of "paradigm" being vague and not operational

in part reflect this failure to emphasize the hierarchical nature of paradigms and discourses and their generally asynchronous phases of genealogical development.

Another area that has begun to analyze dynamics and genealogical development within a four-phase morphology is business theory. In *The Death of Competition* James Moore explicitly links the dynamics of business environments to the dynamics of ecosystems, a frequent metaphor in Nietzsche’s writing. According to Moore, the old paradigm of rival businesses competing for market share in a well defined, natural product market is no longer descriptively adequate. Rather, products, services and markets co-evolve like co-dependents in an ecosystem. In this genealogical mode of analysis, one must consider business relations as primary, not products. The evolution of business relations continually and often chaotically reconstitutes the definitions of products and market—telephony, cable television, media carrier, or computer network. The interaction of businesses is then driven by rival product-market definitions and forging relationships with businesses that share similar constitutive visions of the genealogy of products and markets. Competitors fighting for a share of an old-concept market may find their market chaotically disappear and be replaced by a new product that redefines the market by redefining needs. The working definitions of markets and products from time to time are thus a coherence truth that makes sense of the relations. In this “postmodern” concept of the economy, Moore identifies four phases of development, just as does Nietzsche. Moore notes that the fourth phase is a significant bifurcation point—rebirth or nihilism.

The same grand pattern of four phases has been identified in analysis of social history as well. William Strauss and Neil Howe argue in *The Fourth Turning* that most enduring societies

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go through a recurring cyclic pattern of four major phases. The germ of their thesis is that because of a society pulling through a major crisis, it forges a new social code and then goes through four phases of development, each shaping the average tendencies of a generation. They apply their model to recent American history as follows: After World War II there was a “high” phase of prosperity that emphasized social cohesion and produced a distinct baby boom generation. Strauss and Howe call this the “prophet” generation. As the children of the prophet generation reach late adolescence, they challenge the prevailing emphasis on conventionality—the solidarity that was so crucial to overcoming the previous crisis—in an “awakening” phase. This is a turning in which distortion of social convention breaks out into plain view. Earlier challenges just did not have the political impact of a generation-wide trend—beatniks were an oddity, hippies a social force. The Establishment must now exercise discretion to tolerate consciously individuals who openly challenge the social code. In the context of a challenge to social conventionality by youth, child rearing becomes less venerated and a “nomad” generation of unsheltered, cynical realists is raised—Rosemary’s Babies. As the bonds of social convention further decay and individualism flourishes, the society enters an “unraveling” phase. Soon sentiment begins to shift toward reconstitution of social bonds and a new “hero” generation of children is nurtured—Babies on Board. In the period of social decay and dissent, there arises a bitter confrontation of rival visions as to how to reconstitute social solidarity. Society then enters a “crisis” phase. During this phase a generation of overprotected children is raised—Christopher Robins, from the previous cycle—the “artist” generation that in adulthood favor process-oriented conciliatory solutions instead of conflict. As the crisis phase matures, the artist generation of the prior cycle ages out of power and the uncompromising prophet generation takes the reins. This

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creates an unstable alignment of uncompromising ideologues as leaders, cynical realists as managers, and solidarity-seeking young adults. The crisis phase explodes into a conflict that results in either rebirth or social collapse. Of course, substance drives the macro-pattern. Strauss and Howe identify the last crisis as the great Depression and the Second World War, which forged a new social contract that negotiated the conflicting demands of capital and labor—resulting in welfare capitalism.

Strauss and Howe note that this four-phase view of historical development is ancient and informed how the Romans divided their history into saeculums. Indeed, this is the general four-phase dynamic of pagan causality this thesis has found to underwrite classical myths, Shakespeare, Nietzsche and self-organized criticality. Each general transformation of the social code generates a Caliban that will haunt it and, after a period of increased utility enjoyed because of the reliability created due to the discipline of strict enforcement, the society eventually either incorporates the challenge through rebirth, or collapses into unresolved civil war.

The preceding examples are meant to reinforce an intuition for the four-phase morphology of development that results from attempting to add new friends when trust and friendship is a catastrophic or emergent function. The model of Strauss and Howe is instructive because it locates the material causes of the dynamics within the archetypal psychology caused by how each generation of parental attitudes to child-rearing are influenced by social trends. In this way, the final causes of the social trends are connected to the material causes of the dynamic patterns.

Similarly, the task of this chapter is to find the mechanisms and teleology that drive the four-phase morphology of doctrinal development in law—the task shifts from taxonomy to physiology. In law we can posit the existence of a “value matrix” within the unconscious
decision-making psychology of judging that has a level of both empirical reality and operational utility. By developing the approach of Coval and Smith, this chapter finds the material cause of doctrinal transformation in a concept of “causal residue” or “judicial residue.” Judicial residues are an effect of the interaction of micro-level rules and macro-level goals, which the narrative contents of judicial decisions implicitly accumulate. The remainder of this section will attempt to clarify the concept of “causal residue.” The next section will examine what psychological mechanisms could serve to accumulate and use causal residues to invent new rules to resolve crises of incommensurable goals. The final section will examine how legal reasoning accumulates causal residues from social conflict and how legal reasoning preserves and transmits the causal residues to subsequent judges to become sites of doctrinal creativity.

Common law may be characterized as an evolving set of doctrines that attempt to channel social behavior toward the fulfillment of an ever-expanding set of goals and values. In terms of causality, each goal or value concept in the underlying discourse would either refer to an emergent utility or a specific rule pattern that produces the emergent utility when enough agents follow them. Alternatively, the concept might refer to an ideal that is not computable. Because of the catastrophic and emergent nature of the goals and values, each emergent macro-form (a consequent) or constituting micro-rule (an antecedent) must to some extent be treated as an end in itself. As emergent forms generate differing amounts of social utility, they tend to be ranked in a general manner apart from specific contexts. Legal realists have attempted to catalog and rank such values but this approach seems to have run aground. The reason is obvious from the postmodern perspective of this thesis—the values are not stable universals; they evolve in a

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55 The utility function here is one of point-wise comparison for each actual experience, which is provisionally generalized pending amendment by local consequential reasoning in future experience. One need not presume a total, absolute utility function to make the value-matrix operational. Plainly some things are more useful than others.
complex, genealogical manner. For example, the values are hierarchical in different ways. Some depend on the prior fulfillment of other values. In other cases, two goals might rely on a common value so that the utility of the value outranks the utility of either of the ends it serves. The values evolve like an ecosystem and values are no more stable than species in an ecosystem or products in a business environment. They are stable enough, however, to support a useful formal system of antecedent reasoning in legal doctrine. The state of this hierarchical web of values from time to time will be called the "value-matrix."

Legal reasoning can now be characterized as a set of dynamic principles to add more values to the active value matrix while minimizing the likelihood of disproportionate losses to existing utilities. Legal reasoning invents and tests rules to resolve the interaction of values in local contexts to find an overall code that provides more than a minimum threshold of fitness for each emergent goal at all the specific points of conflict that have been tested by case experience so far. Viewed in terms of computational complexity, if each emergent goal has a characteristic catastrophic function, then the problem of creating and testing coherent doctrinal possibilities until a threshold of accommodation has been surpassed for each goal would appear to be a computationally hard problem. The mediation of antecedent logic and consequent logic under an ongoing viability constraint, therefore, would qualify as a hard problem from the realm of human "surplus" as discussed in the introduction to this chapter.

Another feature of legal reasoning suggests a process dependent on pre-conscious psychology. By allowing the generalized code to emerge as the effect of countless local experiences, transformation of the doctrine is always driven by higher quality empirical data. The warrant of quality data depends on the fact that people who have something on the line

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emotionally become more acutely sensitive to things that cause impairment to their needs—emotional bias. The gritty reality of an actual dispute brings out causal nuances that would otherwise be screened out by preconscious perception and gestalt tendencies. This is a corollary to Nietzsche’s claim that passion for knowledge becomes unreliable outside the horizon of emotional need.\(^{57}\) This psychology will be discussed in the following section. Our present task is to add some more precision to the concept of “causal residue” or “residue of justice.” The next section will explore its psychological equivalent and sharpen the definition even further, as required by the necessary conditions for self-organized criticality.

The logic of mediating conflicting values is now familiar to common law legal reasoning as “proportionality.” Again, this insight is ancient—Aristotle used the concept of proportionality.\(^{58}\) However, without an appreciation of emergent causality, proportionality degenerates to bland platitudes about avoiding extremes. By focussing on causality, though, a much more detailed logic of proportionality can be developed. J.C. Smith has articulated some of the basic logic of proportionality as five distinct rules.\(^{59}\) Generally, if two goals conflict in a particular context, law favors the higher-ranking goal. However, if when the decision is generalized to all relevantly similar cases the lower-ranking goal would be catastrophically impaired (or the risk of it would be unacceptably high) and the higher one not so impaired, then the law reverses and favors the lower-ranking goal in those similar contexts. Therefore, if one possesses the causal knowledge to narrow the scope of generalization to “like” cases, then one increases the probability that an exception to the general ranking of goals will be acceptable. However, if the universalization to all relevantly similar cases cannot be contained to a context


that does not threaten catastrophic impairment of the higher goal, then a “slippery slope” argument would defeat the claim of the lower-ranking goal. It follows that the effect of the underlying value-matrix changes as expectations about causal generalization change. While the values might be relatively stable, the code that mediates their interaction can transform itself radically as causal knowledge is improved.

The following Venn diagram illustrates the interaction between two competing goals across the range of factual contexts where they conflict. (Figure 2.6.)

**Proportionality**

![Venn Diagram: Proportionality](image)

The darker inner ovals are the factual contexts where the risk of catastrophic drop in the utility of the goal becomes unacceptably high. Thus, while Goal-A generally outranks Goal-B, Goal-B will be favored where circumstances risk nonlinear impairment to Goal-B. However, this reversal would be again reversed in circumstances that risked nonlinear impairment of the Goal-A.

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J.C. Smith's deep structure methodology attempts to model the interrelationship between goal conflicts and doctrinal development. As noted already, the link between macro-level goals and factual circumstances cannot in general be known with full precision. Law-makers must craft rules for concrete factual circumstances that implement the goal ambitions as well as could be done feasibly. This process of crafting doctrine seeks to produce highly operational, efficient fact-oriented rules that produce a macro-level side effect that roughly matches the boundary line between the two interacting values. However, the micro-macro problem implies that this effort will always be approximate, in the manner of squaring a circle. (Figure 2.7.)

Proportionality and Doctrine

The fundamental principle of coherency in law is that relevantly similar cases be decided alike. This is the principle of formal justice. The principle of formal justice, however, begs the

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question of when two cases are relevantly similar. Our value-based proportionality logic suggests that two cases are relevantly similar when there is an absence of a relevant difference, and the only differences that matter are ones that change the expected degree of impairment to goals as indicated in the diagram above. (Figure 2.7.) The “bandwidth” of legally relevant facts is established by the causal onus on the person who seeks to promote the lower ranking value (the “underdog”). The underdog must adduce evidence to disprove the likelihood of nonlinear impairment to Goal-A and to prove the likelihood of nonlinear impairment to Goal-B. This is the area to the right of the doctrinal boundary in Figure 2.7. The underdog could alternatively prove that Goal-B should now generally outrank Goal-A and that Goal-A would not suffer nonlinear impairment, or if it did, that Goal-B would as well; however, such a case would be extremely difficult to make in practice.

The precise line of what is a relevant difference depends on two variables: (1) how conservatively or liberally judges perceive the vulnerability of each value to a catastrophic drop in utility, and (2) whether the judges are convinced that a factual category could be universalized into a general rule for similar cases without crossing the boundary line. Generally speaking, the better one’s knowledge about causal links between facts and values, the more precisely one can universalize cases in favor of the underdog. Thus, a case which falls on the underdog’s side in the particular, might not be acceptable because no general rule could be made that would limit the universalization of the case to the underdog’s side of the boundary line. The counter-argument would be a slippery slope argument.

The first residue of justice we have identified, then, is when universalization of a particular case cannot be contained from impairing the critical zone of Goal-A. (Figure 2.8.)
Chaos theory teaches us to expect that the fact categories will rarely, if ever, be fine-tuned enough to generate a doctrine that perfectly mediates between concrete fact patterns and value-goal aspirations. Evidence is "legally" relevant only if it relates to the concepts defining the doctrinal boundary. Specifically, facts that provide causal evidence of impairment to Goal-B short of nonlinear impairment, or even of nonlinear impairment where there is nonlinear impairment to Goal-A, are simply not relevant in law. However, it can be seen that any evidence that would tend to strengthen the case of the underdog in terms of the value boundaries, even if insufficient to overcome the onus of the burden of proof, would be relevant to the underdog. Moreover, the legal result is particularly painful where the case falls between the doctrinal boundary and the value boundary.

An equitable judge, however, will use various techniques to achieve the proper result in the particular without endangering the higher value through universalization. A judge might
distort the case by fitting it within a doctrinal exception where the case does not really fit.

Secondly, the judge might openly invoke some species of equitable discretion. Thirdly, the judge might openly legislate by dissenting from established doctrine and argue it should be changed. The facts of the case that provide causal evidence relevant to “equity” would be much be broader than those which are relevant at “law.” The facts with equitable relevance would have dramatic relevance to the case narrative because of their causal connection to the underlying value-matrix. The value-matrix in law, then, serves the same function as background myths and metaphors that guide narrative relevance in reports of scientific experiments.

Equitable relevance is also broader than legal relevance because the critical-impairment boundaries in practice are dependent on how risk-averse various judges are in terms of the threshold where the perceived risk of catastrophic damage to a goal becomes decisive. One would not want to have to make new law in front of Mr. Justice Hayek, whereas Mr. Justice Dewey would be a great draw. The onus style of legal reasoning exacerbates this effect. When Goal-A outranks Goal-B, the underdog advocate for Goal-B bears the onus of proving causal effects. However, if one were to reverse the relative ranking between the two values, a different set of facts would become relevant. Before the reversal, relevance was determined by the underdog’s onus to prove no critical impact on Goal-A, and critical impact on Goal-B. With the goal ranking reversed, the former favorite would become the underdog and have to prove no critical impact on Goal-B. For example, proving no substantial impact on freedom of speech is a very different matter than proving no substantial impact on a sense of personal privacy. Only if one were to apply the law of the excluded middle rigorously could the two tasks be equated, as they are under the principle of formal justice that governs legal doctrine, which values coherency over equity in the particular. It should be apparent that the dominance of Goal-A makes a range
of experiences that are relevant to Goal-B invisible to legal doctrine. One might call this a "shadow effect."\(^{62}\)

### Residues of Conservatism and Onus

![Diagram of Residues of Conservatism and Onus](image)

**Figure 2.9 Residues of Conservatism and Onus**

In this diagram, a slight shift in risk aversion in determining unacceptable risks of catastrophic impairment, as Goal-A contracts and Goal-B expands, will reverse the outcome in the areas marked by black dots. Changing the boundary of the *de minimis* threshold of causal concern for each goals would reverse the result in areas marked by half-moon dots. Finally, a change in rank with attendant shifts in onus would reverse the result in the areas marked by white dots.

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Comparing the legal recognition of causality in two different contexts illustrates the effect of reversing onus. One of the four causal errors Nietzsche identified was the confusion of cause and effect. This problem plagues social science. There is an endless debate as to whether pornography increases or decreases the incidents of sexual assault. The Supreme Court of Canada has found that pornography causes violence against women to uphold the constitutionality of laws regulating the distribution of pornography. However, my research failed to produce any cases prosecuting a distributor of pornography for “aiding and abetting” sexual assault by having “caused” a third party to assault another sexually. From a value-reasoning standpoint, the result is reasonable. In cases where intrusion into liberty is low—prior regulation of economic activity—the onus favors recognition of a causal link between pornography and sexual assault. In cases where intrusion into liberty is high—criminal conviction of storeowner for sexual assault for selling magazines—the onus in favor of the accused trumps the weakly established causality. When used to further a higher ranking value the causality is accepted, but when used for a lower ranking value the causality is rejected.

As a result of the shadow effect, a subtle shift in conservatism regarding the goal’s zone of chaotic unpredictability, or a shift in onus due to a reversal of goal ranking, would expose a whole range of factual and causal information that previously had been irrelevant and invisible to strict legal doctrine. These, together with the distorting, discretionary and dissenting decisions referred to above, are the “residues” of justice. The term “residue” has been selected to accord with Wai Chee Dimock’s “residues” of justice found in the canon of “dissenting” opinions in the canon literary justice. We want the legal reasoning dynamics to accumulate these residues so

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64 Wai Chee Dimock, Residues of Justice—Literature, Law, Philosophy (Berkeley: University of California Press, 1996).
that they serve as small doses of “irrationality” that will form the bottom-up empirical basis for transformation of the doctrine.

The wisdom of the adversarial method in common law becomes apparent. Perceiving the full bandwidth of relevant causalities requires one to be a “bad man” and to step outside the doctrine with its “legal” relevance, using a “reversal” of perspective that, for methodological purposes, provisionally ranks Goal-B above Goal-A. In other words, one must take the perspective of the underdog to perceive the residues currently invisible to law—to overcome the shadow effect. Further, as will be seen in the following section, psychologically the opponents must have something at stake emotionally in order for the equitable causalities outside of the conscious doctrine to become visible. This is precisely equivalent to Nietzsche’s perspectivism and his methodology of reversal, which corresponds to the falsification principle in scientific method.

The issue for legal reasoning is this: how can law save information regarding value comparisons in specific contexts and causalities that are equitably relevant yet rendered invisible by legal doctrine? How can these small doses of “irrationality” (from the perspective of the legal doctrine) be accumulated and used to guide subsequent transformations of legal doctrine? What is sought here is a process by which common law legal reasoning could learn from its own experience by collective pattern recognition. What is sought is a means to use cases that have examined in detail the interaction of values in specific contexts in a manner that saves the residues and infuses in subsequent judges an intuitive and emotional appreciation for these residues. The need for collective learning makes judicial rhetoric become important. How can judicial opinions convey information that is hidden from the “consciousness” of legal doctrine?
This is where the judicial opinion as dramatized action plays an essential role in the dynamics of justice. The presentation of the facts of the case must make it evident what causal residues have been swept under the doctrinal rug. A simple yes or no judgment without reasons will not fulfill this task. This task will not be fulfilled by a simple doctrinal judgment that “justifies” the yes or no result with doctrine and merely recites only the facts required to fill in the doctrinal antecedents. Nor will the task be fulfilled by a “well reasoned” decision about how policies justify changing the law—unless social sciences were perfect. The only way to accomplish the task is with an opinion that dramatizes the case with all the facts required to make the equitably relevant facts emotionally relevant to the outcome of the drama. With such facts in the opinion, subsequent jurists can as “bad men” reconstruct the residues from the facts, doctrine and outcome of the case as though solving a mathematical equation. These surplus facts allow the subsequent reader to detect doctrinal distortions made to achieve a disguised equitable result in the particular. Further, as will be argued in the next section, the judge will have to rely on emotions—and empathy with the underdog in particular—to identify those facts that are relevant to detecting residues. The last section of this chapter will argue that judicial rhetoric must make these facts emotionally relevant to subsequent readers, or the judge has failed his or her duty to contribute to the task of collective learning. Moreover, since legal reasoning is a preeminent task for justice in heretical jurisprudence, the non-rhetorical judge has failed the process of justice—whether the decision was right or wrong and no matter how well reasoned it was.

Some brief case examples will illustrate how courts create residues and use residues and values in legal reasoning.

Legal academics have made a profession of exposing distortion in legal decisions. Evan Caminker observes:
Lower court judges more often nullify the doctrine [of stare decisis] through less visible subterfuge. Considerable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court. As Justice O'Connor put it, judges “know how to mouth the correct legal rules with ironic solemnity while avoiding those rules’ logical consequences.”

Justice O'Connor is certainly no formal nihilist from critical legal studies. The phenomenon of distortion is well known and even practiced by the Supreme Court of Canada to achieve justice in the particular. In *CKOY v. The Queen*, a radio station broadcast a telephone interview with a university student without her permission. The regulations under the Act required the consent of the person interviewed and the radio station was charged. The regulation was made under a section that listed several matters for which regulations could be made, including “standards of programs,” followed by a general “other matters” clause. The minority judgment pointed out that getting consent to broadcast an interview had nothing to do with ensuring programs were of a high standard. That three Supreme Court judges, including Chief Justice Laskin, and an influential lower court appeal judge, Mr. Justice Dubin, could find the interpretation so plain suggests the majority were distorting interpretive principles. From the drama of the case, it is not difficult to see why. There is no common law tort of invasion of privacy and the majority obviously felt that the increasing intrusion of the media might warrant reconsideration. The case

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67 Warren and Brandeis argued for the existence of such a tort, after Warren was upset about unapproved publications of photographs of his daughter at her wedding. Later, Mr. Justice Brandeis read in a right to privacy within the U.S. Constitution.
presented an opportunity to signal this through a distortion that did not jeopardize established
document—the right to privacy is not mentioned in the judgments—while achieving a good result
in the particular case.

Later, in Aubry v. Editions Vice-Versa Inc., the Supreme Court of Canada considered
the scope of the right to privacy expressly contained in Quebec’s Charter of Human Rights and
Freedoms. In this case a magazine of modest circulation published a photograph of a 17 year old
girl sitting on the steps of a public building and plainly identifiable as the subject of the
photograph. The photograph was not posed, was taken without her permission, and was
published without her permission. The majority of the court held that the use was an
infringement of her right to privacy under the Quebec Charter. As one might expect, the majority
cited the CKOY decision.

A Supreme Court of Canada case that more openly relied on residues was R. v. S. (R.I.).
In this case, the Court considered the right against self-incrimination protected under sections 7
and 13 of the Canadian Charter of Rights and Freedom. In formulating its “derivative use
immunity” doctrine, an issue for the Court was whether the right against self-incrimination was a
principle of fundamental justice based on fairness to the accused or was merely a rule of evidence
to promote the reliability of evidence. Mr. Justice Iacobucci, writing for the majority, referred to
earlier cases that had observed that fairness to the accused was a “strong and continuing
undercurrent of dissent” and an “undercurrent” to the reliability rationale. With the introduction

69 At paragraph 63, though nominally for the proposition that freedom of expression was not absolute under the
Canadian Bill of Rights, a predecessor to the Canadian Charter of Rights and Freedoms that had lesser
constitutional and practical significance.
71 Paragraphs 74 and 75.
of an express Charter right, value rankings were altered by constitutional amendment, thereby exposing the shadowy residues to be used to craft subsequent doctrine.

The following cases highlight proportional reasoning and the generation of policy arguments from pre-existing sources of law. *Harrison v. Carswell* was a landmark case in the Supreme Court of Canada that considered the legality of labor picketing on shopping mall property.\(^2\) The dispute was whether the mall owner could enjoin the store employees from picketing in front of the store on mall property. If the mall owner were successful, the picketers would have to demonstrate on the public sidewalk beyond the mall parking lot, which would be ineffective as an incitement to boycott the store and exert economic pressure. The majority chose to give priority to private property, even though the mall property in front of the store was open to the public during business hours and not leased by any particular tenant. In common law, property rights are viewed as integral to economic viability and the majority plainly felt that, if the decision were generalized, the impairment to control over property in general would have been excessive. This sentiment was expressed through a rigid application of property law and the legal incidents of ownership. The minority, on the other hand, was swayed by the fact the picketing weapon of the union would be substantially impaired, whereas the intrusion on property rights in the case of peaceful picketing on publicly accessed commercial property would be manageably narrow. The minority, therefore, would have reversed the general ranking of values in the local context. The outcome of the decision turned on how the majority and minority differed as to risk-aversion and how much causal assurance was required to establish the exception would not endanger the purpose of the general rule.

The approach of the majority might be usefully compared to a similar case from California, *Schwartz-Torrence Investment Corporation v. Bakery and Confectionery Worker's Union, Local 31.* In this case the court inferred the contextual ordering of value-goals from the law itself, looking to legislation to find prior legal recognition of the importance of picketing as a value and causalities that had been recognized as defining manageable exceptions to the general incidents of property ownership.

The approach of the court in *Schwartz* demonstrates a fundamental principle regarding legal innovation in common law:—legal innovation is driven primarily by the bandwidth of equitable relevance judicially recognized in cases and legislation. In general, policy argument in common law must be generated internally from this bandwidth and not imposed externally.

Baron Alderson said in *Egerton v. Brownloe*: “if by ‘public policy’ is meant the object and policy of a particular law, then I readily accept it as a rule.” Common law accumulates its policy database in small doses of case-by-case experience. The test of time, or legislative enactment, gives each dose a warrant of empirical authority that supports empirically plausible comparisons at relatively low cost. Establishing policy from external sources would involve leading a substantial body of evidence at great cost. Baron Parke cautioned in *Egerton v. Brownloe*: “This [public policy] is a vague and unsatisfactory term and calculated to lead to uncertainty and error when applied to the decision of legal rights. ... The term ‘public policy’ may indeed be used in the sense of the policy of the law, and in that sense it forms the just ground of a decision.”

When Lord Denning later claims to ride the “unruly horse” of public policy, he does so by working through and making coherent the database of policy and causalities existing within the law. Of course, as a litigant one might seek to introduce external policy data through evidence—

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73 394 P.2d 921. See, again Coval and Smith, *ibid.*
74 10 E.R. 359 at 402.
the infamous Brandeis brief—however, one must question the institutional competence of the courts and the burden on litigants to mount a war of social science experts. Indeed, the U.S. Supreme Court has come to view these battles as sometimes degenerating into “junk science.”

Policy argument, then, works best when grounded in many “small doses” through value-conflicts across a large number of particular contexts. Using the patterns of experience means that “incremental” value and goal-driven changes in particular contexts can later be universalized into general doctrinal rules with minimal risk of impairing higher-ranking goals and values by collapsing emergent utilities taken for granted. Because social systems evolve largely unconsciously, a system that works takes many emergent forms for granted. As Holmes observed, the final title to our common law is that it exists and is not merely a Hegelian dream.

We tend to only conceptualize that which we are forced not to take for granted. Consequently, radical, non-localized change is dangerous because of the incompleteness of knowledge and the non-linearity of causation in many cases. The compromise that Holmes found in law was to follow a principle of “minimal mutilation” (W.V.O. Quine) to facilitate early detection of impairment to emergent processes taken for granted and cohering adjustments.

The extension of the Smith and Coval “teleo-analytic” model of legal reasoning presented here therefore relies on “local” developmental principles of proportionality and reversals. No computationally intractable, utopian ideal of justice is required to make the model work. Rather, in this model common law develops in a manner similar to a plant—by growing faster where it is darker. This is a very simple and tractable local rule that achieves the indirect macro-effect of

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75 *Ibid*, 408.
77 “The Path of the Law” 473.
growing toward the sun by growing tall faster in total darkness and following the arc of the sun during the day when in sunlight. We do not know how to look into the sun of Justice as an ideal. Common law pursues simpler local tasks of comparing expected pain in a high number of very limited contexts and seeking a coherent doctrine that grows away from obvious injustices.\textsuperscript{79}

The extended teleo-analytic model also structures itself to exploit self-organized criticality. Incremental changes in case decisions would generate stress upon emergent utilities taken for granted and so provide feedback to the common law. Internal avalanches of doctrinal change would create a new coherent doctrine—and less often of the values themselves—to restore the satisfaction of taken-for-granted values back above a critical threshold. A heretical claim is that because of the neural process of avalanching in the individual judges required for doctrinal creativity, the rational-perceptual filtering effect of reasoning styles presumed by intractable ideals of justice would undermine the process of judges “loading” themselves with small doses of experience to enable the process of self-organized criticality to take place. (See Figures 2.1 and 2.2.) This effect will become evident once the psychology of seduction and persuasion is examined. The result of this inquiry will be a persuasion model of legal reasoning based on the psychology of creativity and emotional persuasion.

The persuasion model of legal reasoning must show that the psychology is empirically plausible and that, as a system, the common law has rules to help ensure the judges are properly “loaded” with appropriate small doses of experiences. To develop the persuasion model of legal reasoning, it has been instructive to examine Holmes’s writings for insight as to what small doses are appropriate (“The Path of the Law”) and as to how law uses the creativity of individual

\textsuperscript{79} Indeed, building on the work of C.S. Peirce, one might view all knowledge-building as the development of coherent models to accommodate perceptions of patterns of mistakes. See Deborah Mayo, \textit{Error and the Growth of Experimental Knowledge} (Chicago: University of Chicago Press, 1996). Mayo proceeds by critique of Bayesian
judges for collective learning ("Law in Science and Science in the Law"). Nietzsche’s insights into persuasion, organized by Baudrillard’s taxonomy of seduction and refined by recent psychology, together make Holmes’s intuition as to the means of inter-judicial persuasion and individual creativity much more explicit.

A broad view of the persuasion model of legal reasoning can be summarized in the following mission statement to explore and model legal reasoning:

1. The task is to develop an overall system of empirically and computationally plausible local development principles to regulate the switching between antecedent and consequent styles of reasoning.

2. *Emergence and Anti-Reductionism.* — Devise a logic to experimentally derive micro-level rules (antecedents) to better achieve macro-level goals (consequents) without endangering the viability of the traditional system insofar as existing value-goal structures are taken for granted.

3. *Magnanimity.* — The form and logic of the system must perceive the most politically significant residues of the onuses (causal simplifications) implicitly imposed by the antecedent code.

4. *Persuasion and Propagation.* — The residues must be stored in the form of dramatized action and consequence (cases) to persuade or educate inductively the emotional-experiential aspect of subsequent judges.

5. *Adaptive Intelligence.* — Each individual judge must be capable of assimilating enough cases to incorporate patterns distinctly enough to guide self-organized criticality as part of emotionally engaged decision-making.

models. This thesis locates the psychological mechanisms of mistake perception and coherent-model building in emotional bias and self-organized criticality, respectively.
6. *Arbitrary Form.* — The form (concepts) of the antecedent logic must be flexible enough to accommodate and accumulate causal residues and independent enough from extra-legal discourses to accept evolving interpretations and logical relations.

7. *Criticality.* — To promote a power law distribution of criticality and avalanching effects, the concepts of the antecedent logic should be hierarchical.

8. *Masochism.* — The overall system logic must contain a self-referencing logic that is capable of undermining itself (*i.e.*, rules of *stare decisis*) to allow periodic transformation, by treating the system's own requirements as just one goal of the system.

9. *Anti-Idealism and Critique.* — Justice includes the ongoing task of readjusting the overall system logic itself to achieve these goals more effectively.

The next section of this chapter will explore and elaborate the creative psychology of the individual and the neural mechanisms required for each of these points, drawing on Nietzsche, Holmes and some current science that supports them. The final section will consider legal reasoning as a social process and explore its propagation dynamics within a community of legal reasoning individuals.

### 2.4 Creative Persuasion—Causal Residues and Self-Organized Criticality

The weakness of the extended teleo-analytic model of legal reasoning presented in the previous section of this chapter is that it relies on "magical" transformations of values and doctrine. By

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81 This model, however, more precisely isolates the "magical" aspect of legal reasoning than other legal theories. Ronald Dworkin's account of legal reasoning, for example, similarly focuses on value reasoning and implicitly trades on the emergent aspect of rule utilitarianism. However Dworkin's main purpose is to cast legal reasoning in a way that satisfies his concept of rights and legitimacy. (See Kress, *supra.*) Moreover, his account of the relationship between doctrine and values is extremely vague, lacking in operational utility and descriptive adequacy. (See Coval and Smith, *supra.*) J.C. Smith's deep structure model integrates rule and values where Dworkin simply claims the
correlating the magic of judicial value-based reasoning and doctrinal transformations to the magic of the psychology of creative decision-making and self-organized criticality, this section attempts to make this model of legal reasoning empirically and computationally plausible from a psychological perspective. If, as is claimed here under the tag heretical jurisprudence, an important limiting factor on common law’s ability to achieve justice is the quality of its “magic,” then factors that impair self-organized criticality impair the project of justice. By correlating these factors the dynamics of legal reasoning could then be empirically tested and elevated to normative principles.

A dividend of this approach is a practical theory of legal argumentation as a substantive theory of rhetoric. Following Nietzsche’s lead in linking knowledge acquisition and language to sexuality, this section will consider the form and psychology of seduction as the paradigm of persuasive argument and creative decision-making. Seduction links emotion-driven self-organized criticality to the play and genealogy of representational forms. This produces a model of persuasion to exploit the process of judicial creativity to connect residues of justice to the transformation of doctrinal forms. The peculiar features of common-law legal reasoning arise by adapting the model of emotional persuasion of the individual judge to the communal task of law. Holmes sketched an outline of this adaptation in “The Path of the Law” and “Law in Science and Science in Law.” Judicial decision-making is also constrained by the information costs and limited resources of courts as a law-making forum. In the result, the persuasion model of legal reasoning purports to achieve a cost-effective means of mediating antecedent and consequent styles of reasoning. In this way, we will have accomplished a large step in John Dewey’s shift from rules to value-reasoning is not rule-governed. Smith’s deep structure model has proven itself quite effective in designing empirically adequate legal expert systems, even if the analysis is difficult to do.
unheeded call to address the problem of justice by seeking logic to mediate antecedent and consequential reasoning.\textsuperscript{82}

For Nietzsche, opening oneself to acquire knowledge is like winning a woman’s heart:

Supposing truth is a woman—what then? Are there not grounds for the suspicion that all philosophers, insofar as they were dogmatists, have been very inept about women? That the gruesome seriousness, the clumsy intrusiveness with which they have usually approached truth so far have been awkward and very improper methods for winning a woman’s heart?\textsuperscript{83}

The rationalist pathology is the unyielding assumption that all judicial decisions are or can be completely justifiable with reason. The rationalist asserts that a just decision is the application of law to fact and, therefore, argument merely marshals the right justification to fit the facts. Rhetoric, to a rationalist, is mere ornament. The petitioner presents the justification and has a “right” to demand a favorable decision. From the Nietzschean perspective, this is date rape—“I bought flowers. I paid for dinner. You invited me here.” Rationalists date rape Justice. A dogmatic completeness assumption about language and justice pathologically overstates the warrant of rational discourse. In contrast, heretical jurisprudence concedes that the petitioner never has a “right” to a decision from Justice—the choice is always Hers. In all cases, the petitioner must persuade, but a good case is necessary since Justice is never arbitrary—just not fully predictable because of the incompleteness of language and the computational intractability of inductive transfigurations. Rationalist hubris results in persuasion impotence. Its chief

symptom in legal practice is forcing an issue without sufficient emotional groundwork—
premature interrogation.

Following Nietzsche in linking the creation of language-based knowledge to sexuality, an
intuition for persuasion in general can be gained by briefly considering the dynamics of sexual
seduction. In *The Evolution of Desire*, David Buss presents the results of numerous surveys in
attempting to link contrasting male and female attitudes to the different gender perspectives of
the political economy of reproduction.84 We need not accepts Buss’s sociobiology to observe that
unmated males and females have very different tendencies toward being persuaded to engage in
sex. Buss’s survey of males found that the most effective sexual invitation a female could make
to a male was to ask him to have sex. The females responded that the male asking to have sex
was the *least* effective invitation.85 Why the extreme differences?

From the perspective of a post-rationalist psychology of decision-making, pressuring to
change someone’s behavioral code triggers emotionally rooted fears of consequences. Plainly,
the consequences of casual sex have been much different for males and females. Women
undertake far graver risks that would have impact on an emotional level. From a socio-biological
perspective, single motherhood is a great cost to reproductive success: the woman risks poverty
and misery, and the child is likely to be less competitive. From a social perspective, casual sex
may harm the woman’s reputation—she risks humiliation. From a personal perspective, the
woman makes herself more vulnerable to violence.

83 Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future*, tr. Walter Kaufmann (New
case for evolutionary sexuality presumes a political economy of mating was stable long enough to genetically
reinforce adaptive behavioral tendencies. This makes strong assumptions about developmental psychology, which
are unnecessary for the model of legal reasoning developed here.
85 Ibid, 117-118.
Reasons are ultimately ineffective for sexual seduction and, more generally, for emotional persuasion because the person sought to be persuaded ultimately lacks of faith in his or her conscious grasp of the facts and the risks. Incompleteness of knowledge favors preservation of the status quo. Any decision to alter the status quo must be emotionally driven. Applying Nietzsche's psychology of rhetoric, the emotional status quo has to be transformed by the cumulative effect of a series of emotional experiences. It is extremely important to note that the emotional experiences are not arbitrary—they must implicitly contain patterns not consciously perceived by the person being persuaded. Moreover, the patterns must be sufficiently vivid to enable emotional bias to perceive them and drive self-transformation to re-integrate coherently various perspectives of experience and knowledge. Lack of faith in reason alone reflects the broader bandwidth of emotional perception. On the other hand, emotions are also vulnerable to distortion. Nonetheless, the computational critique outlined in the previous section of this chapter implies that we lose too much if we retreat into Cartesian, rationalist skepticism. Rather, improving the power of legal reasoning entails attuning critique and cultivating social processes to reduce vulnerability to emotional distortion within decision-makers.

The human mating ritual is the most obvious example of emotionally driven self-transformation. In a typical human mating ritual—an erotic dance—a man seduces a woman into choosing him to have sex, and a woman seduces the man into commitment. The crucial feature of this process is that the male and female each subvert ego—somatic-DNA values—to incorporate and emotionally anchor meaning from outside the self—joint germ-DNA values. Whatever the

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86 Indeed, an indication of the greater depth of the effect of seduction and persuasion is that it may even alter what one pre-consciously experiences as disgusting. The boundaries of disgust are rarely altered by simple rationalist justification. See William Ian Miller, *The Anatomy of Disgust* (Cambridge, MA: Harvard University Press, 1997). It is noteworthy that Miller is a law professor at the University of Michigan Law School.

biological origins of the erotic dance, however dependent it is on social context, and however kaleidoscopic the range of gender variations it generates, there is a distinct morphological pattern in the typical male-female dynamic which can be used as an illustrative base case for studying the dynamics of persuasion.\(^88\) The issue is how the morphology of the basic seduction ritual connects to self-organized criticality and emotions.

Nietzsche explored this connection. Jean Baudrillard’s *Seduction* contains a morphology of seduction dynamics, though it is not clear he adds anything original beyond organizing Nietzsche’s more fragmentary presentation.\(^89\) However, Baudrillard only gives an external, structural account of the dynamics. Baudrillard does not relate seduction to an internal account of how the power transfer takes place—his work remains at the stage of taxonomy and what is required here is the physiology that produces it. Baudrillard seems to avoid this because any internal model would itself be vulnerable to seduction (in his epistemological sense of the word). In terms of Nietzsche’s metaphor of truth as a woman, the fact that the heart of Justice must be won each date drives Baudrillard to celibacy. Terry Eagleton, for example, bluntly calls Baudrillard “vacuous.”\(^90\)

Power must be reintroduced into the dynamics of persuasion, and here Baudrillard overlooks an essential element of mating dynamics. Characterizing the empirical work of Jack Morin in more Nietzschean terms, the erotic dance has the following general script.\(^91\) There is an attraction to the power of another. The other presents an obstacle. A spiral escalation of increasing attraction and obstacles results in increasing limerence—longing, obsessive

\(^{88}\) The base case is arguably the least interesting. As Frans de Waal and Frans Lantry observe, after studying our closest evolutionary relative, the Bonobo chimpanzees, one must conclude that there is no such thing as a single “natural” type of sexual relationship or practice. However, for present purposes the base case is sufficient. See Frans de Waal and Frans Lantry, *Bonobo: The Forgotten Ape* (Berkeley: University of California Press, 1997).


uncertainty and manic-depression that results in masochistic ego-submersion (of somatic-DNA values). Limerence culminates in an affect reversal and transformation—rational code death and transfiguration, euphoric mourning and an emotionally anchored goal re-ordering (to joint germ-DNA values).

The same morphological pattern applies to persuasion generally, though perhaps less intensely and with other values at stake. The present task is to seek inner dynamics that would produce this outer morphological pattern. The rest of this section of the chapter will proceed as follows. The first half will discuss chaos theory and self-organized criticality. It will then examine how self-organized criticality can constructively harness structure to achieve increasing complexity as a complex adaptive system. In particular, complex adaptive systems exploit symbolic codes to ratchet gains in complexity when mediating conflicting final causes that influence the system. The first half of this section will therefore show how self-organized criticality can use formality to adapt to multiple substantive constraints. The second half of this section will examine the role of self-organized criticality and formality in creative decision-making. By examining how emotion, language and rationality interact during creative decision-making, the interplay of antecedent and consequential reasoning within an individual will become clearer. This will provide a plausible psychological process to link emotional experience, self-organized criticality and the amendment of moral code in a manner that produces the morphology of seduction, and persuasion in general without reliance on sexuality. This section of the chapter will then have provided a psychologically and computationally plausible decision-making skill, to serve as the foundation of the legal process examined in the final section of the chapter.
Postmodern interpretation of Nietzsche has thus far dwelled on the negative implications of chaos theory for knowledge formation. The second phase of Nietzsche’s postmodernism was to seek ways to exploit chaos to advantage for purposes of knowledge formation. Again, following the path of Nietzsche, this leads us to examine basic processes in thermodynamics—chaos theory.\(^{92}\)

Consider a simple example of a chaotic dynamics: a water faucet.\(^{93}\) The water stream goes through a series of discrete phase transitions as the faucet is slowly opened. It starts as a steady drip at regular intervals and the drip rate increases as the flow of water increases. The phenomenon is due to the surface tension of the water, so that a critical mass of water is necessary before gravity prevails and a droplet will detach. If the dynamics of the stream were linear, the rate of dripping would steadily increase until it became a steady stream. The dynamics, however, are chaotic. As the input flow is steadily increased, the drips fall at a constant rate but get bigger until at some point the dripping rate suddenly bifurcates into a double drip pattern. Similar doublings may occur as the input flow is slowly increased even more. Eventually the pattern shifts to aperiodic drip clusters. Finally, all drip cluster complexity is lost once there is a steady stream.

The chaotic element of the dynamic system of the faucet is that the phase transitions between discrete patterns of drip clustering exhibit sensitive dependence. It cannot be known in principle at what precise input rate of water flow that the dripping rate will undergo phase transitions. Presumably because of loops of self-reinforcing feedback of forces of attraction among water molecules and air pressure, the dynamics are always prone to unpredictably amplifying an imperceptible perturbation into a phase transition, no matter how accurately the

\(^{92}\) One could, but need not for present purposes, go farther in either direction to particle physics and astrophysics. See Lee Smolin, *The Life of the Cosmos* (New York: Oxford University, 1997).
input factors are measured for such perturbances. The dynamics are fundamentally historical, meaning that it contains a memory of influences of events that occurred at a prior instant and those instances cannot be fully measured at any current moment. Consequently, the phase transitions may occur at different water input rates as the rate is increased than as when the rate is decreased.

An even closer study of phase transitions indicates the possibility of constructive use of chaos. In the faucet example there was a stage of aperiodic dripping, just on the edge between ordered dripping and chaotic flow. On this edge between order and chaos, the dynamics generate a more complex pattern where the sensitive dependence generates not just transitions between simple patterns, but patterns that are much more complex. Consider another commonplace example: the transition between water and ice. In this chaotic transition, the history of the critical pattern formation at the phase transition is literally frozen in time. The folk wisdom that no two snowflakes are alike suggests graphic evidence of chaos and sensitive dependence. In this sense Nietzsche could claim that equality does not exist in nature—we define the category snowflake and equalize them all, which makes sense in that case because the particular differences do not matter much to human affairs. Nonetheless, snowflake structure is in an important sense inherently unique and unpredictable.

Phase transition criticality is an important phenomenon that can be exploited—the highly sensitive structure-building dynamics is a memory, such that process is converted into structure, energy into information, power into symbolic form. The genius of emotional persuasion is to exploit criticality to mediate power with form in adaptive ways. In effect, emotional persuasion aims to make the critical structure-building process of the system more semantically sensitive. Emotional persuasion causes a phase transition from one structure to a more complex structure.

that, in effect, has a greater bandwidth of structural memory of the typical patterns of power interaction in its environment.

Phase transition criticality, however, is highly unstable. Per Bak has observed that this type of criticality is highly dependent on fine calibration of the input flow to the dynamical system. Nature, on the other hand, is replete with critical systems that are far more robust. This motivated Bak to shift the focus of analysis to robust systems and to call the robust version “self-organized” criticality. Before examining the necessary conditions for self-organized criticality, it is useful to observe that legal reasoning can be characterized as a critical system in which the principles of legal reasoning aim to promote a more robustly critical system. Nietzsche’s “order of rank” then refers to the degrees of scale in which the dynamics are robustly critical.

The central visual metaphor in the discourse of self-organized criticality is the sand-pile. A stream of sand grains lands on a tabletop. As the sand-pile forms it will eventually begin to spill over the edge of the table. However, the spillage is nonlinear—the dynamics produce a series of avalanches. The avalanches vary in size, and in the idealized model, exhibit a power-law distribution within the range of criticality. This means there would be logarithmically fewer avalanches of an exponentially greater size. The degrees of power of criticality—Nietzsche’s order of rank—depends, of course, on the size of the table and the friction properties of the sand.

The sand-pile can be conceived as a system of selective friction that converts kinetic energy into potential energy. The state of the system from time to time is a “treaty” of friction distribution patterns that stabilizes the system. This, in effect, is a memory system with an historical dimension. If the addition of additional stress from a single grain of sand over-saturates the friction-capacity of the locality where it lands, the friction-structure will give way. A

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spontaneous reorganization process will continue to rearrange friction forces until the kinetic energy is absorbed into a larger configuration of friction forces. If one thinks of friction as form, the system spontaneously seeks a new form, a new coherence truth in sand-grain relations.

The crucial feature in terms of the robust criticality of the system is transitivity. When a local area becomes over-saturated, it “seeks” stabilization by “using” the capacity of a neighboring area to absorb kinetic energy. However, the prior history of the neighboring area might have saturated it as well. If so, the scale of the avalanche would increase to a higher order of magnitude. Indeed, the neighbors of these neighbors might be saturated, and so on. Plainly, the order of rank of the system is a function of the velocity and extent of transitivity—too much, and the system will not accumulate enough stress, too little, and the system is insensitive. Other side effects of this scaling are nonlinearity and unpredictability. Any single grain of sand could trigger the largest avalanche. Precise prediction would entail knowing the exact degree and distribution of saturation of all neighborhoods, which would entail a precise historical record of the effect of each grain of sand. Moreover, that would have to assume the friction processes in the avalanches themselves are linear.

A self-organized system is chaotic because local interactions generate non-local influences. The system is “holistic” because the dynamics cannot be reduced to a precise, deterministic model of binary cause and effect. The formal structure of the system—how the potential energies are distributed in relation to the forces of friction generated by the stress of the kinetic energy introduced into the system—enables space-time dimensions of influence that exceed the range of current observation. The ambition of knowledge must be tempered. The precise dynamics and prediction of the outcomes thereby achieved become “magic” to science,

96 No intentionality is required here. This will be important in the context of emotions and neural processes spontaneously gravitating to coherence truths, without directions from consciousness.
and knowledge can only be gained imprecisely in terms of the macro-level properties of the system gathered by observing many particulars. The macro features mentioned so far include the following: avalanches; unpredictability; holistic effects not deducible from local interaction rules; a power-law distribution of frequency of avalanche size; and a power-law distribution of the length of time intervals between avalanches of certain scale.

Of particular relevance to present purposes is the historical, formal record of self-organized criticality in the buildup and release of kinetic energies—fractal landscapes. A helpful graphic metaphor is a river-basin landscape, which pits the kinetic energy of rain and wind against the friction of soil and rock. A pattern of river branching results from avalanches of all scales, so that the characteristic fractal pattern repeats at various scales of magnification. There are countless examples of fractal patterns in nature: the coastline of Norway, the branch-and-leaf configurations of trees, and clouds, to name a few. Clouds form at the critical phase transition from water to vapor, and like snowflakes, no two clouds are alike. Indeed, innovations in animation use fractal-generating mathematics to generate realistic clouds and trees. The reader might have already anticipated that heretical jurisprudence views the common-law database of case precedents as a fractal landscape. Each case is an erosion event driven by the kinetic energy of political dissatisfaction that challenges how the form of legal doctrine forms a coherent structure to mediate conflicts of goals.

The shift that has occurred in this last example is that the system of self-organized criticality has become an information system. As an information system, each of the elements of

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97 The term "magic" is appropriate because it connotes the triggering of spontaneous, disproportionate change from within. "Alchemy" would be another suitable term. Francis Bacon was alive to this distinction, as in Book I, Aphorism 4 of *Novum Organum*: "With respect to works, man can only bring natural objects together or separate them. Nature does the rest by her internal operations." See also, Book I, Aphorisms 13, 21, 24 and 48. Francis Bacon, *Novum Organum*, tr. & ed. by Peter Urbach and John Gibson (Chicago and La Salle, Ill.: Open Court, 1994). Giordano Bruno refers to this type of interpersonal influence as magic. See Giordano Bruno, *Essays on Magic*, tr. & ed. by Richard J. Blackwell (Cambridge: Cambridge University Press, 1998).
self-organized criticality—the input stream; the stress and friction where input confronts structure; the absorption into potential energy structures; the release of energy into transitive and recursive interactions; the fractal landscape as memory—can take on functional, perceptual or symbolic semantics. To achieve adaptability, the system must be more apt to generate combinations of form that are more adaptive to preserving the system's order of rank in the context of its environment:

The field of complex adaptive systems examines how formal coding schemes help information systems to become more adaptive.98 Given that much of the world is comprised of fractal landscapes, the issue of immediate concern is how self-organized criticality can be engineered into an information system to spontaneously generate codes that are more pragmatic in the way they semantically map to fractal landscapes. More specifically, how could self-organized criticality better map formal legal doctrine to the underlying fractal landscape of value conflicts? It is instructive to consider briefly the semantics of criticality in common law.

Common law appears to be a system of self-organized criticality. There is an input stream of cases. There are avalanches of doctrinal change of varying scale. The avalanches of doctrine are not deducible from any axiomatic first principles. No one claims to be able to predict these doctrinal avalanches with full precision; indeed, even great judges like Lord Denning miscalculate. The doctrinal changes seem to exhibit a power-law scale in range of influence within the common law. Moreover, there seems to be a power-law distribution of stability on different scales. For example, the shifts from the age-of-status to the age-of-contract to the age-of-fiduciary are almost glacial in breadth and duration.

The semantics of common-law's criticality suggest two levels of self-organized criticality. First there is friction generated to the extent the underlying value-matrix is mis-calibrated with
the particular society and generates social stress, and therefore where the input stream of cases will “land” within the value-matrix landscape. If the value-matrix system is critical, this will lead to avalanches of value and goal re-calibration or redefinition to stabilize social forces. Second, there is friction generated because the legal doctrines are mis-aligned with the underlying value-matrix. A rule structure that is more cost efficient (simple and coherent) can generate friction with respect to other criteria. For example, medical resources might be allocated on a crude first-in, first-out basis, which generates some friction, but is tolerated in order to avoid processes of evaluating merit that could create even greater political costs. In common law, the friction is often absorbed in processes of doctrinal distortion, equitable discretion, jury decisions and dissents. Lawyers help calibrate the criticality of the system by attacking the least-fit points in the value-matrix and doctrinal landscapes. This would tend to trigger avalanches to improve internal fitness with doctrine that more effectively models the value-matrix landscape and to improve external fitness with value-goal definitions and rankings that better mediate clashes with the dynamics of social forces. In common-law semantics, the coherency is achieved by principles of local coherence, which by transitivity achieve global coherence in a bottom-up process. By this means, local interactions can release potential energy (i.e., the causal residues referred to earlier in the chapter) implicit in individual cases of distortion, discretion and dissent. Consequently, the value-matrix is a power tree of hierarchical value-goal definitions and rankings, and the doctrine is a power tree of hierarchical concepts.

Following the lead of Holmes in “Law in Science and Science in Law,” insight into the semantics of common-law dynamics can be gained by comparison to evolution. Unlike Holmes, however, we have the benefit of recent re-examinations of evolutionary dynamics in terms of

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self-organized criticality. The Darwinian paradigm sought to explain adaptive dynamics entirely through the local principle of selection. This has been refined to the “selfish gene” principle, a phrase coined by Richard Dawkins, further localizing the dynamic to the level individual genes in the DNA code. However, careful observation of extinction patterns across species and patterns of physiological changes within species demonstrate non-gradual macro-level trends of “punctuated equilibrium,” a phrase coined by Stephen Jay Gould. Some argue based on punctuated equilibrium that evolutionary dynamics cannot be fully explained by steady local dynamics such as the selfish gene principle.

The law of the excluded middle (reductio ad absurdum) is always a dangerous leap of logical faith. Indeed, Per Bak argues that within a self-organized critical system internal local dynamics can generate non-linear holistic effects. Evolution can be viewed as a self-organized critical system where stress drives evolution by increasing the probability of successful mutation in the least-fit species. The interdependence of species through predator-prey and other relations creates transitive effects that can trigger avalanches of co-adaptation. Once all species in the system exceed a critical threshold of fitness, the probability of successful mutation recedes and the ecology stabilizes again, awaiting the next stress. A critical ecology is a fractal landscape of inter-species relationships. The crucial conceptual shift is to think of the patterns of interaction as the fundamental unit of analysis. The avalanche is a spontaneous search for a new stable treaty of interactions.

This inter-species treaty is usefully conceived as a new coherence truth for the system. Indeed, it is a useful metaphor for the relativism of truth in postmodernism. The definitions of

species are not eternal. Even a working definition of what counts as a species is impossible—philosopher of biological science John Hull notes that there are at least 22 working definition of species in various biological disciplines. Interaction is the more important feature. A stable ecology defines a coherence truth system of interaction rules and avalanches are searches for pragmatic truth. Genetic mutation drives the system to experiment with new codes until one generates “truthful” behavior. Postmodern relativism, however, is not arbitrary. Individuals who violate the new inter-species truth are punished with death or reproductive insignificance, which in evolution amounts to the same thing.

This analogy extends to Holmes’s evolutionary view of social truths. The interaction of social forces generated by people pursuing conflicting purposes fundamentally constitutes society. The process of law generates normative codes (legal doctrine) as a coherence truth to stabilize the patterns of social interaction. Stress in the form of cases drives common law into a critical state and will eventually trigger avalanches of doctrinal adjustment to stabilize the interaction of social forces. Nietzsche held the same view as Holmes and both are often characterized as “Social Darwinists” in making social struggle the agency of adaptive change in law and morals. However, it would misstate Holmes and Nietzsche to suggest they maintained that political might makes right. Their point was that social discontent is evidence of a maladaptive code that cannot be ignored because it plays a fundamental role in the learning dynamics of the system. This efficient cause of legal change cannot be reduced to any of the others and must be respected as one of the four causes. It is the incompleteness of knowledge that produces the current doctrinal code that produces the political discontent, so the current state of knowledge is obviously inadequate to explain the political discontent. Political struggle must be

treated, to some degree, as an end in itself within the system dynamics. This will be revisited below.

Insight into the more general interaction between self-organized criticality and formal codes can be gained by considering three stages of code-mapping in evolutionary biology that have produced qualitative advances in biological complexity. The first is sexual recombination of a genetic code that produces proteins with functional semantics made plausible by various division strategies. The second is the recombination of perceptual building blocks made plausible through the guidance of emotions. The third is the recombination of symbolic representation made plausible by the recursive interaction of emotions and reasoned prediction of consequence.

These qualitative changes in the dynamics of complex adaptive systems, in their “order of rank,” demonstrate how important dynamical principles are over time. We see stark contrasts in the highest degrees of complexity achieved by each advance. Asexual reproduction achieves the complexity of slime mold. Through the process of meiosis, the codes of functional proteins are shuffled to introduce more variability and plausibility in the search for a coherence truth. Sexual selection achieves a quantum leap in the rate of adaptation and generates bigger avalanches. The order of rank gained through better dynamics is so large that sexual selection outperforms asexual selection even though the organism only reproduces one-half of its code with each offspring and suffers preprogrammed death to make resources available for the offspring.

Sexual reproduction using a genetic code (without a perception code) increases structural complexity from slime mold to trees.

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Perception abstracts a part of experience as a representation for the full experience. Neural conduits allow for faster communication of partial experiences to anticipate functional responses more effectively. There is a shift from simple stimulus-response behavior to pattern-response-consequence behavior using internally communicated representations. Neural structures form to introduce variability in the building blocks of perception, which construct a system of perceptive categories and gestalts. The system of emotions makes decisions and introduces relevance feedback as to which perceptual patterns from the environment improve strategies of reaction and anticipation. Different emotional modes represent different needs of the system and compete for decision control. Shifting emotional modes, in effect, shifts the truth systems. The time frame of emotional feedback is much faster than through reproductive adaptation and behavioral adaptation becomes fast enough for movement. The introduction of a code of perceptual building blocks that are reshuffled into plausible recombinations and selected through experience enables movement and increases complexity from tree to chimpanzee.

Finally, the introduction of a code of symbolic representation detaches signs from perceptions and, in effect, creates a new code from a new deck of playing cards. Some animals can use signs. Some animals can communicate. Some animals can reason emotionally. Only humans shuffle the symbolic cards to generate variability and plausibility. As noted by Ferdinand de Saussure and the structuralists, the power of a language comes largely from the detachment of

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the concepts in language from a strict one-to-one correspondence mapping to things. Rather, classes of logical-grammatical relationships among concepts become the primary means by which they are defined. Examples of these relations are familiar figures of speech and logical relations: antonym and negation, synonym and homonym, metaphor, analogy, hyponym, metonym, syllogism, predicate calculus, modal logic, and so on. Each of these relations is a means to inject variability into the symbolic code.

The issue for the study of complex adaptation is whether the relations produce plausible variability into the code. This can be evaluated along three dimensions—internal fitness, calculative efficiency, and external fitness. Internal fitness in this context means the satisfaction of bodily and emotional needs of the individual. As implied above, and to be examined in more detail in the next section, emotional decision-making uses a memory of emotional conflicts where feedback strengthens or weakens each emotional proxy for a body need. The emotional memory can be conceived as a fractal landscape that exerts selective pressure to favor certain types of linguistic variations as plausible candidates for a pragmatic conceptual mapping of the emotions. If neural nets are visualized as river basins, a river fork in the basin creates two floodplains that can be mapped with a concept and its antonym (upstream of the opposing branch—foot to hand) or negation (upstream of the opposing branch and downstream—rest of body to hand). Further upstream branches generate hyponyms and metonyms (finger to hand).

The plausibility of the symbolic code variations can also be measured in terms of the space-time complexity of representation and calculation. For example, the transitivity of binary

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107 Ferdinand de Saussure, Course in General Linguistics, eds. Charles Bally and Albert Sechehaye with Albert Riedlinger, tr. Roy Harris (LaSalle, Ind.: Open Court, 1986).
cause and effect—if A causes B and B causes C, then A causes C—is simple to calculate. Reproductive success is a much weaker criterion for evolutionary durability than subtlety of causal representation in symbolic code. Nature favors quick, risk-averse rules of thumb. Indeed, significant progress in chaos theory and dynamic systems modeling had to await the enhanced memory and computing speed of modern digital computers. The speech-parsing technique of "chunking" tends to produce representation schemes with power trees of hierarchical concepts. This phenomenon is known as Zipf's Law and has been observed throughout the structures of language. It enables more efficient searching, sorting and space utilization. The computational constraints on processing of narrative text favor certain types of syntactic relations and grammatical transformations.

The plausibility of symbolic code variations can also be measured in terms of mapping to the external world. Relationships of presumed linear causation in the code (like actions have like effects) map well to much of reality, even fractal landscapes, because most of the avalanches are small. It is more efficient to impose a linear model and explain the rare, extremely nonlinear effects as "acts of God." Knowledge progresses rapidly by projections of code-mapping patterns from one domain to another by analogy, with minor adjustment for local experience because this is much more plausible than random guessing. Again, however, the dividend of pragmatic utility is no guarantee of causal precision and nuance. Finally, much of human reality has been constructed to suit the functional requirements of the sign code. We attempt to make our world in the image of grammatical relations.

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It should be apparent that this spells the end for ambitions for a complete reference truth of a language comprised totally of well-defined concepts that refer precisely to sets of real real-world entities. Each of the sources of constraint on the plausibility of the symbolic code—internal, computational, external—imposes necessary criteria for minimal fitness in avalanches that reconfigure the code in the process of self-organized criticality. Any code variations that were computationally infeasible would not achieve critical stability within the brain even if they more accurately represented the external world. A cost to reference accuracy and nuance in one domain would be sacrificed to meet minimal requirements in another.

The error of modernism, according to Nietzsche, is to presume that the relations of grammar—constraints for computational efficiency—accurately represent or constitute reality. The symptom of this neurosis is to impede evolutionary development of the code along the dimensions of internal fitness and external fitness—usually for an ideological purpose. This lock-in effect makes the code of knowledge and morality less sensitive to the negative side effects of how the coherence truth implicit in the current code generates dis-utilities that percolate into political dissent. Put simply, idealism impedes adaptive growth.

Having explored how self-organized criticality can produce a formal structure that ratchets gains in useful complexity cyclically through phases of stress and transformation, this next part of this section will consider the psychology of how the brain uses emotions for decision-making and promotes self-organized criticality to transform behavioral habits and conceptual codes.

Antonio Damasio’s *Descartes’ Error* is a landmark book that presents compelling neurological evidence that overturns rationalist models of thinking and decision-making. The details of Damasio’s argument are unnecessary for present purposes, which is concerned with the
relationship between emotions and the problem of proportionally mediating conflicting emergent value-goal forms and self-organized criticality. Damasio’s work shows that rational calculation and emotions are both involved in decision-making and that where physiological pathologies impair the integration of emotional input, patients exhibit a widening gap between their conduct and socially savvy behavior.

Of particular note are the card experiments where non-impaired patients implicitly learned patterns of risk-reward through emotional attunement rather than rational calculation of probability. The experiment involved selecting cards from either of two piles. Each pile contained both payoff cards and cost cards in random order, but one pile had more extreme payoffs and costs, with a net cost over time. The emotional “memory” in effect stored small doses of card-selecting experiences to generate statistical information. In the experiments, the non-impaired subjects would eventually exhibit measurable skin conductivity reactions consistent with a preconscious, negative emotional response as they reached for the card pile with net costs. The impaired subjects had to rely on rational estimation, which tended to overestimate the payoffs, and so would eventually go bankrupt.

Emotional reasoning is a necessary supplement for several reasons. Statistical inferences and probability calculations are computationally very expensive. Moreover, as argued above, the rational code of concepts and logic will be necessarily incomplete, particularly with respect to catastrophic phenomena such as friendship and trust. Think of the decks of cards as choosing between two friends, with the emotionally impaired agent systematically hanging around with the wrong crowd. An interesting observation Damasio makes is that the emotionally impaired subjects were otherwise intellectually quite intelligent and could competently identify moral options and reason deductively—they scored well on I.Q. tests. This describes a “black-letter”

lawyer, who relies solely on literal legal doctrines. Damasio says nothing that is not already implicit in Nietzsche's writings; Damasio corroborates Nietzsche with compelling experimental data.

This thesis proposes a model of emotional persuasion that builds on Damasio to examine decision-making in terms of emotions, self-organized criticality and the problem of conflicting emergent social forms. Suppose that for each goal perceived as important by an individual, a new neural structure formed that linked to body gestures of emotional concern. Within the individual's brain there could form a neural net structure that is the equivalent to a fractal landscape shaped by emotional events, the landslides of which entailed releases of affect with semantic relevance. Per Bak proposes a neural net model that uses hormonal dampening and "democratic reinforcement" to tune neural structures into critical landscapes, the details of which are not required for present purposes. The important feature is that body events of emotional gestures attune an emotional fractal landscape to patterns of social risk. Applying Damasio's card experiments and Glen Doman's research on infant-child neurological development, this attunement can be expected to be shaped by the frequency of emotional experiences, the intensity of emotion, and the duration of the emotional experience. These "small doses" are the erosion events of the fractal landscape for the emotional modality that correlates to the new goal.

Another important feature of Bak's neural model is that different semantic landscapes can overlay the same physical neural cluster. This suggests that by creating an emotional modality for each conflicting goal, decisions could be made by exploiting the thermodynamic properties of the neural cluster as a body-calculator to cope with the calculation problem. Self-organized criticality could be exploited as an information processor to find a code of behavior to exceed a minimal

threshold of risk in proportionally mediating the conflicting goals. Self-organized criticality seems to require a holistic system of energy redistribution, so by a semantic mapping that achieves an energy-information ambiguity, a physical process achieves a higher order of computational power.\(^{114}\) The chaotic aspect has been exploited for calculation purposes to achieve an efficiency no digital computer could replicate except for trivial problems. In terms of computational theory, it appears that the body calculation could be at least NP-complete, meaning that the space-time complexity of computation achieved could exceed the effective limit on grammatical calculation and rational intellect.\(^{115}\) A similar quantum increase to NP-completeness in bio-computing power has already been proven with respect to “DNA computing.”\(^{116}\) In DNA computing, various physical DNA processes such as “melting” and “splicing” can create code variations that can be tested for fitness, thereby acting as a biological computer. In the persuasion model of legal reason, instead of DNA re-combinations, the emotions guide neural processes to generate plausible linguistic variations—such as new figures of speech—and then test the re-combinations. This in effect exploits enhanced computational powers to find codes that exceed minimal thresholds of fitness—a coherence truth—and this process is “magic” in relation to knowledge based on reference theories of truth, linear cause-and-effect, and mere “polynomial” orders of computational power. This explanation of creativity fundamentally undermines the core presuppositions of “strong” artificial intelligence and its correlates—including the traditional theories of jurisprudence that Holmes rejects in “The Path of the Law.”


Anything that reduces the “order of rank” of this emotional computational power will reduce the capability of the system to mediate conflicting goals proportionally—fewer friends can be maintained and social utilities must be abandoned to catastrophic collapse. Justice, as will be argued from Nietzsche and Holmes, entails increasing the order of rank to incorporate new values. This model generates powerful critique of any idealistic conception of justice by deconstructing the distortion to the social interests it serves. This critique is the core of the theory of justice of Nietzsche and Holmes and is the subject of the following chapter.

Further development of the model of emotional decision-making will be helpful in terms of analyzing the relationship of the form of legal doctrine to the value-matrix landscape.

Consider the relationship of body to emotion. Bodily perceptions select input and indicate the intensity. Emotions signal the expected degree of relevancy and risk to emotionally anchored goals. However, the causality is not unidirectional—the emotions send feed-forward information back to the body to help perceive emotionally relevant patterns. (See figure 2.10, below.) This image-enhancement occurs in both real time and evolutionary time, as the genetic code finds functional proteins to reduce the cost to learn and detect patterns consistently found to be relevant to the emotions, that is, conducive to adaptive response. Who is genius to whom? Recursion effaces any tidy causal division between nature and nurture, which is essentially irrelevant to development issues in dynamic systems.117

In the model of decision-making proposed here, emotional decision-making is fundamentally a modal switching logic. A situation stimulates perceptions that activate conflicting emotional modalities—that is, emotionally linked neural-net landscapes that operate as emotional proxies for goals of the individual. In effect, the dominant emotional modality wins
control and generates the action it has learned to apply in such circumstances. In effect, each emotional modality has its own theory of truth. As the felt needs of a particular goal intensify, the goal’s emotional modality eventually gains control and switches the truth system in effect. The mind, therefore, can be conceived as the site of a competition among Homeric gods. One can read the appearances of gods as control switching to a different modality and, as in Homer, no one god can control all the others, though there is a clear ranking of gods in each specific context where two conflict.\textsuperscript{118}

The origins of consciousness would appear to entail the development of a switching logic to mediate which emotional modality has control from time to time. Such a switching logic would be an antecedent logic. This contrasts with result-oriented switching behavior whereby the dominant emotional modality assumes control as the needs of an unsatisfied goal intensify. For example, antecedent logic would create a rule to eat three meals per day, whereas the consequential logic is implicit in an increasing hunger and an increasing predisposition to act on it. The threshold for consequential switching that abandons the antecedent code (possession by a Homeric god; internal political rebellion) is a symptom of the incompleteness of the antecedent code and reflects the irreducibility or relative autonomy of each goal in terms of the other goals. Presumably, the maximum intensity of a particular emotional modality would not exceed the net utility of the goal it represents; otherwise, it would probably be a good indicator of neurosis.


\textsuperscript{118} See Bernard Knox, “Introduction,” in Homer, \textit{The Odyssey}, tr. Robert Fagles (New York: Penguin, 1996) 42-43. When Calypso accedes to release Odysseus she observes, “But since there is no way for another god to thwart / the will of storming Zeus and make it come to nothing, / ...” \textit{Ibid.}, Book 5 lines 152-153. The use of the term emotional modality is similar to Freud’s distinction between drive and instinct; however, emotional modality as used in this model is intended to downplay the role of instincts and allow the invention of modalities linked to cultural values that have no traceable origin in bodily instincts or functions.
This process corresponds to the Aristotelian notion of proportionality, similar to the proportionality reasoning discussed earlier in this chapter. Virtues in this model would correspond to emotional modalities selected by evolution, especially the evolution of cooperative tendencies.\footnote{Matt Ridley, \textit{The Origins of Virtue: Human Instincts and the Evolution of Cooperation} (New York: Penguin, 1996) and Elliott Sober and David Sloan Wilson, \textit{Unto Others: The Evolution and Psychology of Unselfish Behavior} (Cambridge, MA: Harvard University Press, 1998).} One might call these emotional modalities “virtual virtues.” From a development perspective, the fact a behavioral tendency is genetically reinforced need imply no more than a certain modality tends to form with lower nurturing costs. Plainly nurturing can entirely override any genetically directed functional disposition to reinforce sociable emotional modalities—otherwise hunger strikes could not happen.\footnote{Frankl noted how in concentration camps people tended to retain their dignity and culture despite the hierarchy of drives. Victor E. Frankl. \textit{Man’s Search for Meaning: An Introduction to Logotherapy}, translated by Ilse Lasch and Gordon Allport (Boston: Beacon Press, 1992).} Aristotle’s logic of proportionality entails developing an antecedent behavioral code and switching logic that lessens the conflict or dissonance of emotional modalities so that there are fewer modal reversals—that is, fewer circumstances where an emotional modality assumes control because the antecedent code has failed to satisfy its minimal requirements. Proportionality, then, is a self-conscious attempt to mediate antecedent and consequent reasoning.

The introduction of language and predictive calculation in the forebrain enables a qualitative transformation in how proportionality enhances emotional decision-making. In Nietzsche’s psychology, the primary functions for language are to communicate and calculate. Language evolves to facilitate external commands, descriptions and predictions. Language also evolves for secondary purposes, namely self-description and rationalization. Language describes the processes of the self primarily insofar as it is useful to the purposes of external communication and predictive calculation using models of linear causation.
As emotions provide relevancy feedback to sharpen perceptions, the concepts of language similarly feed forward to condition both the emotions and the faculties of perception.\(^{121}\) (See figure 2.10, below.) Language conditions perceptions to more efficiently lock-in on patterns relevant to concepts and, conversely, to ignore more nuanced causalities. (See figures 2.1 and 2.2, above and figure 2.12, below.) Language also enables a much more active self-management of one's own development. This self-development, for Nietzsche, is a much more complex endeavor than the vulgar fiction of free will and is a major theme throughout Nietzsche's work.

Notwithstanding language's simplifying presumption of linear causality, it plainly advances the task of proportional reasoning. Linear causality is good enough to generate plausible predictions much further into the future. Language can be used to develop a behavioral code that, through integration, somehow disciplines each emotional modality to defer gratification on the faith of the overall code. Language and meaning, in effect, become emotional promissory notes to defer modal reversals. The concepts implicit in language become the form of a treaty among the competing emotional modalities.

In terms of critique, the important feature of language is its relative autonomy. Factors that promote the coherency and efficiency of the language and calculation processes exert selective pressure that, as noted, affect the development of emotions and perception at the emotional and bodily levels. (See figure 2.10, below.) Language has its own agenda that conflicts with the perception and modeling of the full causal nuances of various internal and external dynamics. Some of these features have been mentioned: Zipf's law; power tree hierarchies of concepts; oppositions and negations; parallel processing and active memory efficiency; conceptual reorganizations that tend to balance power trees of concept hierarchies; context-free

grammars. The most notorious, from the perspective of the model of creative decision-making and legal reasoning in this thesis, is the law of the excluded middle (\textit{reductio ad absurdum}), which trades sensitivity to causal nuance for great savings in computational and representational resources.

\begin{center}
\textbf{Body - Emotions - Language}
\end{center}

\begin{figure}[h]
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\includegraphics[width=0.8\textwidth]{figure2.10}
\caption{Body—Emotions—Language}
\end{figure}

The relative autonomy of language also includes external factors of culturally nurtured development. As culture makes new grammatical and conceptual innovations, these patterns are passed on more efficiently as children form language gestalts. It is much more efficient to assimilate pre-established patterns than to invent them. This introduces the selective forces of social politics as to which language patterns shape emotions and perceptions. Language can evolve as a cultural product, making human consciousness as much a social product as a genetic product. Again, from a development perspective, the nature and nurture distinction becomes less

meaningful as causalities go recursively in either direction. Finally, with *Ecce Homo* comes the fully postmodern self-conscious nurturing of nurturing technology—the development of the ability to develop.

Nietzsche was quite aware of the significance of early nurturing and development. Recent advances in developmental psychology make more precise some of Nietzsche’s principles of “breeding.” Kaufmann refers to Nietzsche’s views of “breeding” as Lamarckian, which makes sense if one presumes that children quickly detect and align themselves to patterns of behavior and that the effects of early nurturing are difficult to alter later in life. Nietzsche claimed it takes three generations to breed in a strong trait.\(^{122}\) Such a comment has nothing to do with genetics or eugenics. It is more consistent with findings in the psychology of abuse where abusive patterns tend to reproduce themselves in the way parents unconsciously emotionally react to the behavior of their own children.\(^{123}\) As an abused child seeks self-mutilating coping strategies, he or she evolves constitutional emotional patterns that are difficult to overcome. Even if later, as a parent, the abused individual becomes aware of the symptoms of the abuse, it is very difficult not to fall into old patterns that his or her own children detect subliminally. Presumably the pattern would not be as strong in the children of a self-conscious parent, and once those children in turn become self-conscious parents the pattern would be weakened further in the next generation of the family. Nietzsche’s three-generation rule is plausible in terms of current models of abuse

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psychology. It is interesting to note that Holmes's father held similar views and was quite active in his son's development.¹²⁴

Nietzsche's views on early nurturing also find strong support in the childhood development psychology of Stanley Greenspan as set out in his recent book *How the Mind Grows* (1997).¹²⁵ Greenspan's work also helps provide detail to the model of emotional decision-making this chapter develops for the model of legal reasoning. Greenspan claims that Damasio has *understated* the importance of emotions in intellectual development. Greenspan bases his conclusions on rehabilitative work with autistic children who seem to lack a genetically reinforced predisposition to engage emotionally with primary caregivers. Greenspan's work shows that hyper-nurturing can replace the missing genetic predisposition and that once the emotional bottleneck is addressed, the children have otherwise normal intellectual development. Again, the nature and nurture division dissolves into a simple variation in required developmental start-up costs. In Greenspan's model, the infant goes through a stage of fragmented consciousness, using the analogy of numerous islands. A tantrum is a standoff between two islands, or what here has been called emotional modalities. A common tantrum standoff is a clash between the desire to assert independence and the desire to retain parental favor, that is, access to parental resources.¹²⁶ According to Greenspan, children achieve integration insofar as they are permitted to experience and articulate their emotional experiences within different modalities. Greenspan claims that articulating and negotiating emotional

¹²⁴ Hoffheimer, who applies Freudian analysis to conclude Holmes was a repressed natural law idealist, refers derisively to these views of Holmes's father regarding early nurturing. See Michael H. Hoffheimer, *Justice Holmes and the Natural Law* (New York: Garland Press, 1992).
conflicts, particularly modal transitions, improves integration and the conscious awareness of needs.

Greenspan’s model provides a developmental explanation of Richard Herrnstein’s Matching Law principle.\textsuperscript{127} Herrnstein’s studies of the psychology of economic behavior partially refute the rational actor hypothesis. Herrnstein’s experiments showed that decision-making does not tend to maximize utility at any given moment. Rather, decision-making tends to make time-share modal switches rather than case-by-case decisions. While one mode monopolizes control, another mode might starve. A starved modality will eventually seize control. This conforms to the Homeric model of Nietzsche described above. The irrational behavior occurs because some needs are not adequately articulated and represented by the conscious rationality. When such a mode is in control, it blindly searches for palliative behavior, which the intellect rationalizes. Nietzsche, taking his cue from dreaming, made the important observation that conscious awareness largely rationalizes and confabulates causes and narrative coherency according to its most dearly held beliefs.\textsuperscript{128} Synthesizing Greenspan and Herrnstein, it can be seen that the weaker the articulation and integration as a toddler, the more prone the individual will be to starved modes assuming decision-control and seeking irrational, palliative behavior.\textsuperscript{129} Mihalyi Csikzentmihalyi observes that people irrationally watch television rather than pursue the complexification of skills, which would produce the affect of “flow” and create a sense of power.

\textsuperscript{129} Greenspan is highly critical of modern capitalist society for eroding the opportunity for childhood nurturing of developments taken for granted. Nietzsche makes the same criticism of capitalism and the state with regard to education of the body and culture, which will be discussed in the following chapter. Greenspan’s point also demonstrates the danger of non-incremental change that risks irretrievable losses to processes taken for granted and therefore absent from the rational code from which the amendments are logically derived.
and deeper satisfaction. This corresponds closely to Nietzsche’s psychological version of the will to power and adds detail to Nietzsche’s preoccupation with a critique of decadence. Indeed, one is tempted to conclude that modern psychology adds nothing new to Nietzsche.

Notwithstanding the importance of language for the development of a more comprehensive, emotionally integrated code of proportional logic, language is not complete. Each emotional modality treats the functional requirements of its goal as an end in itself and, as argued above, emotional fractal landscapes are better at aligning themselves to patterns of risk than derivation by rational intellect. As noted, phenomena like loss of trust are nonlinear. Moreover, adding new goals entails the need to exploit some of the “play in the joints.” Nietzsche remarked that one could almost measure the order of rank of people by how many inconsistent goals they could manage within themselves. The Damasio experiments show that a good intuition for social risk entails subliminal learning from a series of emotional experiences. Our model, then, conceives each emotional modality as a self-organized critical structure whose friction properties and sensitivities are continually reinforced by the functional requirements of the goal it serves. A modality’s function determines its fundamental structure, which is eroded by the frequency, intensity and duration of emotional experiences into a fractal landscape.

An interesting issue in the development of this model was how to characterize the means by which language is able to discipline various modalities to suffer—that is, how does language subvert the tendency of a starved modality to assume control and thereby defer gratification? Various mechanisms could bring this about. For example, a code-following modality might simply out-yell the recalcitrant modality, generating a divided emotional sensation such as bitter/sweet. A dominant modality might reshape the recalcitrant modality so that it no longer

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protests in such cases, or is weakened. This might occur by creating gestalts that filter perception and thereby reduce the tendency of the recalcitrant modality to make over-broad generalizations. (See figures 2.1 and 2.2, above and figure 2.12, below.) The dominant modality might actively intervene and erode the fractal landscape of the recalcitrant modality as a modality capable of outranking the core functional imperative of the recalcitrant modality. Nietzsche implies that language works this way, co-opting the neurological mechanisms that cause the somatic-DNA values to be subverted to the germ-DNA values in mating mode. As noted earlier in this chapter, for Nietzsche all acquisition of language mediated knowledge follows the paradigm of mating seduction. The model of legal reasoning articulated here need not follow Nietzsche in making this link; all that is needed is the empirical observation that emotional decision-making happens to follow the same developmental pattern. Finally, the brain could use painkilling to neutralize the emotional pain of the recalcitrant modality in the circumstances without actively altering the fractal landscape of that modality. Endorphic hormones might be released in an orgasmic-like reversal that reinforced the activated modalities other than the recalcitrant one. There are myriad possible combinations of reinforcement, dampening and suspension, which probably all play some role at the neurological level. The details of how these mechanisms work together are not relevant for present purposes; it is sufficient to establish that psychologically plausible mechanisms could exist.

The important feature of this dual-aspect reasoning system is that it mediates antecedent and consequent reasoning. Decisions prima facie follow the antecedent logic traditional to the cultured individual. Virtues and “natural law” provide an efficient code that preserves the benefit of things taken for granted. If the decision-making process generates a high degree of emotional

131 Jared Diamond claims that the evolution of language presupposes the evolution of recreational sex. Jared Diamond, *Why is Sex Fun?—The Evolution of Human Sexuality* (New York: Basic Books, 1997). This accords with
dissonance of starved or recalcitrant modalities, then deliberation switches to consequent reasoning. The promissory note of the antecedent code is dishonored and the emotions launch an inquiry into utility. Code-based prediction and policy reasoning might accomplish this; however, they are computationally very expensive. Another approach would be case-based experiential reasoning, which is a much less expensive decision process. The system would locate the nearest similar case and follow that case as a precedent unless utility calculations overcame an onus of showing that the expected benefits of another course of action would outweigh the risks.

The following diagram shows how emotions and intellect could be integrated in a recursive decision process. (Figure 2.11.) The emotions provide a proposed decision that has overridden the antecedent code. The brain consults either its code-knowledge or its case-knowledge to produce an alternative decision. This goes to the forebrain to generate an image of the predicted consequence of changing code to apply in all similar situations. This image feeds back into the emotional network as a virtual perception to generate a second order of emotional reaction. This in turn would lead to an amendment to the provisional decision. The process repeats recursively and, with luck, telescopes into a decision with a low level of emotional dissonance.

Nietzsche's assertion that creativity and sexuality are profoundly interconnected.
Presumably, a modality acts as a decision controller. If the change in decision or predicted change in consequences or degree of emotional conflict is no longer reduced appreciably through continued recursion, or the emotional indicators of urgency are high, then the controller would force a decision. If the degree of emotional conflict remained high when the decision was forced, presumably the case-experience would be registered as containing a “dissent”.

This decision-making model can also accommodate conscious deliberation as part of the decision cycle. Per Bak argues that a conscious thought can be conceived as an avalanche in the critical neural network, by analogy to physics where a subatomic particle is conceived as an avalanche of energy in a critical system of forces.\footnote{Per Bak, \textit{How Nature Works: The Science of Self-Organized Criticality} (New York: Springer-Verlag, 1996).} An avalanche within a modality would articulate into a thought, or perhaps as a narrative that makes a stream of thoughts coherent. It
follows that only a small portion of the deliberative process would actually reach consciousness, with most of the processing being done through inter-neural transmissions of preconscious work-in-progress of partially constructed perceptions and so forth.\textsuperscript{133} Articulation into language, in effect, would broadcast the avalanche-hypothesis to all modalities to accelerate the recursion process.

The decision-making model correlates to the psychology of creativity and the model of persuasion discussed above. With language, the antecedent logic is symbolic and is thus useful to calculate and predict consequences. Creative improvements to the symbolic code are driven by the consequential emotional protests of modalities whose functionalities are not fully met by the current version of the antecedent code. Each modality has its own theory of truth constructed to suit its functional perspective. The process of language creation attempts to construct a new antecedent code as a coherence truth to improve the commensurability of the conflicting modalities. In effect, the creative process exploits self-organized criticality to redefine the code until it is predicted to satisfy a minimal threshold for each of the modalities activated by the situation calling for a decision. In terms of the catastrophic function that each modality represents, the creative process seeks a code to keep each modality on the safe side of the predicted threshold of catastrophic collapse. This is how one endeavors to keep all friendships intact.

In Csikszentmihalyi’s model of creativity, successful transformations that entail an increase in power—finding a more stable antecedent code—and a reversal of the accumulated frustration of experiences with unresolved clashing modalities—decisions with dissents—

together cause a distinct euphoric affect, which Csikszentmihalyi calls "flow." This probably serves to emotionally anchor the new code and dissolve the old code through a process of mourning. Like Holmes in "Law in Science and Science in Law" Csikszentmihalyi draws on Herbert Spencer’s notions of integration and differentiation to measure progress in complexification. Complexification of the self is the increasing degree of emotional integration and skills integration, which is regulated by emotions and moods. For example, boredom and aggression propel a strong, under-stressed self to seek challenges to stimulate growth. Conversely, anxious stress and depression withdraw a weakened system where the stress is beyond the bandwidth of absorbable experience. The sports psychologist James Loehr argues that the same principles apply to athletic training of both body-skills and “emotional toughness.” The positive affect of flow is emotional feedback that rewards an increase in power, and a sense of power is fundamental to maintaining an optimistic attitude.

Again, all of these insights are fundamental in Nietzsche’s psychology of creativity and decadence and the modern psychologists have merely made the model more conceptually precise and supported their claims with empirical evidence. The recent work of at least some modern psychologists and scientists of self-organized criticality supports the claim that Nietzsche’s rhetorical model of knowledge creation is both empirically and computationally plausible.

The aim of persuasion, therefore, is to get past the ability of the rational-perceptual filters and the antecedent logic to dispose of a situation peremptorily and to activate an emotional modality that would create a decision dissent. The persuader introduces a pattern of friction into

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the works in the form of an accumulating series of code distortions, discretionary exceptions to the code or dissents. This pattern nurtures a growing emotional commitment—empathy—for a new or previously under-represented value. Eventually, the persuader stages a situation that openly challenges the stability of the code with the destruction of the modality that was nurtured by the series of recalcitrant experiences. This crisis may then cause a reversal where the nurtured modality assumes control and triggers an avalanche that transforms the antecedent code to achieve a minimal fitness within the nurtured modality. Of course, this process might entail re-evaluation of other modalities whose utility had been previously over-estimated.

Based on this psychological model of creativity, the same principles of persuasion apply to any attempt to advocate creative decision-making. Judges evolve modalities that stand as proxies to elements of the notional value-matrix—virtual virtues. The fractal landscape of each modality shaped by prior emotional experiences would reflect the perceived risks of catastrophic collapse in relation to interaction with conflicting values and goals in various contexts. The emotional sensitivity of each of these value-goal modalities would correspond to the bandwidth of equitable relevancy discussed above in the model of proportional legal reasoning. Each modality would operate as a consequential end in itself, reflecting perceived catastrophic vulnerability, but its ability to assume decision control would, ideally, become calibrated so as not to exceed its net utility. Emotional experiences would be the input flow of stresses that would drive avalanches in the emotional landscape. The value-goal modalities cannot, and need not, be defined precisely. Among other reasons, neural landscapes continually reorganize to serve multiple goals, like products in Moore’s business ecology model. Consequently, there is no “natural” value-matrix; the emotional landscape spontaneously reconstitutes its hierarchical...

structure from time to time. For this reason, no fixed, ranked matrix of values and goals is required for the persuasion model of common-law legal reasoning, contrary to the approach of MacDougall and Laswell. Nonetheless, some value-goal modalities would remain sufficiently stable. Finally, self-organized criticality would be exploited to map a code of legal doctrine onto the value-matrix landscape in the same manner that language is mapped to the emotional landscape, and subject to similar constraints and recursions that defy any attempt to reduce one process to the other.

The irreducible nature of the process is reflected in Holmes’s “bad man” approach to law, which cynically gives analytic priority to case outcomes over morality, policy or other singular ways of explaining law. However, viewed more charitably in terms of self-organized criticality, the “bad man” method protects the integrity of law by keeping legal process from being reductively stated in terms of just one of the four causal pre-requisites to its self-organized criticality. Holmes’s “bad man” is a personification of resisting the urge to reduce creativity to any of genetics, emotions, language or culture. In law as in psychology, each of the four domains imposes constraints and self-organized criticality finds a coherent formal treaty that achieves minimal fitness for each constraint. No one dimension controls the process any more than any Homeric God could defeat all others or be totally defeated by the others in all situations. As Homer observes in the Odyssey, Zeus does not go away empty-handed.

Having explored the psychology of creativity, detail can now be added to the diagram of heretical jurisprudence set out in the introduction of this chapter. Recall that principles of computational critique and complexity analysis bisected the task of modeling the “surplus” of human creativity into computationally tractable processes that utilize form and computationally

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difficult processes that creatively transformed the form. The expanded diagram is as follows.

(Figure 2.12.)

In terms of legal reasoning, repeated experiences of the restructuring process lead to an ironic developmental doctrine that promotes the process of change. For example, common law has developed a set of meta-rules known as *stare decisis*. Nietzsche similarly sought to cultivate principles of self-development but was careful to maintain an open system. Therefore, the doctrines of change are themselves vulnerable to change, in a self-referencing infinite regression. The foregoing diagram fails to convey fully that nuance visually, but it does show that emotional creativity can also transform the developmental doctrine itself.
The diagram seeks to convey that decisions are primarily driven by emotionally anchored values. The aim of persuasion is to alter the value landscape by cultivating new types of empathy—virtual virtues. However, experience is filtered both by the gestalt effect of established rational forms and by emotional bias. Baudrillard dwells on tactics for eluding rational filtering to increase this bandwidth. Persuasion, therefore, is situational because the range of detectable patterns is constrained by the pre-existing rationality and the collection of already anchored values—the emotional groundwork may need to be done in stages. Conversely, rational forms are correspondingly reliable for roughly predicting or rationalizing behavior, which makes rationalism and legal positivism plausible philosophies and artificial intelligence a useful endeavor. Nonetheless, the rationalist model fails to capture completely the human surplus of emotional creativity.

Returning to Descartes’ error, in this model of creativity only emotional experiences improve the external fitness of knowledge and the behavioral code. Conversely, only emotionally engaged decisions are good evidence of the emotional landscape and the process of creativity. In terms of legal reasoning, it accounts for the intuitive reluctance of judges to rule on “moot” issues and the rules of *stare decisis* that allow a subsequent court to ignore *obiter dicta*. The judge as decision-maker is emotionally challenged because she or he will have to render a decision emotionally devastating to one of the parties. If either of the parties has nothing emotionally at stake on an issue, then neither has an interest in activating various value-modalities of the judge and any considerations that extend beyond the scope of activated modalities would be empirically unreliable. Again, this merely repeats Nietzsche’s psychology as set out in *Dawn*—the experience must cut into the flesh with knives to spur an impassioned search for truth. The emotional persuasion model of decision-making also reaffirms the essential
role of drama and rhetoric in the judicial opinion. Each precedent must be experienced emotionally to train the value-matrix modalities of the judge to incorporate the law and become plausibly creative within it. This topic will be revisited below when common law is analyzed as a communal process.

Finally, this model isolates the infamous mind-body duality that has long haunted Cartesian rationalism. An emergent coherence truth achieved by self-organized criticality that meets the relevant minimal constraints—including the internal dynamics of language, bodily needs, external strategies and manageable decision costs—produces the illusion of a metaphysical gap between the reference or correspondence truths of the body and the coherence truth of the mind (language and calculation). However, this gap is merely the computational boost gained by exploiting chaos to advantage that cannot be manageably modeled using the concepts and logic of linear causation. The logical faith of the law of the excluded middle (reductio ad absurdum) elevates a computational problem into the metaphysical paradox of the mind-body duality. From a critical perspective, this faith in logic and eternal forms undermines creativity and, therefore, justice.

2.5 Collective Persuasion—Self-Organized Criticality and Legal Process

The first section of this chapter used computational methodology to isolate computationally hard skills of legal reasoning. The second section of this chapter explored science and psychology to find mechanisms for such skills, which suggested some necessary conditions for the enhanced computational power of self-organized criticality and some vulnerabilities of emotional bias. This third section will now resituate the hard legal reasoning skills within the context of law as a viable social process. The ultimate aim is to generate constructive criteria to enhance the adaptive
intelligence of legal process, while refining critical methodology to identify vulnerabilities and address them more precisely with less nihilistic safeguards.

Once legal reasoning is viewed from the perspective of a cultivated emotional skill, it becomes evident that legal process must systematically endeavor to align judicial intuition to both reflect and constitute the social values of ever-improving social utility. This section will consider four elements of legal process that either require or enhance the adaptive intelligence of self-organized criticality. First, legal reasoning is done on a budget. Unlike scientists, judges cannot hold open testable hypotheses until they find appropriate experimental data—they must make immediate risk-minimizing decisions while evidence is slowly gathered collectively.

Second, legal process must humbly acknowledge its own incompleteness and be sensitive to the need for political expression of dissatisfaction where cause-and-effect relations cannot be rationally articulated with precision. Third, legal process must ironically ensure that its use of form promotes the formation and transformation of hierarchical concepts, to both consolidate previous and enable further adaptive change. Fourth, legal process must propagate the “surplus,” dramatic content of individual decisions to cultivate the emotional biases of others in the judging community.

Beginning with the problem of reasoning on a budget, Nietzsche identified the general solution as moving alternatively between antecedent and consequent modes of reasoning. As this section looks toward social context, it is useful to cast the problem in terms of John Dewey’s injunction that jurisprudence should explain the connection between antecedent and consequent reasoning. Dewey, of course, is an important major thinker in social theory and the previous section of this chapter might be usefully contrasted to Dewey’s own approach to social theory based on a theory of action and praxis. Dewey similarly treats humans as creatively adjusting
their unthinking habits to reach stable and coordinated accommodations in social interactions.\textsuperscript{140} For Dewey, a major reason for the predominance of habit is simple decision economics: we lack the ability to evaluate the full consequences of every action we perform.\textsuperscript{141} Consequently, behavioral change goes through cycles of habit, recalcitrant experiences, rational reflective consciousness and behavioral change.\textsuperscript{142} The fruits of such reflection would then percolate up from practical reasoning to antecedent norm-based reasoning to unreflective habits. Ira Cohen critically observes that Dewey’s psychology failed to consider emotions.\textsuperscript{143} With the hindsight of Damasio and others—or the foresight of Nietzsche—this may account for why Dewey’s ambition to connect antecedent and consequent reasoning failed. Dewey’s model attempted to integrate the two styles within the light of conscious reflection rather than in the darkness of emotions.\textsuperscript{144} Consequently, Dewey’s Enlightenment odyssey seems to have run aground on the computational sandbar of NP-completeness. Nonetheless, Dewey shows that the budget constraints on decision-making process are in some sense constitutional of the nature of legal reasoning. Managing decision cost is an important element of both individual decision-making and common law’s institutional design. With respect to the project of justice, one would expect reasoning styles to vary where there is division of labor among institutions with different resources.\textsuperscript{145}

Decision costs can be roughly divided into rule execution costs and rule amendment costs. In the context of an isolated decision, amending rules plainly has much greater costs than simply executing an antecedent code. The previous sections of this chapter attempted to provide

\textsuperscript{141} \textit{Ibid.}, 123-124.
\textsuperscript{142} \textit{Ibid.}, 123.
\textsuperscript{143} \textit{Ibid.}, 126.
a model for accumulating data that would suggest the possibility of an increase in net future utility by pausing to amend the rule, while at the same time using previous experiences as data when exploring how to amend the rule.

Rule execution costs include costs to select, gather or measure information to be used in applying rules and the cost to make the calculations. Rule amendment costs includes costs to determine the relevant causalities and to evaluate how deficient one’s knowledge is from perfect information. Differing attitudes on matters of imperfect knowledge lead to political side effects that impose costs to mediate difficult political issues. Legal reasoning is an accommodating system, seeking to accommodate the competing political interests with the simplest, most imprecise rules that are inexpensive to apply. The following section will examine how Holmes saw common law as an accommodating system. This section will consider the more general problem first. These sections are preliminary to the problem of the form of legal doctrine.

The recent rise of interest in so called “fuzzy logic” reflects the growing realization that, unlike the idealized reasoning of idealist philosophies, empirically and computationally plausible reasoning avoids costly over-precision. We take it for granted that when we ask someone what time it is or ask how old her daughter is that we expect the most imprecise response possible that is relevant to the circumstances of the question. We prefer gradations such as cold-warm-hot, which have different meanings depending on whether it’s a swimming pool, a

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147 Bart Kosko, *Fuzzy Thinking: The New Science of Fuzzy Logic* (New York, Hyperion, 1993). It is not clear that fuzzy sets and fuzzy logic actually add anything to logic and set theory. It seems more a matter of interface between human discourse and precise representation suitable for a computer.
bottle of soda or a cup of coffee. Awareness of the need for fuzzy sets and fuzzy logic seems to have arisen from the ambitions to automate seemingly simple tasks, such as parking a car, in which computers can get computationally overwhelmed by over-precise measurement and calculation.

The degree of precision is a function of various factors, including the available means of measurement, the costs of measurement and the added computational cost of another order of precision. In terms of the model of proportional reasoning, an important consideration would be the degree to which adding precision would better partition the relevant facts and causalities to achieve better the underlying values and goals and to identify better the boundaries of their zones of catastrophic vulnerability. Moreover, the loss of trust example shows that there is an inherent degree of imprecision in partitioning, such that legal reasoning is well disposed to fuzzy concepts like “non-natural use.”

On the other hand, there are benefits to over-precision in certain instances. Here the decision costs of more accurate decisions in terms of the value-matrix exceed the benefits of simple measurement and calculation. To use a commonplace example, the ideal bedtime for a child would depend on many factors—including age, health, how stressful the day was, the next day’s activities, the benefit of more emotional interaction, and so forth—which the child and parent could debate for some time every night. Avoiding such daily bargaining costs results in a set bedtime that is adjusted in exceptional circumstances.

Over precision is often useful for purposes of political accommodation. Voting age is arbitrarily set at 18 years of age to avoid the cost of testing the maturity of each voter. Attempting to achieve a more morally just outcome backfires because the evaluation would create opportunities for manipulation and add costs to resolve political discontent over decisions. On
the other hand, the cost of error from over-precision is not acutely felt. Someone who is seventeen years and 364 days old can vote in the next election. Many political accommodations are resolved with artificially precise rules such as first-come first serve, where the artificial precision closes debate where it would be counterproductive. Where any decision is better than no decision or a slow decision, we use artificially precise rules that accommodate the basic requirements. This corresponds to a general tendency for people to feel a sense of legitimacy in formal rules. Formality gives an artificial sense of neutrality, which is essential if any sort of political compromise in the form of a formal treaty is to work.

There are also derivative benefits to having clear rules. The certainty of having precise formal rules in many cases enables greater reliance, planning and benefits from resolute action. Indeed, in some cases even the losing contestant is better off with the alternative clear rule than continually engaging in costly debate over imprecise principles that attempt to renegotiate a compromise continually among conflicting interests.

It should be plain that the varying considerations of decision economics means that neither antecedent nor consequent reasoning has exclusive title to good reasoning. Antecedent reasoning works from a pre-established code of rules of the general form: if A is the case then do B. The code is presumed to be justified as an article of faith—the same faith that makes formal rules seem legitimate. Decision costs are extremely low because no justification is required to make the decision, apart from identification of the facts and finding the rule. The completeness of the antecedent code is an illusion, but the error implicit in the illusion is cost-justified.

Consequential reasoning is either the evaluation of all consequences for each decision—a utilitarian computational fantasy—or the periodic creation of a new code of rules based on a general notion of preferred results. Justifications for amending the antecedent code require a high
degree of empirical support, which makes the cost of consequential decisions very high. However, where the incompleteness of the antecedent code becomes pathological, matching-law reversals of control will pre-empt the need to find empirical justification to change the rules.

For Nietzsche and Dewey, a purely antecedent system of reason is an idealist fantasy—all human decision-making is a mixture. Common-law legal reasoning is plainly a mixture of antecedent application of legal doctrine and consequential amendment of legal doctrine.

There are at least three distinct styles of using consequential reasoning to amend the antecedent code. The simplest directly translates Matching Law reversals into antecedent code. Thus, the perceived conditions that triggered the reversal, A, become the antecedent of a new rule: if A then switch modes. This strategy begins to break down as the number of rules proliferates and makes strongly linear presuppositions about the identification of A. This is the pre-modern reasoning of multiple Homeric Gods, who are appeased through a code of sacrifices.

The legislative style of reasoning attempts to use science and expensive policy analysis to rewrite the antecedent code as a new complete code. This modern reasoning presumes a single, omnipotent rationalist God, capable of computing the incomputable. The case-based style of reasoning more modestly looks for patterns in related cases and resolves the case at hand to locally amend the rule code. This postmodern reasoning presumes the near-sighted Mr. Magoo—omnipotence is unnecessary and development only requires local observation—"God is dead."¹⁴⁸

Legislative reasoning is comprehensive cost-benefit analysis. A utilitarian calculus compares everything at once using a notional universal currency.¹⁴⁹ It involves a long process of background papers, draft codes, committee hearings and legislative debate. Legislative reasoning

¹⁴⁹ Dimock claims all theories of justice as having totalizing ambition; however, her argument does not address the possibility of a model such as is developed here. Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (Berkeley: University of California Press, 1997).
is a direct, well-funded, comprehensive and explicit response to strong political forces. The responses are large but discrete. The presumed completeness of the antecedent code and the time between amendments together produce large interregnum buildups of collateral costs and political dissent.

Case-based reasoning is a comparative calculus to determine the case outcome with the least expected error when universalized into a rule of law. Case-based reasoning has no direct ambition to compare more than is required to resolve the decision at hand. There is no presumed common currency: the ordering is by pair-wise comparison, which results in a network of partial orderings. If possible, case-based reasoning defers conclusions that are more general as long as possible until patterns become evident in more data that are reliable. Case-based reasoning blends the functions of decision-making and local rule amendment at manageable cost. Cases are generalized into a provisional antecedent code, which may be locally amended if the onus of proving a manageable exception can be satisfied within the limited decision budget for consequential consideration. The continual stream of cases enables ongoing relief of the buildup of the collateral costs of the antecedent code's presumed completeness. Political discontent is channeled into continual incremental changes to the antecedent code—which may erupt into larger avalanches—to harmonize with values and goals already recognized by the law.

Emotional persuasion—in the highly structured sense discussed in the previous section of this chapter—is consequential advocacy on a budget. Persuasion triggers switches from antecedent code-based reasoning to case-based consequential reasoning. If one fails to account for real-life budget constraints on the use of consequential reason in decision-making, one expects all consequential reasoning to be legislative and so fails to see why persuasion is worth studying. The process of common law is a process of collective persuasion. Where individual
persuasion seeds a person with a series of emotional experiences that are slightly recalcitrant to the antecedent code, common law is seeded with a series of cases that introduce distortion, discretion and dissent into the decisions. Persuasion of the individual induces a transformation of the behavioral code to reflect the functional needs of the new empathy. Collective persuasion of the common law triggers avalanches of doctrinal transformation to reflect the functional needs of values and goals already recognized by the law. Collective persuasion of the common law depends on a network of judges, each being persuaded by litigants in a particular case and persuading subsequent judges through the means of the written opinion. The dynamics of collective persuasion will be discussed in the fourth part of this chapter section. The next part of this section considers politics as a necessary element of legal process.

As noted above in the introductory chapter “Emerson’s Twins” and as will be analyzed further in the chapter “Para-Conceptual Rhetoric,” Holmes’s “Path of the Law” implicitly describes legal reasoning as a process mediating four irreducible perspectives of law: law as tradition (material cause—antecedent rules are legitimate through historical warrant); law as logic (formal cause—antecedent rules are legitimate through coherency); law as utility (final cause—consequent amendments are legitimate through provable utility); and law as politics (efficient cause—consequent amendments are legitimate through provable dis-utility). The process of legal reasoning, then, is one of using emotional persuasion to construct a renewed formal cause that achieves a minimal level of fitness according to each of these four major constraints on law. It will be argued in the third part of this section of the chapter that each of these four main constraints reflect necessary preconditions for the collective system to achieve the genius of self-organized criticality in the project of growing away from injustice as the means to attaining a state of justice.
Each of law as tradition, law as logic, and law as utility are fairly self-evident both as plausible views of law and as themes in Holmes's "The Path of the Law." As will be observed again in the chapter, "Para-Conceptual Rhetoric," Holmes asserts the incompleteness of each of these single-minded approaches to law and implicitly argues this on the basis on the incompleteness of language. What is less commonly accepted as a theory of law in jurisprudence, and less self-evident in Holmes's two main essays on legal theory, is the view of law as a treaty to stabilize social struggle. This second part of this section of the chapter will develop this view along the lines of Nietzsche and Holmes as a preliminary consideration before examining how the form of legal doctrine interacts with processes of persuasion and self-organized criticality.

Law is plainly constrained by political compromise. Law that deviates too far would spur insurrection, or not be enforced. In "The Path of the Law," Holmes repeats the quip that if the price of beer were increased two cents the Germans would rise. Holmes also acknowledges that much in law defers to raw political sentiment, whether through jury discretion or through the unconscious resistance of judges to socialist reforms. Moreover, law is continually the battleground of class struggles. One could view innovations in 19th century real property law, such as the abolition of fee tail and the law against perpetuities, as crucial elements in the class struggle that moved England from the age of status to the age of contract. What is less clear is whether the doctrinal innovations were effects of social change, instruments of social change, or constituted the social struggle. Which is genius to which? Law is both reflective and constitutive of social struggle and political expression.

Holmes was weak on this latter point but nonetheless he considered the dynamics of social struggle to be an essential element of the dynamics of justice. It has been noted that
Holmes is a social Darwinian but not of the typical sort.\textsuperscript{150} For Holmes social struggle was an important means in the search for practical knowledge. Political discontent that percolates into action is a bottom-line consequential indicator that the incompleteness of the antecedent code has ill effects. This is the "matching law" at the social level. Political discontent is an efficient cause of legal transformation and so has constitutional status in terms of the project of justice. Though Holmes was less than explicit on the point in his two main essays, the constitutional status of political expression in his understanding of law can be inferred from his epistemology and his legal opinions, in both reasoning and result. Thomas Grey notes the general consensus that Holmes was a judicial conservative, in terms of following established case law and legislation, except in four main areas: judicial restraint, free speech, labor combinations and business combinations.\textsuperscript{151}

Regarding judicial restraint, Holmes was concerned that judges were using constitutional due process and protection of property to thwart political expression in the form of socialist legislative efforts to address manifest social dis-utility. Holmes was no socialist. However, Holmes saw judicial constitutional activism as entrenching the dominant political class at the cost of causing buildups of political dissent. For Holmes, law should be adaptive to pre-empt destructive forms of social struggle. This reflects Holmes's pragmatist skepticism. The search for social utility is worse served by digging in to hold on to a position one cannot be entirely certain of at the cost of civil war. As one of the four causes of law, political expression of dis-utility had to be elevated to a constitutional principle of judicial restraint in reviewing legislation.


Holmes’s free speech cases are legendary, producing such well-known expressions as “free trade in ideas” and “clear and present danger.” The currency of Holmes’s statement of the doctrine appears to wane and wax over time.152 However, the important aspect for present purposes is its constitutional status. As Holmes noted, freedom of speech is only meaningful with respect to ideas that offend the dominant sensibility. Free speech is necessary for the political expression of dis-utility by those who are dissatisfied. Again, free speech connects strongly to Holmes’s pragmatic skepticism.

Holmes was also rather bold in dissenting against injunctions against labor combinations. Holmes was concerned about the eruption of violence in the steel strikes. While a judge, Holmes made a point of visiting a local labor leader to ascertain first hand what labor required and he read up on Hegel, Marx and political economy. Although Holmes thought socialist solutions were “rot,” he thought it important to facilitate non-violent means of social struggle in the search for social utility. In terms of doctrine, Holmes argued that we allow businesses to set out to destroy one another’s market position through competition because we perceive a public benefit as a side effect. Holmes reasoned that the public benefit in allowing labor combinations to economically battle businesses was equally strong.

Similarly, Holmes was disposed to allow business combinations. Holmes seemed to have been influenced by an earlier railway crisis that resulted in a rash of bankruptcies, which Holmes perceived as being caused by fragmentation and duplication in the railway industry. Holmes intervened in favor of anti-trust laws that allowed combinations so long as they were not abused.
For Holmes the anti-combination laws were indiscriminately over-broad legal impediments to socially adaptive reorganization of social forces.

This pattern of selective intervention is consistent with Holmes elevating the processes integral to active, nonviolent expression in response to perceived social dis-utility. That Holmes would become a judicial activist only in this limited realm indicates he considered it fundamental to his concept of justice. This is consistent with the model of justice as the dynamics of self-organized criticality in the search for rules that improve social utility. For Holmes, law should promote the process of forming and maintaining political compromise and propagate the result throughout the fabric of the law.

Political compromise has numerous entry points into law: legislation; an increased number of cases where doctrine has failed to align with the current *de facto* compromise; the emotional experiences of judges; and the emotional experiences of juries. The internal coherency principles of law would ideally propagate the results of political struggle throughout the fabric of the law. By propagating change from the points of least fitness in the law (where cases or legislation is most likely), law would tend toward a state of criticality regarding its formal representation of the state of the greater political compromise.\(^\text{153}\) Of course, the process of law has other constraints to integrate proportionally with political pragmatism—law is *constrained* by political struggle, not *determined* by it.

Once the role of politics is recognized as an essential element of legal reasoning, some areas of critical concern become readily apparent. The "play" in the system might be exploited for political purposes, as Holmes noted that judges tended to favor a conservative political economy. Furthermore, ideological exploitation of the ability to distort doctrine and use

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discretion would impair law's political dynamics. For example, experience relevant to lower-ranking goals would not become part of the "friction" in the shadows of the cases and remain invisible to the law—residues would not accumulate. Instead of the common law being internally persuaded to a new political compromise, the system would have to be externally disciplined with reform legislation, or worse, civil insurrection.

While Holmes was quite advanced in his critical analysis, he could be criticized for being naïve about the susceptibility of democracy and the legislatures to manipulation. It seems he could have been sharper in this respect, given his familiarity with Marx and appreciation of the need to protect the free speech of dissenters from the majority sentiment. Similarly, it seems Holmes was not constitutionally aggressive enough to promote political expression. Given the power alliances required to win elections and the impact of Gresham's Law regarding the effect of the mobility of capital, free speech is arguably not enough to constitutionally entrench political expression of dis-utility as a fundamental element of the process of justice. On the other hand, Holmes in today's media and capital-dominated world might have been quite a different judge.

Having now considered budget constraints and political constraints, this section explores how the properties of legal form constrain the development of law and promote the processes of its development.

Holmes launched one of the first assaults on the metaphysical status of legal doctrine in American jurisprudence. Continuing the assault to its logical extreme, the legal realist Felix Cohen later argued forcefully that the essentialisms of legal doctrine have no reality and should be abandoned. For example, when the law considers whether a plaintiff can commence a lawsuit against a corporation, it is pure fiction to attempt to determine the "location" of the corporation as though a set of abstract legal relations could reside anywhere. The "real" object is
to do social policy analysis as to where best to conduct such lawsuits. If that is the case, then why does common law create formalism and continue to do so?

Holmes did not claim that legal formalism should be abandoned. It is clear that Holmes did not think social policy analysis could provide complete answers, and therefore legal formalism becomes the repository of accumulating knowledge. This is simply a specific application of Holmes’s more general nominalist view of language. Legal doctrine, like language generally, has utility in the project of evolving a set of useful habits. Indeed, Holmes saw this process as equivalent to the evolution of useful species-forms in biological evolution. In “Law in Science and Science in Law” Holmes specifically compares the dynamics of doctrinal forms to the dynamics of species-forms.

The scope of Holmes’s critique against essentializing doctrinal forms becomes clearer when read with Nietzsche’s observation about the need for “brief habits” in section 295 of Joyous Science. There Nietzsche notes that habits undergo cyclic transformation, as suggested by the general model of self-organized criticality. Nietzsche’s important observation is that during the tenure of the habit, before transformation, one has to have faith in the habits as though they were eternally true. However, those who never slacken this faith to allow transformation essentialize the habits and arrest development of the doctrine. Therefore, Cohen’s critique goes too far, looking for new eternal habits in social policy analysis. Holmes, ever the skeptic, had settled in his mind the philosophical problem of how to act on faith as a skeptic and seems to have felt no need for the fiction of cyclical faith in habits.

Rather, Holmes seemed content to treat legal doctrine as just a looser form of pragmatic truth, whose warrant is its social utility and its utility in evolving new doctrine of even greater net utility. For example, realists such as Cohen have overlooked the function of formality in reducing

decision costs, an issue discussed above. By narrowing the scope of legal relevancy and favoring more easily provable evidence over costly consequential policy analysis, formality keeps litigation within the means of typical litigants and the resources of the courts.

Another direct utility of formality is the ability to articulate relations and provide the building blocks of more complex social relations. For example, the logic of property rights partitions its subject matter along dimensions of space, time and uses. Ownership may be divided in different ways along the dimensions of decision-making authority, resource contribution and allocation of benefits. More nuanced variations can be achieved through hierarchical ownership. The variety of forms allows solicitors to construct elaborate structures that suit complex economic relations. The availability of reduced bundles of rights reduces costs where less than full control of property is required and enables multiple users. The logic of property and the inventiveness of language continually generate new formal possibilities—such as time-share condominiums—as social relations evolve. Conversely, the formality of property divisions enables the constitution of more complex relations than could be achieved without formality. Some of the logical possibilities from the logic of property have been disallowed as contrary to social interest, such as the law against perpetuities or restrictive covenants based on racial discrimination.

Finally, another direct utility of formality is low-cost approximate predictions of judicial behavior. Paraphrasing Holmes, formalities are prophecies. Formal equality is fundamental to human intelligibility. The principle of formal justice provides that like cases should be decided alike. Cohering principles such as these serve the reliance interests that law protects that enables trust, planning, division of labor and resources, and other social activities that rely on predictability.
The primary concern in this section is the utility of formal doctrine in developing better laws. Holmes attempted to launch a scientific investigation into formality in "Law in Science and Science in Law." Holmes attempted to fit the genealogy of legal forms into Darwinian and Spencerian models of evolutionary change. Holmes found that areas of law became arenas of Darwinian competition for survival of the fittest, such as contract law where different doctrinal conceptions of contractual obligation vied for supremacy. Holmes also applied the Spencerian concepts of integration and differentiation to catalogue the morphological transformations that happen to legal form. Holmes's model manages to capture both dynamics of internal selection (law's internal efficiency) and external selection (law's instrumental effectiveness), but his account is highly unsatisfactory in failing to provide any mechanism to account for the patterns of change. What does it mean to say different doctrinal forms compete for supremacy, as though they were autonomous agents? This thesis claims that the emotional persuasion model is the mechanism Holmes understood, but lacked evolutionary concepts to express adequately.

In terms of the role of form in the evolution of law as a complex adaptive system, the fictions of doctrine must generate and store the social friction that creates a manageable bandwidth of equitable relevancy and absorbs the residues of legal decision. The three main mechanisms are distortion, discretion and dissent. The existence of these residues can be emotionally inferred by the excess of meaning contained in the dramatic account of the facts and outcome versus the doctrinal rationalization of the result. It can be inferred that Holmes understood the emotional persuasion dynamics in legal reasoning from his concern about drama and rhetoric in judicial opinions and his antipathy to the use of moral concepts in law. In his earlier writings, Holmes sought to remove the concept of intention from law, based partly on his implicit theories of mind and language. Holmes later tempered this view, opening himself to
charges of self-inconsistency and vacillation. It seems Holmes overstated the substantive reason and so his rejection of moral concepts in “The Path of the Law” is misread as a rejection of any relation between morals and law, or extreme moral skepticism.

Rather, Holmes was uneasy about moral concepts because the development of law requires concepts that are capable of flexibly responding to the values and goals that are introduced, especially due to the institutional constraints unique to the process of law. For example, problems of evidence and indirect feedback effects that plague law—such as people rushing onto crashed buses to claim whiplash—do not factor into the moral deliberations of an individual who presumes judgment from a perspective with perfect knowledge of intentions and truthfulness of testimony.

The problem of moral concepts can be demonstrated graphically. Suppose for a first approximation the law were to adopt a moral concept, such as requiring actual intent to deceive in the moral sense for an action in fraud. This was the approach taken in the notorious English decision of *Derry v. Peek* which exonerated directors of a company that issued a false prospectus on the basis of no actual intent to defraud.\(^\text{155}\) (Figure 2.13.)

\(^{155}\) *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.).
As a high-watermark case, numerous subsequent cases sought to get around the decision. This resulted in cases that purported to follow the doctrine without amending it, but distorted the application of the doctrine. Judges could also hide distortions by selective descriptions of the facts, but that type of judicial creativity fails to contribute to the development of the law because subsequent judicial readers would not be able to detect the distortion from the drama of the opinion. As numerous small doses of distortion, discretion and dissent accumulate, the domain of law enters a decadent phase. The doctrine becomes dangerously unpredictable, threatening a risk of catastrophic collapse of utilities generated by reliance on the integrity of legal formalisms. As the distortions become more evident and judges are derisively insulted by idealist law professors, the cases more clearly deviate from the doctrinal line. The following diagram visually suggests the unpredictability of cases in the decadent phase. (Figure 2.14.)
However, it is at this stage that doctrinal progress is most likely. Under the persuasion model of legal reasoning, a judge hearing a related case will read several opinions, each written to have emotional and dramatic impact. The reader should come away with the feeling that the judge reached the right result in the case, but for perhaps the wrong reasons. By incorporating all the precedents at once, the subsequent judge is loading her emotional memory with data for a pattern-finding doctrinal transformation. If successful, the judge will propose new doctrinal rules that will make the cases predictable again. This is the deep structure method of J.C. Smith who, choosing remoteness of damages in nervous shock cases as representative of perhaps the most intractable doctrine in Anglo-Canadian torts, found that over 90% of Canadian, English, Australian and New Zealand cases were consistent.¹⁵⁶ (Figure 2.15.)

Moral Concept

Legal Doctrine

Figure 2.15 Doctrinal Solution to Exceptions to Moral Concept

The House of Lords finally re-aligned the doctrine for fraud in Nocton v. Lord Ashburton. That case involved a lawyer who profited based on a misrepresentation made to a client who held a mortgage on a block of properties and had released part of the collateral because of the misrepresentation. Sir Frederick Pollock wrote a letter to Holmes, who was then on the U.S. Supreme Court, noting that the bar had been quite dissatisfied with the decision in Derry v. Peek and that Nocton v. Lord Ashburton would undo its effect. Lord Haldane introduced the doctrine of equitable fraud, such that where a fiduciary benefited from a misrepresentation to a beneficiary, it constituted a fraud in equity regardless of whether there was actual intent. Nocton v. Lord Ashburton corrected the distorting effect of the moral concept in the

\footnote{Nocton v. Lord Ashburton, [1914] A.C. 398 (H.L.).}

realm of equity and fiduciary relationships. The invocation of “equity” enabled the court to substitute the homegrown “equitable fraud” concept for the “legal fraud” concept imported from moral theory. However, a more general solution to misstatements was still required for law. This correction did not occur until the House of Lord’s landmark decision in *Hedley Byrne*, extending the principle in *Nocton v. Lord Ashburton* to become the foundation of the tort of negligent misrepresentation.\(^{159}\) It took common law almost 100 years to correct the distortion introduced by importing a moral concept.

A natural-law advocate would tend to argue that law’s departure from the moral concept was a mistake and a positivist would counter that morals are irrelevant. However, the benefit of hindsight shows that law’s conceptual boundary differs because the interests are different. In cases where the defendant has induced the plaintiff to rely on the defendant for information or has otherwise put the plaintiff in a vulnerable position, the defendant usually has means to exploit the vulnerability of the plaintiff and cover his or her tracks. Putting the burden on the plaintiff to prove actual intention to defraud would permit too much “fraud” to go uncorrected. Moreover, as the law Lords observed in *Nocton v. Lord Ashburton*, when one stands to gain from some interpretation of the facts, one is simply less apt to perceive ill effects to another consciously. In situations where that other person is vulnerable and relies on the defendant, the defendant cannot avoid responsibility due to the lack of conscious intent to defraud. Equity increases the standard to prevent a feedback distortion due to the advantage that the defendant has through control of the information and the difficulty of proving actual intention. The following diagram shows that the seemingly haphazard distortions actually conformed to underlying goals, one that is not relevant within the purely moral domain, which presumes perfect knowledge of intentions. (Figure 2.16.)

It should be clear that Holmes's antipathy to moral concepts in law follows from a concern that legal concepts be flexible enough to accommodate the dynamics of doctrinal adaptation. Nonetheless, Holmes heavily qualified his remark—"For my part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought." By continuing to use the moral concept, subsequent judges would have a tendency to snap back in line with the original moral concept, introducing unnecessary confusion or preserving moral prejudices. The Canadian Parliament has

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specifically intervened to sever moral connotations in order to remove impediments to the
development of legal concepts in the case of Criminal Code amendments redefining “rape” as
“sexual assault” and “mental disease” as “mental disorder.”

On the other hand, as Holmes conceded, there is instrumental utility in law borrowing
morally charged terms. The point became an issue in the Supreme Court of Canada in R. v.
Vaillancourt which considered whether constructive murder provisions of the Criminal Code
offended the Canadian Charter of Rights and Freedoms.\(^1\) The accused was an unarmed party to
a store robbery. His partner used a gun to murder in the course of the robbery. The accused knew
the gun would be used to frighten the storekeeper but had only agreed to participate if the gun
was not loaded. The issue was whether Parliament could define “murder” to include the accused
in such circumstances. The majority held that the moral sting of the term “murder” precluded
Parliament from using it to refer to constructive murder. The minority said it did not matter what
Parliament called the offence—it could call it “horse.”

By giving up moral terms, then, the courts would pass up the opportunity of borrowing on
morality’s “shame capital” to underwrite its instrumental effectiveness in shaping social
behavior. Returning to the example of fraud, equitable fraud and negligent misrepresentation, the
term “equitable fraud” has much more rhetorical punch than “negligent misstatement.” Indeed,
the term “equitable fraud” has proven useful for the Supreme Court of Canada to express moral
censure regarding how the federal government has treated aboriginal peoples without having to
identify specific individuals as agents of fraud.\(^2\) On the other hand, legal co-option of moral
terms can introduce moral confusion. For example, a finding of “not guilty” because of the
inadmissibility of illegally obtained evidence does not morally exonerate an accused. The term

“not guilty” creates confusion about the moral concept of “guilt.” Plainly, determining the net cost of using or not using moral terms is no simple matter and Holmes’s hesitation is understandable.

Nonetheless, the effectiveness of moral terms demonstrates something profound about form and emotions and how they connect to values and goals. Recall the above discussion of how the logic of property generates variations for selection as to appropriateness for the underlying political economy. The reorganization process privileges various fundamental forms through stronger emotional linkage, so that forms more directly linked to achieving important values elicit a stronger emotional reaction. In terms of advocacy, during the reorganization process the advocate wants to activate within the judge the emotional modalities representative of the values and goals of the advocate’s cause. A good advocate will carefully craft phrases and presentation so as to continually evoke the emotions relevant to the client’s preferred ranking of values and goals.

For example, in the case of *Kester v. City of Hamilton* the plaintiff suffered injuries diving into a swimming pool and gliding into a submerged wall. Counsel for the defendant, J.J. Robinette, called the wall the “safety wall” in an effort to continually re-emphasize the purpose of the wall to keep children from going into the deep end and drowning. Robinette—perhaps the greatest courtroom advocate in Canadian legal history—recounted this case at a dinner speech and noted that he crafted the phrase deliberately, and soon the judge was using it, soon the witnesses used it, and eventually even opposing counsel began referring to the “safety wall.” The court held that the defendant was not liable.

The point is not that courts are hapless victims of rhetorical persuasion. Rather, a good advocate intuitively understands the nature of judicial decision-making and uses form to activate
fully any modalities linked to the values and goals favorable to the desired outcome. If one is interested in legal reason, it is insufficient to study rhetorical forms in isolation. The emotional connection to the values and goals conflicting in the situation at bar is what makes rhetorical forms effective.\textsuperscript{164} The rhetorical battle is each side activating the competing modalities within the judge, raising fears of consequential costs, and the tide of the battle is indicated by which discourse is preferred. For example, in the "Baby M" case—in which genetic parents sued to enforce a contract for the gestating mother to give up the child for money—the tide of the battle had turned when the courtroom discourse gravitated to the term "surrogate mother," implying that the mother was not the true "biological" parent.\textsuperscript{165} The reasoning of the decision was secondary from that point; the value conflict had been conceded at the operational level of the emotions. Using the "best interests of the child" test to fill the doctrinal void is transparent ideology.\textsuperscript{166} That test is sure to favor wealth, class and education; the social hierarchy is preserved.

This view of rhetoric as persuasion provides a mechanism for the Darwinian struggle of doctrinal forms that Holmes describes. Law's formality helps propagate value and goal rankings by projecting forms that mediate values and goals in one domain into another. New problems import plausible doctrinal solutions from other contexts. An initial draft solution is then adjusted by experience particular to the new context. In this way, the probability of successful adaptation is increased—in contrast to inventing formal solutions from scratch—and system learning is thereby accelerated.

\textsuperscript{164} Klinck provides a very helpful collection of rhetoric forms but such work is taxonomic and does not connect form to substance through a process like seduction. See Dennis R. Klinck, The Word of the Law (Ottawa: Carleton University Press, 1992).
\textsuperscript{165} In the Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).
From this perspective, a legal case becomes the site of a value competition where rival candidate value-goal rankings compete to become the base concept-structure from which the doctrine makes its adjustments. This is similar to the notion of concept and adjusters in philosophy. The abortion issue illustrates how the competition among values is fought out as a competition between preferred concept and adjuster structures. In terms of doctrine, the question is whether the fetus is a legal person. Different concepts used to identify the fetus favor different rankings of interests. Calling the fetus an “unborn baby”—“baby” adjusted for lack of features—favors the interests of the father and the state (insofar as the state might want to intervene to prevent drug abuse by pregnant mothers that would increase health costs in treating the child). Calling the fetus a body part, that may later become something else, favors the interests of the mother and state (in not having to support reluctant mothers who cannot support a child). The U.S. Supreme Court in Roe v. Wade in effect split the difference, so that the fetus transforms from “body part” to “unborn baby” at the stage it could possibly survive outside the mother. The interests of the Church and the father are advanced by the term “soul” which imports a rigid moral absolutism. The interests of the mother would be most strongly served by calling the fetus a parasite—not an implausible characterization—thereby entitling her to a right to a funded abortion as a health care benefit (presuming a health care system that requires a pathology to qualify for fully funded medical services.)

In a world of linear causation and logical completeness with the law of the excluded middle, it would be logically irrelevant whether “17” were characterized as ‘16+1’ or ‘18-1’. However, where concepts are emotionally linked to values, changing the base concept-structure in effect changes the ranking of the conflicting value-goal modalities. This in effect changes the onuses and chooses which value-goal gets the benefit of the “shadow effect” discussed earlier in the chapter. The underlying substance of the rhetorical battle is that each side is seeking to evoke an emotional feeling as to where pragmatics suggest the onus should lie. The result is that the causal experiences of the winner become fully relevant to the law whereas the experiences of the loser are shaded and enter the law only as residues. Feminist critical legal scholarship has argued that the “consent” doctrine in sexual assault primarily reflects the perspective of the male accused and overly simplifies the woman’s experience where various subtle degrees of coercion are subsumed within the concept of “consent.” While this is insightful critique, it misses the mark to attack “reification” or other formal properties of legal doctrine as the culprit. The problem is the substance, not the form. Indeed, much like the concept “fraud”, “consent” is a lingering moral concept from a morality that treated wives as chattels of their husbands and did not otherwise allow sexual contact. Continuing use of the conceptual form “consent” reinforces value-goal rankings at the preconscious level of the judges, especially in male judges, who share an interest with the male accused. The presumption of innocence then becomes an ideological cover for judges who fail to collect the causal residues of the women’s experiences to transform the “consent” concept in law. The concept keeps snapping back toward the old moral concept, flushing out the residues that should otherwise spur doctrinal reform. (See the “discharge”

170 Compare, Richard Rorty, “Anti-Essentialism in General: The Number Seventeen as a Metaphor for Reality” (Toronto: Legal Theory Workshop, Faculty of Law, University of Toronto, 12 January 1990).
171 Carol Smart, Feminism and the Power of Law (London and New York: Routledge, 1989).
function in figure 2.12, above.) Such legal reasoning should be attacked as being too much a natural-law approach rather than as being too formalistic.

The process of projection and adjustment accomplishes more than just the Darwinian natural-selection process among competing forms and accelerating adaptation by working from plausible hypotheses as the starting point. Projection is part of the integration process observed by Spencer, promoting the internal coherency and efficiency of the doctrinal code. However, as just argued above, integration in this form entails a risk of interfering with the process of differentiation. Just as the use of moral concepts impairs the local differentiation of doctrine, the projection of a purely doctrinal concept from one domain to another can create similar distortions to the adaptation process.

The rigidity of imported concepts has a potential to interfere with the differentiation aspect of evolution observed by Spencer. Differentiation adds to the "external" fitness because local adjustment, in effect, adds to the information content of the system. This added external fitness comes with added costs to internal coherency and efficiency of representation and calculation. This process of differentiation is equivalent to the incorporation of small doses of irrationality in the Nietzschean model of education and rhetorical persuasion.

An important means for language to enable differentiation is through a hierarchy of concepts. The effectiveness of a hierarchy of concepts depends partly on the usage of a concept without committing to any specific means of determining the precise scope or inner complexity of that concept. This is similar to the principles of "object-oriented design" in computer programming, according to which the structure of an object higher in the hierarchy can be used as the base-structure for local adjustment without affecting how that higher object is used by other objects. This facilitates local experimentation and adaptation without endangering usage
elsewhere. In legal doctrine, for example, we see concepts such as an “employee for tax purposes.”

Another related feature of object-oriented programming is that a procedure can interact with an object knowing the object’s rules for interaction but not the implementation details, which are masked from object clients. The implementation of the object can be varied without affecting its functionality. Stephen Toulmin has observed this phenomenon. He notes that in a committee to review the ethics of experiments on humans, the committee members were able to agree on the results of each of the sample situations, but seriously divided on how the results should be justified and eventually wrote separate reports.172 This phenomenon occurs in law with respect to concepts such as “rights.” Everyone seems to agree on how to use the concept “right,” but no one can agree on a coherent philosophical definition of the concept.173 On the other hand, because the artificial formality of the concept “right” blocks deeper inquiry into what a right is, many inconsistent conceptions of the nature of rights can be rallied under the same formal concept, thereby promoting political stability and compromise. The lack of concern about philosophical coherency is a good thing in this case—philosophy can be dangerously destabilizing for no good reason. Indeed, “rights” may be a concept without any referent but quite meaningful nonetheless, in the sense that “Santa Claus” is a concept without a referent but has a tangible, pragmatic meaning in North American society. As Nietzsche observed in section 44 of Joyous Science, it is often more important to know the fictional motives for conduct than to know the actual motives.

In “Law in Science and Science in Law” Holmes develops a genealogical outlook that is virtually identical to Nietzsche’s. Holmes’s survey of doctrinal patterns includes projection

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errors, transformations and survivals. Holmes gives examples of transformations where a projected form may take on a life of its own that outlives the original source of the projection. A survival is a variation on this where the form survives in its original context after the disappearance of the original purposes. Holmes noted that the survival might be due to a new, unstated ideological function served by the form. Applying the persuasion model of legal reasoning developed in this chapter, a survival could be any of the following: (1) an empty artifact of the rigidity of form, (2) an indication that new values have come into play (possibly ideological ones), or (3) evidence that the form has proved suitable as a political compromise without any well-defined referent.

In “The Path of the Law” Holmes gave as an example of projection error the rule of evidence that avoids a contract as against the party who materially alters the written instrument. Holmes traces the rule to bonds—which makes sense in the case of a negotiable bearer instrument. The rule was projected to promissory notes, which was sensible in the result because they are negotiable commercial instruments. However, the rule became general and was projected to other written contracts for no good policy reason. Elliot suggests that Holmes viewed such errors as the “mutations” that form part of the Darwinian selection. The persuasion model of legal reasoning developed in this chapter suggests that mutation would be an extremely incidental chaotic perturbation within the general dynamics, much as mutation has been overwhelmed by meiosis and sexual selection in current evolutionary theory and complex adaptive systems.174

In “Law in Science and Science in Law” Holmes also identified various morphological features of concepts in terms of measurement.175 Law tends to set up opposing concepts that are

plain enough at the poles, but become divided by fuzzy boundaries. This is one means by which law’s formality responds directly to the problem of decision costs and over-precision. This also shows how opposing formal concepts tend to be invented to reflect the opposition of underlying values. The apparent arbitrariness and fuzziness of the line reflects the causal uncertainty as to the exact points of catastrophe within the zones of unpredictability relating to the conflicting values or goals.

Another significant feature of formal concepts that reflects the underlying dynamics of mediating values and goals are “privileged” signifiers. Recall that the addition of a friend entailed a greenhouse period while that friendship was carefully nurtured. In terms of language, a new concept might be invented to signify the new value, while an opposing signifier identifies all that impairs it. We see this tendency in common language, which tends to define femininity in terms of what is not masculinity. The dynamics of language operate to impede any challenge to the goal of the privileged signifier because the anti-signifier is less well defined and so its causal connections to values and goals are diffuse. Nonlinear impairment to the interests subsumed under the umbrella of the anti-signifier is difficult to prove because it is difficult to determine exactly what the anti-signifier means in terms of values and goals. In such a case, there is no focussed counter-value or goal to generate a shadow effect of accumulating causal residues and the process of equitable relevancy is impaired. Again, this problem would be assumed away if one applied the law of the excluded middle.

Holmes also gives examples of integration in the morphology of doctrinal forms. These processes promote internal fitness by making the formal elements more coherent across the corpus of the law. Apart from the projection process discussed above, the most common integration process in legal reasoning occurs when several specific tests generalize into a more
broadly stated test. A classic example in Canadian law is the transformation of the hearsay rule from a highly differentiated set of many different rules for independent factual circumstances, to a broad rule based on the underlying values of reliability, necessity and fairness. The example is instructive because the underlying values were identified by Marilyn Macrimmon using J.C. Smith's "deep structure" method of deconstructing the link between doctrine and values, and the Supreme Court of Canada subsequently adopted Macrimmon's proposed doctrinal integration.\textsuperscript{176} Other important examples of integrating transformations are the Wigmore test—whether communications should be privileged from production in litigation—and the House of Lords' famous decision in \textit{Donoghue v. Stevenson},\textsuperscript{177} which integrated various pockets of tort law into a general standard for negligence.

This integration process begins after an area of law has generated several local tests that are closely tailored to each individual context. However, the specific tests do not cover the entire field, creating difficulties where two or more pockets abut or overlap with different tests. To achieve justice in the particular case, distortions begin to accumulate, putting stress on the conceptual integrity of each pocket. Generalization occurs when the frequency of cases that fall between the specific tests become intolerable. However, the general test tends to be more vague and gains in theoretical integrity must be balanced against a reduced degree of operationality. That is, a context-sensitive test is typically more fact-driven and locally calibrated than the vaguer general test. Not surprisingly, in both the areas of the hearsay rule and the Wigmore test, the specific tests have been retained and the vaguer general tests are used more to deal with cases that come between the established categories.


The morphology of such transformations is generated by the mechanisms in the emotional persuasion model of legal reasoning proposed in this chapter. The transforming event is an instance of the self-organized criticality where the system has accumulated small doses of irrationality (doctrinal distortions). The jurist assimilates case-dramas and adjusts her or his emotions to conform to the results of the cases. With the luck of a good representative sampling of distorting cases, the jurist invents a new doctrinal structure that more coherently accounts for the results of the cases and the underlying goals and values. If the new doctrine is stated in terms of result-oriented goals rather than fact-driven antecedent values, then the transformation will lack operational detail due to the uncertainty in moving from macro-level goals to micro-level values.

Finally, courts have over time come to recognize some of the system principles that promote the efficacy of law as a self-organized critical system. These tend to be collected in the doctrines of how courts deal with precedent and policy in rules of stare decisis and principles of interpretation. These principles can be easily linked to the persuasion model of legal reasoning developed in this chapter. For example, the doctrine against hearing moot cases reflects the principle that the empirical reliability of a case depends on both the parties and the judges having something at stake in an emotional sense. If one of the participants has nothing at stake, counsel is not disposed to activate fully the relevant unconscious emotions of the judge, and so the decision would be empirically unreliable. The exceptions to the rule against hearing moot appeals involve cases where other sources of concern replace the indifference of the parties directly affected. The rules for amicus curiae can be similarly explained.

Another corollary of the emotional element of decision-making is the doctrine of obiter dicta, which permits a subsequent judge to ignore doctrinal rulings that are unnecessary to decide
the case. Again, the fact the judge will have to devastate one of the parties emotionally
determines the scope of what is empirically reliable about the decision. Similarly, the strong
tendency of courts to distinguish previous cases on the facts demonstrates that the emotional
drama of the case takes precedence over the reasoning.

The Supreme Court of Canada has recently developed rules of *stare decisis* that recognize
the dynamics of accumulating small doses of distortion and discretion driving doctrinal
transformations. While on the surface a doctrinal shift might appear massive, the fact the
change can in hindsight be characterized as a pattern underlying a large number of seemingly
exceptional cases makes the transformation “incremental.” While this had been a feature of
doctrinal morphology all along, it seems the Supreme Court of Canada first came to an ironic
understanding of this self-development *in R. v. Khan* when introducing the general rule for
exceptions to the hearsay rule.

Finally, the introduction of the *Canadian Charter of Rights and Freedoms* has spurred the
Supreme Court of Canada to regulate self-consciously how it seeks to apply the logic of
proportionality to mediate conflicting *Charter* goals. Again, the difficulty with goal-based
reasoning is that it lacks operational detail—clarifying the social goal-values at stake, clarifying
their core areas of potential catastrophe, and determining their relative ranking are invaluable
tasks but they fail to operationalize the law in terms of viable antecedent code. A general
antipathy to formalism seems to have infected the Supreme Court of Canada and hampered the
development of law as a complex adaptive system that maps an antecedent code over the fractal

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landscape of conflicting values with highly operational but evolving fact-driven rules. This same criticism might be made of Holmes who seems to imply that law could eventually shed the need for formalisms by becoming fully self-conscious and articulating all underlying values and goals in each decision. While this is a laudable sentiment, it under-emphasizes the difficulty of making macro-level goals operational. Nietzsche remained much more appreciative of the need for illusion and formality as an enduring condition of the process of constructing useful knowledge.

It would be tempting to characterize Holmes’s ambition for fully self-conscious goal reasoning as a mere rhetorical stratagem. The difficulty with this interpretive gloss is Holmes’s judicial record in practice. In practice, Holmes did not strive to find justice in the particular by manipulating doctrine or equity. Holmes’s style was to apply the law, while making the policies that clashed at the point of contact quite evident in the drama of the opinion. In terms of the drama of the opinion, Holmes made sure the reader emotionally felt the cost to each policy. In essence, Holmes’s judgments contained their own dissent. They are literature and contain residues of justice in the sense argued by Wai Chee Dimock.

In total effect, Holmes’s approach might be marginally more efficient in terms of the adaptive learning of the system. His powerful rhetoric ensured all residues would be available for subsequent use. However, it is troubling that Holmes was so disposed to sacrifice justice in the particular for greater self-awareness. As Nietzsche observed of Greeks and women, they were superficial out of profundity. Richard Parker makes the same point about Holmes’s aversion to the “darkness” of the law: “Might we not—if our eyes become accustomed to the dark—see

more in it than the (admitted) confusion and perversion of smug morality, logic, and tradition? Mightn’t some of it touch us and move us—even if non-rationally—in ways that all of that smugness never can? Mightn’t we know more?”¹⁸¹ The converse of this tendency in Holmes was his reluctance to act as the agent of doctrinal transformations, preferring instead to leave the matter to legislative reform.

One explanation might be that Holmes was always somewhat out of touch with his times. He tended not to read the newspapers. While Brandeis urged him to read about working conditions in mills, Holmes read Shakespeare and Spinoza. Holmes envied Chief Justices Marshall and White who were instinctively reflective of their times and could judge instinctively.¹⁸² On the other hand, judging by pure instinct gleaned from outside the law is dangerous—it is more a matter of luck whether, in the hindsight of history, one’s instincts will be judged to have been timely. Moreover, as Nietzsche observed, greatness entails a sense for political timing and rhetoric to generate great contemporary or posthumous influence. Therefore, passing up an opportunity to attempt a transformation of the law in an inappropriate political climate may be the greater act and be less evidence of personal conviction than a prudent respect of the overall process of law.¹⁸³ Holmes’s readings of philosophy have greatly advanced the process of law, and following the process of law, apart from the luck of great instinct achieving great power, is the most reliable way for law to advance the project of increasing net social utility. Indeed, one might compare the checkered record of Lord Denning. When Denning

¹⁸¹ Wai Chee Dimock, Residues of Justice: Literature, Law, Philosophy (Berkeley: University of California Press, 1997).
¹⁸³ Weinberg’s sharp critique of Holmes seems based largely on Holmes’s reluctance to take political risks as a judge to aggressively transform the law. Even Weinberg appears to acknowledge some prudence in Holmes’s opinion in Giles v. Harris, 189 U.S. 475 (1903), regarding the Supreme Court maintaining its instrumental effectiveness.
faithfully applied the logic of common-law legal reasoning he achieved justice in the particular
and introduced welcome transformations to the law, perhaps slightly ahead of their time.
However, when Denning’s personal natural-law instincts took over, he could revert to moralizing
and bigotry that embarrasses every fan of Denning’s greater accomplishments.\footnote{\textit{Ward v.
Bradford Corp.} (1971), 78 L.G.R. 27 (Eng. C.A.), might be cited as one such example.}

The situation is as in sports. Great coaching produces great teams, but perhaps not the
greatest individual player or the most spectacular individual plays—good or bad. For Holmes,
common law is a team sport and the team does best by following the coach’s system, even if one
does not understand its result in the particular case. Therein lies the soldier’s duty.

The final part of this section of the chapter considers how the persuasion model of legal
reasoning could be achieved as a collective effort. In effect, Holmes takes Nietzsche to the level
of institutional design by examining how the common-law system learns collectively through
distributed propagation of persuasion. By considering the required system dynamics for the
common law to achieve self-organized criticality, this approach also generates criteria for
effective critique.

In relation to the four major constraints on the process of law surveyed above—tradition,
social utility, politics and decision budget (computational resources and doctrinal efficiency)—
does the system have principles or safeguards to ensure the following: (1) perception of the stress
at the point of least fitness from the perspective of each constraint; (2) form that generates
friction and accumulates a history of subcritical stresses; and (3) means of propagating the effects
of super-critical stresses with highly recursive local adjustments to accommodate the minimal
requirements of each competing constraint.

\textit{(Weinberg at 712). That Holmes and the Court would take up injunctive claims to constitutional rights six years later
in \textit{Ex Parte Young}, 209 U.S. 123 (1908), might show an understanding that timing is important (Weinberg at 712).}
Criticality, and hence greater adaptability, of the common-law system occurs only insofar as cases tend to put stress on the system at the weakest points. With respect to tradition and established doctrine, settlements of cases are less likely where the doctrine is incoherent, vague, highly distorted or has implicit patterns that are evident within a series of discretionary decisions. With respect to social utility, improved social-science knowledge leads to attacks on established causal assumptions. With respect to decision costs, budget stress affects the proceedings of each case. Finally, with respect to political utility, the weak spots in the doctrine's manifestation of the political compromise will generate cases, influence juries, and provoke constitutional challenges.

From a dynamic systems perspective, class impediments to access to the courts is a constitutional issue because the rate of inflow of cases significantly affects the process of accumulating causal residues and generating doctrinal reform in specific areas of law. Indeed, based on principles of self-organized criticality, one might argue for a constitutional right to litigation funding, not as a personal right, but from a systems perspective in the manner Holmes gave constitutional status to free speech. (Holmes was not a liberal.)

The experience of case stresses must generate friction and be absorbed. The system must generate an equitable bandwidth of relevant causal data. The role of distortion, discretion and dissent and how these must be conveyed through drama has been discussed. The judge writing an opinion has a duty to produce dramatic literature. In terms of the system-wide dynamics, the amount of friction generated is affected by the frequency (number of cases), intensity (level of court; reputation of judge) and duration (memorable impact; lingering controversy) of friction cases.

The accumulated friction has to drive transformations and provide patterns for creating plausible new coherence truth hypotheses. For criticality to occur, relations of transitivity are
required to set off change in neighboring pockets of saturated doctrine. A series of attempts to restore coherency on a local level can lead to avalanches of readjustment over a broad range of doctrine. A formal coherency principle like the principle of formal justice plays an essential role in system dynamics. Similarly, local solutions to constraints could expose a new substantive weak spot in a neighboring domain. A conceptual hierarchy, both in values and in doctrine, promotes transitivity by affecting all concepts that depend on a transformed concept.

However, the system structure cannot itself generate self-organized criticality because the velocity of inter-personal interactions is too slow. Compared to an economic market, which has a large number of agents interacting and adjusting, case transactions in law are relatively few. Moreover, as indicated above, the weak optimization or accommodation problem of constructing a coherence truth to achieve minimal fitness of numerous conflicting constraints seems to be at least an NP-complete problem that requires a medium of self-organized criticality where the exponential number of energy transactions in an avalanche serve an information-processing function. Put simply, the highest known level of self-organized criticality is in the emotional unconscious of the individual judges. Any attempt to divide the task through division of labor and take aspects of the computation outside the emotional unconsciousness of a judge causes a substantial drop in the “order of rank” of the system. This would include any attempt by the single judge to delegate decision-making to conscious calculation.

The emotional unconsciousness of the judge is the calculator that drives the criticality of common law. A good judge has well-trained emotional modalities that are appropriately calibrated to the values and goals that underlie the coherence truth of the law. How does this training occur? How are judges “educated” in the Nietzschean sense? Plainly, life experiences are fundamentally important, particularly formative experiences in early childhood. This raises a
critical red flag: does our system of favoring workaholic, aggressive litigators who cultivate political connections adequately select for capacity for empathy, that is, for magnanimity and masochism in the Nietzschean sense?

Judges are also “educated” by the assimilation of precedents. Judges read precedents as dramatic gestures and unconsciously adapt their emotional landscapes to conform in the same manner that Damasio’s subjects used emotions to calibrate to risk in the playing-card experiments. Regarding a specific issue in a case, the judge “loads” his or her emotional unconscious with a series of cases that contain small doses of doctrinal irrationality. Finally, for a decision in a specific case, the presentations of facts and “argument” calibrate the risk sensitivities of the judge to the causalities involved in the context of the specific case—“the point of contact” as Holmes liked to write.

The judge becomes the site of self-organized criticality by making an emotional decision that exploits self-organized criticality at the neural level. As counsel, I have seen judges flush at what, with the benefit of hindsight after reading the reasons for judgment, appeared to have been the instant of decision. From a psychological perspective, it is as though the mind takes a flash photograph of the unconscious emotional landscape, which then goes to consciousness for rationalization.

In terms of common law’s collective learning, the primary function of reasons for judgment is to “educate” subsequent judges. The reasoning is secondary. The identification of conflicting policies serves to highlight the residue in the dramatic outcome of the case, making clearer the dissent implicit in each judgment. Holmes was a much greater dissenter than his admirers claimed.
Although self-organized criticality takes place entirely within individual judges, no one judge can direct the system. It is like several people being inside a large, hollow ball with pliable skin, each person taking turns pushing the leading edge and then giving way to the next. Each individual judge makes a small empirical contribution to the project and cannot know how it will eventually influence the system—the ball has its own momentum and will encounter unseen terrain. Though each judge-poet works as a solitary concept-smith, the formal principles of propagation and the contingency of subsequent judges gives common-law doctrine a life of its own beyond the control of any one judge.

This feature appears to result from the bottom-up intelligence of common-law. The principle of least decision—the judge should not try to resolve more than the case at bar—increases the empirical reliability of the system in a couple of ways. First, it allows local development of values and the buildup of friction. Second, when decisions are restricted to the “point of contact,” the emotional involvement of the parties increases the probability that relevant causal nuances and risks of side effects will be perceived. When transformations come to be generated by the patterns in recalcitrant cases, there is a greater probability that pattern-recognition will be empirically sound. Moreover, by postponing larger scale decisions until there is a collection of specific cases, the new coherency truth will be more likely to preserve local fitness requirements previously achieved or taken for granted and not yet articulated. The individual judges can concern themselves with the application of policy in the case at bar without direct concern for system-wide policy making, so long as they apply the local dynamics and follow the principles of stare decisis. This design is pragmatic because it postpones the need to make code-amending decisions except in response to issues tested by the cases spurred by palpable dissatisfaction.
It is important for the criticality of the system that judges be generalists. A division of labor among subject areas would impede propagation through precedent education. Like the brain itself, this gives the system an holistic memory. Because of the processes that adjust doctrine to restore coherency among subject domains, if the common law lost all the cases in one domain, the law could probably be quickly restored by projection and adjustment—like recovering speech after a stroke. Conversely, un-reinforced local innovations could fade into irrelevance by holographic reconstruction from outside the locality, as shown above regarding the concepts of “fraud.”

For Holmes, the judge is like a cell in a coral plant. The role of the judge is to become a site of persuasive transformation. The judges must know the doctrine, emotionally align to common-law values, and allow themselves to be persuaded. The judges must minimally decide each case and propagate their experience through a persuasive, dramatic judgment. Sometimes they become the sites of doctrinal avalanches, with large-scale transformations being exponentially rarer in proportion to their scope. The more precedents are “incorporated” the less likely the patterns will be either over-generalized or under-determined so as to cause lock-ins from projections of similar, but rigid concepts.

Finally, it may be noted that although the engine of the adaptive intelligence—self-organized criticality—is an individual event and allows no division of labor, the persuasion model creates natural divisions of labor in the task of preparing the judge for the decision event. Traditional academic inquiry attempts to catalyze doctrinal avalanches by making the distortion, discretion and dissent in cases more vivid and using them to hypothesize patterns in the cases and doctrine to achieve coherency. Heretical jurisprudence suggests a whole rethinking of the division of labor in legal process and the aims of legal education. In particular, heretical
jurisprudence generates a theory of legal practice—something that has been anathema to traditional jurisprudence, although a theory of practice is essential to a coherent approach to legal education.

Within the division of labor in heretical jurisprudence, the role of the barrister is much more important than in traditional theories of law. The barrister is the impresario to the emotional persuasion of the judge. The barrister marshals the cases, legislation, academic commentary, empirical commentary and political commentary as means of enhancing and guiding the feat of persuasion. Straightforward recitation will not do. For example, courts will not become a battleground for a contest of opinion. The information must be introduced in more filtered ways, preferably by making a point by finding the pattern in earlier court decisions or legislation. All of this must be tied to causalities relevant at the point of contact. The barrister makes all of this emotionally accessible and emotionally reinforces it through rhetoric to be emotionally vivid at the moment of decision. The advocate, therefore, is not merely a manipulative rhetorician. The more effectively the barrister persuades—whether by cajoling, shocking or winning over—the better the dynamic mechanisms of justice are served.

In this model, the effectiveness of the more general barrister function is measured by the degree to which decisions are caused in third parties, whether they are judges, bureaucrats, or opposing litigants who agree to settle. However, every feat of emotional persuasion involves accumulation of small doses in the unconsciousness of decision-making, so work in progress is difficult to value.

Dealing with witnesses, a barrister might do better to watch the film *Dangerous Liaisons* than run to court for an order to compel a deposition from a reluctant witness. The barrister could stage some artful, small doses of contact to build empathy for the client or a sense of power to
bring about the just outcome could elicit more information. This process could perhaps crystallize unsettled intuitions toward factual interpretations more favorable to the client, or at least make the witness less disposed to questionable inferences that would allow the witness to save face with respect to the powers to which he or she is emotionally beholden. The barrister in this case negotiates a memory that will be less reconstructed from over-generalizations that the witness unconsciously feels are necessary to protect self-interest, including self-esteem, or is otherwise disposed to make.

The persuasion model of legal reasoning plainly suggests a much more descriptively adequate and complete model of courtroom advocacy than is suggested by traditional models of jurisprudence. The barrister becomes an emotional stage manager through every detail of the presentation of the case. Failure to treat the task as such is a failure in the task of justice.

The persuasion model of legal reasoning also clarifies the solicitor’s task. The solicitor is an intermediary who causes business decisions and other social actions to reflect the policies of the law. In terms of business, the solicitor creates legal instruments to align legal risks to the client’s business expertise. This entails a prediction of what the law will be. Under the persuasion model of legal reasoning, coherence truth has a shelf life and “ripple effects” of transformations may change the law in contexts where there is yet no decision of high authority. A good sense of which areas of law have accumulated enough small doses to be ripe for transformation enables one to gauge the risk of change with regard to the duration of the contract and the expected time to enforce the matter. In practice, one hears cautions from senior counsel that one ought not to get too far ahead of the law—a comment that would be meaningless in traditional theories of jurisprudence.
Negotiation is a central aspect of both the barrister’s and solicitor’s practice and falls squarely within the persuasion model.

Similarly, legal writing of all sorts are usefully conceptualized as instruments of persuasion. The judicial opinion has already been discussed. Factums come squarely within the model. Less obvious are contracts, but the persuasion structure should dramatize a transaction as a context of accumulated irrationality (whereas...) that is resolved by the contractual transformation of legal relations (... now therefore the parties agree to change their relationship as follows...). An effectively dramatized contract sells the deal to the client and to a subsequent court, such that the alteration of relations is dramatically motivated. The recitation of the dramatic buildup to the persuasion event motivates the discontinuity in legal relations and provides an emotional foundation for various clauses, reducing the need for over-drafted qualifying safeguards against judicial antipathy to such clauses in general. Indeed, the contract that became the subject of the Baby M case included clever recitals which, among other things, defined the father as the “Natural Father” and the mother as the “surrogate mother” and, as argued above, may have had a significant influence on the outcome of the case. As it is, young solicitors receive little theoretically grounded guidance as to what type of information to select for inclusion in the recitals of contracts, or indeed, any other legal instruments such as living wills or testamentary deeds. The persuasion model of legal reasoning provides theoretical and empirical guidance as to what to include in a recital, far beyond the typical vague advice to include background circumstances for interpretive context.

Finally, this chapter will conclude by identifying a difficult task for critical evaluation of legal process that is more plainly revealed by heretical jurisprudence. Other critical problems and

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185 So effective was the drafting that the reported case included the contract as an appendix. In the Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).
their implications for a theory of justice will be developed more fully in the following chapter.

The present discussion is intended to cast the problem of critical review in terms of the role of judge in legal process as a collective enterprise.

The judge is the site of an indivisible act of creative decision-making—the computational power of self-organized criticality takes place deep within the brain of one person. Even so, the impossibility of division of labor at the neural level hardly precludes common-law legal reasoning as a collective effort. Nonetheless, it is plain that the dynamics of common law's collective intelligence requires judges of high intelligence, emotional balance, openness to emotional persuasion and a high "order of rank" in the Nietzschean sense.

A disturbing implication of the emotional persuasion model of legal reasoning is that it concedes there is a degree of necessary elitism—the legitimacy problem is real. The propriety of individual decisions cannot be fully verified by consciously communicable reason—the wisdom of a judge depends in part on the degree of emotional absorption of causal residues, which by definition are not communicable in direct language. This hardly implies the decisions are arbitrary—palpable constraints preclude capricious attempts to forge coherence truths beyond the ranges of plausible conservatism or liberalism regarding catastrophic collapse of utility. Nonetheless, an adaptive system that generates a series of coherence truths made to accommodate criteria that become progressively more demanding over time opens the possibility of "path dependence." That is, the whole subsequent development of the doctrinal form could depend on which of two doctrinal options were chosen because the feedback effects of such a choice could send social development on a singular trajectory, thereby foreclosing doctrinal backtracking. The only check on the wisdom of such choices is reproducibility by other judges of
high order of rank. A doctrinal transformation hypothesized by a single judge may not catch on among the judiciary and recede into insignificance.

Because of the "genius" of self-organized criticality, the ambition to justify completely any particular decision is misguided and political theory that depended on it would be ideological in some unstated way. Bad decisions could be identified, but there would be a range within which either good faith or bad faith decisions could be made without detection through the methods of reason. This thesis has conjectured that such verification would require at least an NP-complete calculator of order of rank equal to the judge, which is simply not attainable through computers or conscious deliberation.

However, one could improve the quality of decisions—reduce the probability of bad faith decisions—by attempting to select judges of high order of rank who could police each other. Of course even the judges of highest rank are vulnerable to unconscious biases, such as ingroup-outgroup biases that might cause them to unconsciously favor their own class origins.186 By applying the emotional persuasion model of adjudication, it becomes apparent that critical legal theorists may have under-stated the need for representative variety within the judiciary. It would be absurd to suggest a representative of each class would be required to decide each particular case. Rather, the variety of an individual's educative experiences from before and outside the judicial context that new classes of judges bring with them, would have to propagate and compete for acceptance within the judicial community to correct class biases and percolate into doctrinal innovations. The persuasion model of legal reasoning suggests principles of communal propagation—such as ensuring no one class has a majority at any level of court—to weaken the effect of class bias on doctrinal development, rather than drawing on ideals to blind itself.

theoretically to the possibility of an intractable legitimacy problem and failing to seek principled, pragmatic safeguards.

Advocates of idealist theories of justice might object to the emotional persuasion model of legal reasoning because of the need to rely on elite decision-makers and advocates. Nonetheless, Dworkin’s requirement that every citizen has a “right” to decision must be relaxed. The emotional persuasion model of heretical jurisprudence alters the basis of the rule of law and the court’s claim to political legitimacy. Self-conscious selection and cultivation of judges for higher orders of rank with adequate samplings of social classes throughout the judicial hierarchy would increase the political legitimacy of the system more than trumping up the majesty of reason, communicative action and rational process. The processes must be empirically designed to enhance the computational capacity of the judges in the system, to screen out psychological weaknesses, and to generate an ironic, masochistic disposition to subvert the processes themselves as an element of self-transformation. Legal process cannot be derived from and fully legitimated through the majesty of reason. Traditional jurisprudence begs the question of the incompleteness of reason and fails to address the engineering problem of the computational bottleneck in communicative reason.

2.6 Summary

This chapter has endeavored to demonstrate how a computational approach to legal reasoning and jurisprudence can produce constructive solutions to standoffs that plague traditional jurisprudence. Heretical jurisprudence does not assume that any decision-making beyond conscious deduction is simply political discretion, as do some legal positivists. Heretical jurisprudence does not assume that humans must possess higher powers of reason as would be
required to produce decisions fully legitimated by reason. Rather, heretical jurisprudence
presumes that higher powers of reason must be actively cultivated as a skill and integrated into a
collective process. Performance constraints on legal reasoning are a significant limiting factor on
the adaptive intelligence of legal process. Heretical jurisprudence reveals a wealth of wisdom
implicit in the doctrinal myths of common law that has been endangered by recent critical
assaults, while at the same time taking common law to a level of ironic self-awareness that
enables more focused and constructive critique. Furthermore, constructive critique of common
law will entail careful examination of the adaptive use of conceptual forms, a project that has
much to learn from the engineering of computer software. Finally, computer modeling opens the
way to an empirical science of jurisprudence that can verify the benefit of various adaptive
principles that characterize legal reasoning.
CHAPTER 3

CULTIVATING JUSTICE

...an honest animal, as he has richly betrayed, moreover a democrat...¹

3.1 Introduction

This chapter reveals that justice was the ultimate concern of Nietzsche's work and that he understood himself to be a democrat. Nietzsche produced a coherent, empirically testable theory of justice based on psychology and systems theory principles. Nietzsche's theory of justice differs markedly from others by not implicitly canonizing some un-evolving, "normal" or "common sense" paradigm of human psychology within static ideals and "self-evident" truths. The paradox Nietzsche discovered was that by inducing us to ignore biological and cultural factors shaping human development, the "free will" ideology impairs our capacity to overcome biological and cultural contingencies. "Totalizing" theories of justice in the tradition of Plato, Kant and Hegel create and sustain a class of biologically and culturally fortunate, condemn all others, and so cruelly and ideologically undermine the development of a full range of sociable human types to their potential. "Humanism," for Nietzsche, is inherently anti-democratic. Moreover, for Nietzsche such theories of justice undermine the ability of the community to adapt in response to a changing environment and so are inherently anti-communal. One might call Nietzsche's the first "green" theory of justice that could cultivate a psychological foundation capable of reining in capitalism's assault on the environment.

¹Friedrich Nietzsche, *On the Genealogy of Morality*, tr. Maudemarie Clark and Alan J. Swenson (Indianapolis: Hackett, 1998) 18, Essay One, section 9. [For brevity, subsequent cites to this work will be by title and section number in the form *On the Genealogy of Morality*, I, 9.]
Nietzsche has not been generally recognized or acknowledged as a philosopher of justice, much less a democrat. Philosophy texts typically classify Nietzsche as a nominalist and a “life” philosopher with no mention of justice as a theme. Peter Berkowitz attempts to discern a coherent “ethics” of human excellence within Nietzsche, but Geoff Waite ridicules that ambition for failing to account for Nietzsche’s esotericism. Nietzsche’s legacy within the philosophy of justice has principally been to hone critical tools for subsequent Continental philosophers, such as Michel Foucault, Gilles Deleuze, Jacques Derrida or Jean Baudrillard. Nietzsche has not been widely read, if at all, as a comprehensive theory of justice to rival and supplant, for example, Plato and Kant.

The pre-eminence of justice in Nietzsche’s work can be inferred substantively as his solution to the problem of the necessary incompleteness of language that arises due to the holistic causation of self-organizing criticality. Nietzsche had come to these premises—holistic causation and the necessary incompleteness of conceptual truth—early in his career, but it took him some time to work out the implications for a philosophy of justice. As argued elsewhere in

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2 Richard Weisberg appropriately reads justice as a central preoccupation of Nietzsche's work. See, for example, "Text into Theory: A Literary Approach to the Constitution" 20 Georgia Law Review 939 (1986) at page 974, footnote 104. Nonetheless, Weisberg's understanding of Nietzsche's active sense of justice depends heavily on sound literary intuition rather than Nietzsche's analysis of the causalities of developmental growth. Weisberg has not yet set out a comprehensive theory of justice attributable to Nietzsche. Weisberg's work will be discussed below in section 3.6 of this chapter.


5 The Blackwell Companion to Philosophy, supra, 706 et seq.

6 For example, The Blackwell Companion to Philosophy devotes just three pages to Nietzsche without mentioning justice, whereas it indexes John Rawls to 24 pages.

7 The necessary "incompleteness" of language as a medium of communication does not imply language is ineffective as a disciplining force in aid of justice as active growth. Indeed, Nietzsche makes the point that simplifying falsifications are essential to a will to life. See sections 1-4 of Beyond Good and Evil.

8 A clear early indication of Nietzsche's connection between nominalism and causation is his distinction between logical causation and factual causation. See “Richard Wagner in Bayreuth,” section 9. In hindsight, Nietzsche in The Birth of Tragedy used Apollinian and Dionysian as metaphors for logical causation (positivist science) and factual
this thesis, a major methodological breakthrough for Nietzsche was coming to the conclusion that conceptual truth ultimately overcomes itself by proving its own incompleteness, whether by analogy to Cantor's Diagonalization Theorem or otherwise. By whichever route Nietzsche arrived at that result, it is the functional equivalent of Gödel's Incompleteness Theorem and the Halting Problem in computational theory and provided Nietzsche with the fundamental precept to understand nonlinear dynamic systems. Nietzsche wrote Book V of *Joyous Science* and the third essay of *On the Genealogy of Morality* principally on the psychological foundation of the human desire for the completeness fantasy and the self-overcoming of the "Will to Truth." The problem of how rationality could overcome the completeness assumption is central to Nietzsche's thinking—its importance cannot be overstated. Nietzsche's "nominalism," therefore, goes far beyond skepticism to locate the holistic causal principles that imply nominalism.

Nietzsche uses these causal principles to construct a systems theory and genealogical method, and then applies them to construct a theory of justice. The foundation of Nietzsche's theory of justice also explores how the completeness fantasy of the Will to Truth undermines the future of humankind in a reality that develops according to the principles of self-organizing criticality. Nietzsche's theory of justice thus contains both a Yes-saying part that cultivates human capacity to exploit self-organizing criticality to advantage, and a No-saying part that protects the cultivation of justice from the development-arresting effects of the completeness fantasy. The

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9 See the chapter "Para-Conceptual Rhetoric"


11 See also *Dawn* section 327 (the Don Juan of knowledge) and *The Birth of Tragedy* generally. Friedrich Nietzsche, *Daybreak*, tr. R.J. Hollingdale (Cambridge: Cambridge University Press, 1982). [For brevity, subsequent cites to *Dawn* will be by title and section number.]
previous chapter, “Legal Reasoning,” explored the constructive residue logic of the Yes-saying portion. This chapter will examine the No-saying part and present and then develop the Yes-saying part from a broader institutional perspective than legal reasoning.

One can also infer Nietzsche’s ultimate concern with justice from textual, mythical and biographical clues, guided by Nietzsche’s esoteric markers as to matters of pre-eminence. As argued elsewhere in this thesis, Nietzsche appears to have experienced a dramatic self-transformation on Sunday, April 2, 1876 while reading Malwida von Meysenbug’s memoirs. Soon after that event, Nietzsche initiated his break from Richard Wagner and academia, and the next work Nietzsche published, in 1878, was Human, All Too Human. In the preface to Human, All Too Human, written later in 1886, Nietzsche describes himself as having suddenly heard an answer to a question, which he quotes in detail in the form of a series of imperatives. This transformational event bears the hallmarks of what Ted Hughes refers to as the “shamanic call” of a poet-priest-moral legislator. Other chapters of this thesis have explored much of the

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12 See the chapter “Nietzsche’s Horrific Thought.”

13 Human, All Too Human, Preface, 6: “At that time it may finally happen that, under the sudden illumination of a still stressful, still changeable health, the free, ever freer spirit begins to unveil the riddle of that great liberation which until then had waited dark, questionable, almost untouchable in his memory. If he has for long dared to ask himself: ‘why so apart? so alone? renouncing everything I once reverenced? renouncing reverence itself? why this hardness, this suspiciousness, this hatred for your own virtues?’—now he dares to ask it aloud and hears in reply something like an answer: ‘You shall become master over yourself, master over your virtues. Formerly they were your masters; but they must be only your instruments beside other instruments. You shall get control over your For and Against and learn how to display first one and then the other in accordance with your higher goal. You shall learn to grasp the sense of perspective in every value judgment—the displacement, distortion and merely apparent teleology of horizons and whatever else pertains to perspectivism; also the quantum of stupidity that resides in the antithesis of values and the whole intellectual loss which every For, every Against costs us. You shall learn to grasp the necessary injustice in every For and Against, injustice as is inseparable from life, life itself as conditioned by the sense of perspective and its injustice. You shall above all see with your own eyes where injustice is always at its greatest: where life has developed at its smallest, narrowest, neediest, most incipient and yet cannot avoid taking itself as the goal and measure of things and for the sake of its own preservation secretly and meanly and ceaselessly crumbling away and calling into question the higher, greater, richer—you shall see with your own eyes the problem of order of rank, and how power and right and spaciousness of perspective grow into the heights together. You shall”—enough: from now on the free spirit knows what ‘you shall’ he has obeyed, and he also knows what he now can, what only now he may do.” Friedrich Nietzsche, Human, All Too Human, tr. R.J. Hollingdale (Cambridge: Cambridge Univ. Press, 1986) 9.

content and biographic significance of Nietzsche's shamanic call.\textsuperscript{15} The point here is that "justice" is the foundational theme of this passage. All the other "you shall" imperatives in his task-defining call are means to justice. Nietzsche ultimately defines justice negatively as a condition of necessary injustice in which judges of high order of rank continually seek to extirpate the greatest injustice.\textsuperscript{16}

Nietzsche's preoccupation with justice has been generally overlooked probably for at least three reasons.\textsuperscript{17} First, the nominalist and causal premises Nietzsche develops are in themselves a radical challenge to Enlightenment ideals. Nietzsche claims there is a deep psychological fear that underwrites our faith in the potential completeness of knowledge and of the existence of productive eternal truths. Consequently, readers of Nietzsche encounter a difficult path to clear just getting to the doorstep of his theory of justice.

Second, Nietzsche's philosophy of justice itself is ultimately stated in negative terms—poetic creativity and self-organizing criticality progress by successive transformations of the value-form relationship to accommodate the most pressing set of negative constraints from time to time. In mythic terms, the male hero cannot capture female beauty (wisdom) directly in words—Perseus must view Medusa in reverse with a mirror. In biological terms, plants grow toward the sun by each cell growing faster in darkness because that strategy is the only one

\textsuperscript{15} See the chapter "Para-Conceptual Rhetoric" on the biographical and esoteric significance and the chapter "Legal Reasoning" addresses the implicit dynamics of perspectivism.

\textsuperscript{16} This is comparable to recent views on scientific method. See Deborah G. Mayo, \textit{Error and the Growth of Experimental Knowledge} (Chicago: University of Chicago, 1996). Although justice is the side effect of actively seeking to extirpate the greatest injustices, this does not make it reactive in terms of Nietzsche's analysis of active and reactive forces. For Nietzsche, creativity, happiness and justice emerge as the fruit of an actively disciplined process, the final outcome over which the creator has no direct control. The creator is ultimately passive to the forces of self-organizing criticality. The reactive type resentfully undermines the active discipline required to stage self-organizing criticality.

\textsuperscript{17} As noted above, Weisberg identifies justice as a central theme in Nietzsche. In terms of the discussion that follows, Weisberg's law-and-literature sensibility enables him to avoid all three pitfalls. Weisberg has an intuition for "literary truth" in excess of conceptual truth and is therefore untroubled by the lack of a complete, positive, rationalist account of the principles of justice. Weisberg, as a lawyer, is well-disposed to take Nietzsche at his word in stating that justice requires codification.
mechanistically or "computationally" tractable at the cellular level. Likewise, "justice"—growing toward the sun—is the indirect, holistic, positive side effect of striving to minimize palpable "injustice." However, since Plato, we have come to expect philosophies of justice to look like a set of ideals and political procedures deduced from principles of reason. A philosophy of justice that directs one to look away from the ideals of reason and construct something unknown—as the holistic side effect of applying negative but operational principles of local development to accumulated experience—has hitherto not qualified as even a candidate for a theory of justice.18

Third, Nietzsche’s writings do not particularize any institutions of state or political process. Indeed, the forcefulness of Nietzsche’s critique of institutions might lead one to read him as an anarchist. That would be a serious misreading of Nietzsche. Nietzsche considers the problem is some detail, especially in the second essay of his late work, On the Genealogy of Morality. Nietzsche, who describes his esoteric persona to reveal himself as both honest and a democrat,19 could not conceptualize in advance a political process that preserved the benefits of self-organizing criticality in the poetic fusion of form and value.

The main argument of this chapter shall be made in four sections: "Justice Requires Institutions that Self-Overcome," "Poisoning the Ideals that Cultivate Individual Decadence," "How Institutions Exploit the Cruelty of Ideals to Deficit Finance a Psychic Economy," and "Institutional Self-Overcoming." The first two sections will be based largely on the second and first essays, respectively, of On the Genealogy of Morality. Nietzsche’s position broadly is as follows. Nietzsche’s theory of justice begins with the problem of the architecture of enduring social institutions. Nietzsche posits a substantial homomorphism between systems principles evident at the individual level and those at the social level. For Nietzsche the problem of

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18 One noteworthy exception would be the systems theory approach of Nicklass Luhmann, which has been applied by Drucilla Cornell, discussed below.
institutional design is, for the most part, a projection of the problem of training strong individuals. Rhetorically, this allows Nietzsche to avoid making visible commitments at the political-institutional level by making his points indirectly on the plane of individual development. For Nietzsche, the significant difference between individuals and institutions is death. Through the application of his eternal recurrence doctrine, individuals can overcome their neurotic desire for the completeness fantasy, with its a-social side effects, because individuals die and can become disposed to self-sacrifice in favour of broad reproductive goals. An enduring social institution, on the other hand, does not feel compelled by the inevitability of its death to self-sacrifice for the sake of external values. Furthermore, institutions in a growth phase must extract more “surplus” from other values to establish themselves, and they can only ease up once social habits have been conditioned. However, without the scepter of death or some other strong will to power to discipline them, the more dominant social institutions will be those that spontaneously gravitate toward extracting more and more surplus from conflicting values—capitalism being the perfection of this spontaneous institutional genius. The completeness fantasy enables capitalism to discipline us to think with concepts in which capitalism’s metabolic needs perfectly coincide with its functional purposes. After developing his critique of the use of moral concepts (ideals) in religion, Nietzsche implicitly asserts that capitalism likewise exploits a neurotic desire for the completeness fantasy to equate “objective” exchange value (communicable language; logical causation) with subjective value (incommunicable knowledge; factual causation), and so capitalism implicitly convinces us that it has fully accounted for the

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19 On the Genealogy of Morality, I, 9.
20 Nietzsche understood reproductive goals in a broader sense than mere individual propagation of DNA. With humans, offspring only flourish within a cultural context. Nietzsche implicitly relies on a weak version of “group selection.” For a recent contribution to the “group selection” debate, see Elliott Sober and David Sloan Wilson, Do Unto Others: The Evolution and Psychology of Unselfish Behavior (Cambridge, MA: Harvard University Press,
value of the inscrutable "work-in-progress" of creativity and fully provided the cultural means to cultivate creative capacity. This critique of capitalism is another manifestation of Nietzsche’s nominalism, and by asserting self-organizing criticality as the engine of creativity, Nietzsche provides criteria to specifically identify values that capitalism takes for granted and endangers by spontaneously maximizing the surplus it extracts from those values. The situation becomes critical when the endangered values represent nonlinearly emergent properties—such as an environmental ecology, a social ecology, or children’s development of creative capacity—where collapse can be sudden and very difficult or impossible to rehabilitate. Nietzsche’s ultimate solution is to compel institutions to self-limit and defer to a greater institution of cultural physicians whose purpose is to manage the runaway self-reinforcing logic of institutional growth. Following the path of Holmes, this chapter proposes the institutions of cultural physicians could be variations of a common law court system of constitutional review, adjusted to context to reflect considerations of institutional competence and pragmatic due process. The final problem for Nietzsche is how to police the cultural physicians. Nietzsche developed the notion of order of rank to connote highly creative individuals who are disposed to self-sacrifice for community values. Ultimately, however, Nietzsche evidently believed that males are plagued by a subliminal tendency to exploit windfall opportunities in the grand reproductive economy—a variation of the classic "free rider" problem—such that the ultimate discretionary authority as to how much to limit capitalist metabolic needs should rest with women of high order of rank—and so mythically, Justice is a Goddess.


21 In the context of a somewhat different approach to justice, Robin West identifies these values as "women’s work." This will be discussed below.
This final appeal to sociobiology will no doubt be controversial. The following section of the chapter will apply some recent scholarship on human cognitive evolution and child development theory to show that, apart from the matriarchal claim, Nietzsche's theory of justice is by its logic designed to help humans overcome socio-biological constraints as much as possible. This will show that Nietzsche's attempt to make the self-aware cultivation of creative capacity an essential element of a theory of justice marks one of three great milestones in human cognitive history—the three milestones being the externalization of representation (cave drawings onward), the externalization of calculative thought (Plato onwards), and to the extent possible, the externalization of creativity (Nietzsche). From this Nietzschean perspective, theories of justice based on principles of sufficient reason or conceptual communication are mere footnotes to Plato's externalization of calculative thought.

No modern theories of justice are fully comparable to Nietzsche's; however, at least four approaches develop important themes in Nietzsche. The law-and-literature approach of Wai Chee Dimock criticizes "totalizing" theories of justice based on the completeness of reason and looks for "residues" of justice implicitly contained in the narratives of great literature. The law-and-literature approach of Richard Weisberg recognizes the centrality of justice within Nietzsche's thinking and advances from critique to active, constructive justice by exploring the need for the production of and respect for great text and codifications in the process of justice. Elements of the systems theory aspect of Nietzsche's theory of justice are manifest in the "autopoeaic"

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22 This breakdown, up to Plato, is based on Merlin Donald, Origins of the Modern Mind (Cambridge, MA: Harvard University Press, 1990). Plato is used here as representative of the Greeks of that era in general.
systems approach of Niklass Luhmann and Drucilla Cornell. Finally, Nietzsche’s concern for cultivating and valuing the “work-in-progress” of creativity is reflected in Robin West’s critique of current theories of justice for systematically failing to value fully child development and the cultivation of social-emotional relations.

This chapter will conclude with a brief look at Holmes’s understanding of justice. Holmes never laid out a theory of justice. However, the discussion of Nietzsche will reveal that Holmes’s implicit theory of justice was quite similar to Nietzsche’s and so Holmes is useful to gain a sense of how institutional design could be done within Nietzsche’s theory of justice.

3.2 Justice Requires Institutions

Justice, for Nietzsche, is a community’s self-conscious disciplining of its members for the purpose of its overall growth, its “Will to Life.” To appreciate fully Nietzsche’s concept of “growth” and “life” one must examine his evolutionary life philosophy, a theme of the following chapter of this thesis, “Joy in Duty.” For present purposes, one might characterize “growth” as that which generates greater power within future generations. One can preemptively deflect vulgar criticisms by observing that by “growth” Nietzsche means something like active, increasing robustness without undermining the necessary conditions to future active, increasing robustness. Indeed, in section 6 of the preface to On the Genealogy of Morality, Nietzsche prefers to state the will-to-life imperative in negative terms—“What if a symptom of regression were inherent in the ‘good,’ likewise a danger, a seduction, a poison, a narcotic, through which

27 On the Genealogy of Morality, II, 11.
the present was possibly living at the expense of the future?" Nietzsche does not mean a self-defeating, unchecked imperialism of "Will to Power" in the sense of political pillaging or ravishing the environment. More specifically, Nietzsche understands the way to future growth to be through qualitative transformations of the art of self-discipline. For this reason, the second essay of *On the Genealogy of Morality* is fundamentally concerned with the genealogy of technologies for social discipline and the psychology thereby presupposed and created. Nietzsche's aim is to find a viable psychology to underwrite his understanding of justice.

The second essay of *On the Genealogy of Morality* is Nietzsche's most direct and subtle treatment of the problem of justice. Justice, as Nietzsche defines it, only comes into existence once society makes laws. This represents a stage of development whereupon "promise-keeping" by individuals is consciously cultivated by a social institution. "Promise-keeping" is important enough that Nietzsche begins the essay by defining humans as the promise-keeping animal. Roughly, this entails mnemotechnic self-discipline to make the future calculable. The importance of this becomes clearer later in the essay when Nietzsche describes how justice overcomes itself by transcending from a dispute resolution and compensating function that primarily serves to restore social equilibrium, into a regulative function directed toward the overall teleology of growth.

By emphasizing this transition, Nietzsche indicates that the causal phenomena of emergence and self-organizing criticality present challenges that fundamentally constitute the problem of justice. First, trust and calculability are building blocks for emergence and greater

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28 *On the Genealogy of Morality*, II, 12.
30 Michel Foucault has developed this theme. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr. Allan Sheridan (London: Allen Lane, 1977).
31 *On the Genealogy of Morality*, II, 11.
32 *On the Genealogy of Morality*, II, 1.
units of social power. Promise keeping enables the creation of greater advantages to living in a community—"oh what advantages! we sometimes underestimate this today"\textsuperscript{34}—but presupposes effective disciplining of individuals, without emasculating their active nature.

Second, justice must check the "paring" tendency of institutional wills-to-power. The active creativity of individuals presupposes "genius" in the sense of self-organizing criticality. This entails a cyclical process in which each individual accumulates "work-in-progress" that may or may not ripen into a self-transformation that generates a quantum of utility unattainable by rationalist derivation. This work-in-progress is by nature difficult to evaluate. Working against this "genius" process is the spontaneous paring tendency of the will-to-power of social institutions. Nietzsche's early works manifest a Marxist critique of capitalism (Nietzsche's attacks against socialism obscure the Marxist origins), which Nietzsche extends to social institutions in general, particularly institutional scholarship and the "contemporary science business."\textsuperscript{35} The social institutions that unwittingly or wittingly maximize tendencies to reinforce themselves as institutions are the ones that endure. These institutions exploit all available surplus capacity of their constituent elements toward the survival of the institution for its own sake, and minimally provide for all other necessary conditions to its survival. A conflict between the paring tendency of institutions and the needs of creative action (genius) arises because the work-in-progress of self-organizing criticality is so difficult to evaluate. This work-in-progress will appear as "surplus" that can be pared away from the perspective of the self-reinforcing intelligence of the social institution. Indeed, the implicit assumption that "objective" market

\textsuperscript{33} On the Genealogy of Morality, II, 10.
\textsuperscript{34} On the Genealogy of Morality, II, 9.
\textsuperscript{35} "For seventeen years I have not tired of shedding light on the de-spiritualizing influence of our contemporary science business." Friedrich Nietzsche, Twilight of the Idols, tr. Richard Polt (Indianapolis: Hackett, 1997) 45, "What the Germans are Missing, section 3. [For brevity, subsequent cites to Twilight of the Idols will be by title and
valuations are complete—that the “language” of the market is complete—has eroded our appreciation for any of the preconditions for self-organizing criticality and the development of the capacity for creative action of a high order of rank—the task of “culture.” Put differently, the market only rewards creativity after the creative event and otherwise takes for granted a ready supply of non-transferable work-in-progress—the aim of West’s “women’s work.” As Marx argued capitalism drives down the price of labour to subsistence levels, so Nietzsche understood its effect on the cultivation of creativity. Hence, Nietzsche continually returned to the theme of “education” in the conflict between culture and state.

Third, the project of justice itself must be accomplished through a social institution. Self-organizing criticality has two major implications. First, the process of justice must structure itself to exploit creative action to enhance its adaptive capability. This was the subject of the previous chapter, “Legal Reasoning.” The causal phenomenon of emergence generates the residues of justice that become the work-in-progress that drives creative transformations of legal form. Second, as a social institution, justice must check the tendency of institutions to pare away at creative surplus and culture. Foremost, the process of justice must check its own institutional paring tendency—it must have a built-in self-limiting or “masochistic” tendency as part of its design.

Institutions, then, are a major theme in Nietzsche’s theory of justice, though artfully downplayed, and are essential tools for justice. What makes institutions problematic are, (1) their

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36 Capitalism has learned to recognize “intellectual property” as growth-promoting exceptions to laissez-faire economics; however, little attempt has been made to link the extent of a property right to the order of rank of the self-organized criticality that underwrote the created work. Consequently, copyright control over trivial works can become a valuable source of windfall assets for businesses with distorting effects on economic development and other social values. See, for example, David Vaver, “Copyright in Legal Documents” (1993), 31 Osgoode Hall Law Journal 661.

inherent systole and diastole nature, and (2) their looping feedback effect to change human psychology, consequently changing human calculability, consequently changing institutional architectural possibilities, and so on in an unending feedback spiral. Within Nietzsche's nonlinear dynamics, no particular institutional form or political procedure should ever be eternalized as the guarantor of justice, any more than any psychological norm should ever be eternalized as "human nature." Theories of justice premised on fixed rationalist formulae implicitly cast human nature into an un-evolving form.

The systole and diastole nature of institutions was discussed in the context of legal reasoning in the previous chapter, which observed that the continual expansion of nuanced value recognition requires periodic "greenhouse" phases. Nietzsche makes the point forcefully in the second essay of On the Genealogy of Morality that the origin of an institution requires much "blood"—the discipline to "breed" the promise-keeping citizens.\(^{38}\) The institution in its formative stage must extract "surplus" from recognized values and to that extent over-disciplines its constituents until they become regular and habitual in the necessary manner.\(^{39}\) Nietzsche describes this as regrettable but necessary, a horrific aspect of our past that fortunately has enabled greater organization. This "taming" stage of institutional development requires the direst cruelties and necessary suffering. It is in this context that Nietzsche is against pity in the sense of avoiding or relieving suffering as an end in itself. One's nature must adjust with the season.

Nietzsche does not disguise his recognition of the necessity of seasonal cruelty. Indeed, Nietzsche almost celebrates the Caesar who writes his will in bronze to forge enduring

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\(^{38}\) Nietzsche means "breed" in the sense of early upbringing, as in Cordelia's reply to King Lear: "Good my Lord, / You have begot me, bred me, loved me. / I return those duties back as right are fit..." The Tragedy of King Lear, Act 1, Scene 1, lines 95-97. All Shakespeare cites are from The Oxford Shakespeare: The Complete Works, ed. Stanley Wells and Gary Taylor (Oxford: Clarendon Press, 1988).

institutions. However, it is plain from the structure of the second essay that Nietzsche considers this a phase of history which, thankfully, has past. However, Nietzsche suggests that although such stages of cruelty in the future will be "spiritual," the sensitivity of the pampered modern will be such that the suffering caused by future phases of institution building will be no less palpable.\(^\text{40}\) Nietzsche would make the point that someone from the Renaissance would double over in laughter at today’s political correctness with its obsession to prevent hurt feelings; whereas today’s sensitive Canadian would not last a day in the Renaissance. Conversely, the public censure of political incorrectness today is a festive joy in cruelty on a par with the bloodier auto-de-fe of times past. Nietzsche’s point is that, like childbirth, growth comes with pain, and our sensitivity to pain will always re-adjust to suit the times. In other words, our basic psychology compels us to become continually more sensitive to pain and thereby seek to expand the matrix of recognized values as society can afford to do so, no matter how much our situation improves. Therefore, growth entails a seasonal disposition to seek and endure pain masochistically. I will call this “masochism of the inferior” because it connotes that the constituents of the greater community must self-sacrifice for the communal good of stronger institutions, being the superior level of social organization.

The masochism of the inferior must be followed by “masochism of the superior.” As the greenhouse period comes to close, the institution will have sufficiently burned itself into the constituents that its self-reinforcing mechanisms of discipline can be relaxed. However, what power will enforce the relaxation of discipline to enable surplus to be re-directed to the overriding growth teleology? What will cause the seasonal shift from masochism of the inferior to masochism of the superior? The problem of over-discipline—an institution becoming locked

\(^{40}\) On the Genealogy of Morality, II, 7. I refer to this below as the “Princess and the Pea” principle.
into the blood phase of its development\textsuperscript{41}—is exacerbated when its discipline mechanisms have self-organized spontaneously outside the ambit of conscious awareness and critique. Michel Foucault’s critique of discipline is compelling, though one must avoid misreading him to say such implicit discipline is bad \textit{per se}.

The problem of justice, then, is one of managing the systole and diastole fluctuation of institutional discipline, particularly the problem of seducing the institution to relax its grip. (See figure 3.1.) An institution forged by a strong individual, a Caesar, might willingly relax, but this is historically not so reliable—in the first essay of \textit{On the Genealogy of Morality} Nietzsche’s Napoleon is ultimately an \textit{inhuman} beast and not the over-human he seeks to train with \textit{Thus Spoke Zarathustra}.\textsuperscript{42} An institutional logic might, as the completion of its own logic of development, undermine itself to minimal metabolic maintenance. Nietzsche in the third essay will argue that the will to truth ultimately undermines itself in this way. In the second essay, Nietzsche describes Justice as achieving self-overcoming in the form of “mercy.”\textsuperscript{43} Mercy, however, is only a right of the strong; the institution must have completed the blood phase and be strong enough to absorb a minor assault on its durability. Finally, the institution might submit to a higher will to power, perhaps one constrained by the same will to life that Nietzsche hopes will bind great individuals—sexuality as the instinctual masochism of sacrificing self for the future, germ-DNA values over somatic-DNA values, eros over ego. Nietzsche hoped for a “cultural”...

\textsuperscript{41}Nietzsche elsewhere refers to this as “moral vampirism.” See \textit{Ecce Homo}, “Why I am a Destiny,” section 8. Friedrich Nietzsche, \textit{Ecce Homo}, tr. R.J. Hollingdale (New York: Penguin, 1979, 1992) 103. [Hereinafter, cites to \textit{Ecce Homo} will be by section number.]

\textsuperscript{42}See also \textit{The Anti-Christ}, section 44. Friedrich Nietzsche, \textit{Twilight of the Idols / The Anti-Christ}, tr. R.J. Hollingdale (New York: Penguin, 1968, 1990) 170. [Hereinafter, cites to \textit{The Anti-Christ} will be by section number.]

\textsuperscript{43}Richard Weisberg shows that Nietzsche greatly respected Napoleon as a juristic codifier. See Richard H. Weisberg, “It’s a Positivist, It’s a Pragmatist, It’s a Codifier! Reflections on Nietzsche and Stendhal” in \textit{The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture}, edited by Morris Dickstein (Durham, NC: Duke University Press, 1998). Napoleon was plainly of the Caesar type, but Nietzsche’s admiration was ultimately qualified. Nietzsche elsewhere describes the legislator as a Caesar with the heart of a poet, so one might infer Nietzsche would qualify his respect for Napoleon as lacking the heart of a poet.
institutions that ensured masochism of the superior within all institutions, including itself. This institution would be staffed by Nietzsche’s cultural physicians who would overcome the problem of institutional mercy.

**Systole and Diastole Cycle**

![Systole and Diastole Cycle Diagram]

Nietzsche weaves together numerous strands in the second essay of *On the Genealogy of Morality*. The strand of present interest is the complete cycle of the systole-and-diastole, blood-and-mercy life cycle of a social institution that self-overcomes. In this way, Nietzsche demonstrates how an institution can develop from the perspective of the psychological dynamics of the constituent individuals. The institution Nietzsche selects is law, both moral and institutional. Nietzsche writes that the most naïve form of justice is based on compensation for

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43 *On the Genealogy of Morality*, II, 10.
wrongs and is premised on the great generalization that everything can be paid for.\textsuperscript{44} At this level, justice is settlement.\textsuperscript{45} As the genealogy develops, the purpose of the compensation emerges as preserving social equilibrium so as to preserve the advantages of community living with the utilities implicit in having greater units of will to power. The same form—compensation or punishment as compensating title to inflict suffering\textsuperscript{46}—takes on new meaning. Now the “creditor” is the community whose integrity has been violated and the just punishment is compensation to restore community equilibrium.\textsuperscript{47} As the community grows in power, the criminal act is no longer a threat to the existence of the community as an independent will to power—as an entrenched, sufficiently reinforced, instrumental social force. At this stage a crucial development can take place—the community begins to isolate the criminal and his deed from one another. This, Nietzsche argues, is a prerequisite to “mercy.”

Nietzsche’s underlying good nature might be inferred from the thrust of the first essay—the radical claim there is “no doer behind the deed” enables his theory of justice to “condemn the fault, and not the actor of it.”\textsuperscript{48} It will be argued below that Nietzsche makes this as a strategic overstatement, and the argument of the second essay makes it clear why: Nietzsche is attempting to counteract the poisonous “free will” moralization which he understands as a conceptual roadblock along the path to institutional mercy. Separating doer from deed and undermining the “free will” doctrine enables the transition from the blood stage to the mercy stage in the systole and diastole of the institution. Nietzsche says of Kant, who wrote to counteract utilitarian

\textsuperscript{44} On the Genealogy of Morality, II, 5.
\textsuperscript{45} On the Genealogy of Morality, II, 8.
\textsuperscript{46} Shakespeare makes similar points in The Merchant of Venice, particularly the compensating nature of title to cruelty and how that the creditor’s pleasure is greater to the extent the creditor is of lower social rank. Nietzsche makes reference to Roman tables that measure degrees of compensating flesh for indebtedness.
\textsuperscript{47} On the Genealogy of Morality, II, 9-10.
\textsuperscript{48} On the Genealogy of Morality, I, 9. William Shakespeare, Measure for Measure, Act 2, Scene 2, lines 29-37.
arguments against the death penalty. "And might one not add that, fundamentally, this world has never since lost a certain odor of blood and torture? (Not even good old Kant: the categorical imperative smells of cruelty.)" Nevertheless, Nietzsche makes it clear that the transition from blood to mercy depends on reliable intuitive perception as to the strength of the institution.

The "creditor" always becomes more humane to the extent that he has grown richer; finally, how much injury he can endure without suffering from it becomes the actual measure of his wealth. It is not unthinkable that a society might attain such a consciousness of power that it could allow itself the noblest luxury possible to it—letting those who harm it go unpunished. "What are my parasites to me?" it might say. "May they live and prosper: I am strong enough for that!"

The justice which began with, "everything is dischargeable, everything must be discharged," ends by winking and letting those incapable of discharging their debt go free: it ends, as does every good thing on earth, by overcoming itself. This self-overcoming of justice: one knows the beautiful name it has given itself—mercy; it goes without saying that mercy remains the privilege of the most powerful man, or better, his—beyond the law.

Within this passage Nietzsche freely moves between the community as creditor and the noble as creditor and thereby signals that in his developmental systems theory, what applies to one applies to the other. It seems Nietzsche switches to the noble person so that he will not be quoted out of context to be arguing for unqualified institutional mercy. Nietzsche seems to have been doubtful that the institutions of his day were strong enough for that, but plainly, he understood the shift from blood to mercy as a most desirable development, once the institution was strong enough.

49 Wai Chee Dimock, Residues of Justice: Literature, Law, Philosophy (Berkeley: University of California Press, 1997).
50 On the Genealogy of Morality, II, 6.
51 On the Genealogy of Morality, II, 10.
Marking the time for transition from blood to mercy is therefore a discretionary decision of constitutional significance.

When read with earlier passages from *Dawn*, it becomes clear that the second essay of *On the Genealogy of Morality* argues against the sin and punishment model of “moral” justice. Nietzsche understands justice as overcoming itself by shifting its emphasis from maintaining equilibrium to regulation—only “laws” can be “just.” Justice should self-overcome to treat criminals as “sick,” as irresponsible pieces of fate. Instead of the justice system punishing criminals into wily self-prudence, physicians, both physiological and cultural, should physiologically heal and morally seduce criminals into conscientiousness self-discipline.

Let us do away with the concept *sin*—and let us quickly send after it the concept *punishment*! May these banished monsters henceforth live somewhere other than among men. If they want to go on living at all and do not perish of disgust with themselves! —In the meantime. Consider that the loss society and the individual sustain through the criminal is of exactly the same kind as the loss they sustain through the invalid: the invalid propagates care and ill humour, produces nothing, consumes what others produce, requires attendants, physicians, distractions, and lives off the time and efforts of the healthy. Nonetheless, we should nowadays describe as inhuman anyone who for this reason desired to take *revenge* on the invalid. …Can we not yet say: every ‘guilty person’ is a sick person? —No, the hour for that has not yet arrived. As yet we lack above all the physicians for whom that which has hitherto been called practical morality will have to have been transformed into an aspect of their science and art of healing…

On another level within the second essay of *On the Genealogy of Morality*, Nietzsche analyzes the psychological foundations of what it means to have a self-limiting conscience. Nietzsche

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52 *On the Genealogy of Morality*, II, 11.
thereby provides by analogy a developmental explanation of how justice self-overcomes. Nietzsche implicitly uses this as an exemplar of how institutions generally move through the systole-and-diastole dynamic because of shifts in the direction of “active” forces.

The distinction between “active” and “reactive” forces in the grand economy of interacting wills to power is introduced by Nietzsche in the first essay and has been usefully analyzed and typologically organized by Gilles Deleuze in *Nietzsche and Philosophy*. In general terms, “active” forces proactively adopt means to promote future growth—not sacrificing the future to present comfort—whereas “reactive” forces seek stress-reducing preservation strategies out of weakness. Not surprisingly, Nietzsche understands justice as an active force. “Just” means laws of partial self-restriction for the purpose of the Will to Life, which is better served by the creation of greater units of will to power in the form of social institutions.

Nietzsche’s purpose in the second essay of *On the Genealogy of Morality* can be gleaned from careful observation of the form of the essay, both in structure and image pattern. By breaking the essay into parts according to predominant directions of active force, it can be seen that the essay charts the systole-and-diastole life cycle of an institution as the shifting of directions of active force between constituents and community and among the constituents themselves. Nietzsche weaves into this life cycle a critique of conceptual moralization and esoteric signals as to Nietzsche’s solution to the modern dilemma.

The second essay of *On the Genealogy of Morality* can be divided into three movements of seven sections plus one, followed by a tag: 7-1-7-1-7-1-tag. (See figure 3.2.) The first movement constructs primitive justice as settlements among strong, active equals, which is summarized in section 8. The first stage of the community-level will to power, then, is as a side

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effect of mutually disciplining active forces at the individual level. Nietzsche, in passing, notes that this applies to all levels of composite will to power—the dynamic between individual and community is an exemplar of the more general principle. At the midpoint of the movement (section 4), Nietzsche introduces the important methodological point that a genealogist ought not to project back late forms of consciousness—such as, the criminal deserves punishment because he could have acted differently—to earlier stages of psychological development. Nietzsche immediately turns to the psychology of punishment as anger at some harm or injury, vented on the one who caused at—"as parents still punish their children." This ominous aside is the key to unlocking Nietzsche's concept of "breeding" because it signals that Nietzsche's genealogy of development applies equally to the psychological development of a child. The second half of the first movement discusses the festivity of "venting" on others under the form of "punishment." Section 8, which begins "To return to our investigation" ends Nietzsche's deconstruction of punishment and recapitulates the first theme, community as byproduct of active individuals.
On the Genealogy of Morals - Second Essay

On the Genealogy of Morals - Second Essay

In the second movement, Nietzsche reverses the direction of active force. In the first three sections, community becomes the “creditor” and justice becomes active regulation of the individuals for the purpose of establishing greater units of will to power. The midpoint of this middle movement (section 12) introduces one of Nietzsche’s most influential methodological injunctions: the genealogical distinction between form and meaning, which he applies at all levels from physiological organ to legal institution. Section 12 is somewhat a non sequitur because sections 9 through 11 complete the theme of justice as an active community force to regulate for the purpose of will to life—greater units of power to prevent sacrificing the future for the desires of the present. Nietzsche first uses the form-and-meaning distinction to criticize...
reactive models of evolution, which view dynamics fundamentally as adaptation in response to stress. Making stress avoidance the prime teleology would sacrifice potential growth to present repose and would not account for the leading edge of evolutionary change. This nice scientific point aside, Nietzsche begins section 12 with “Yet a word on the origin and the purpose of punishment—…” and, after the methodological interlude, begins section 13 with “To return to our subject, namely punishment…” The remainder of the middle movement dwells on how punishment is ineffective for creating an internal conscience in an individual and, rather, breeds stout-hearted fatalism and a-moral prudence.

Then in section 16, the transition section ending the second movement (7-1-7-1-7-1-tag), Nietzsche introduces the main point of the essay. Once the community institutions palpably demonstrate advantages to “tame” community living, active individuals turn the active forces to actively self-limit, self-sacrifice and self-undermine. In the first essay, Nietzsche went to great effort to distinguish active self-limitation from weakness and incapacity. This turning of active force against itself as will to life only makes sense within the context of a greater unit of will to power, the state, that is or will be itself subordinate to the same will-to-life imperative. In terms of nonlinear dynamics, the turning of active force back against itself—in the manner of a fractal—generates the possibility of greater complexity and nuance of form and the potential for greater degrees of self-organizing criticality. Nietzsche refers to this effect as “depth.” Nietzsche now introduces his poetic image scheme, beginning with “pregnancy” and “dice.” Nietzsche describes this self-mutilation, this masochism, as an illness, but an illness in the sense pregnancy is an illness—one becomes pregnant with a future, though an uncertain one. The robust

55 Persephone’s dice. See Dawn, section 130.
individual who turns active force against self creates depth and, if the dice roll well, greater order of rank.

In the third movement of the essay, the active force changes direction from community to individual, to change the direction of active force in the individual against itself. The prerequisite to this development is a strongly integrated community, presumably so the benefits of self-taming become palpable, given that Nietzsche has utterly demolished any notion that punishment could induce this internal reversal in an individual. Generally, Nietzsche strongly favours discipline through seduction and sees punishment as ineffective—particularly, it seems, concerning child rearing. Nietzsche then celebrates the blond beasts of prey (a lion image from the poetic scheme) who forcibly create the advantages of state to seduce the noble types into self-taming. The ruthless Caesar type sculpts his work with the hammer blows of an artist’s violence and possessing an artist’s ego knows itself justified to all eternity in its work, “like a mother in her child.” The poetic images in this section are extremely important, signaling the parallelism between Caesar forging community, the self forging a self of more depth and the philosopher—Plato and Nietzsche—forging humanity for millennia.56

Nietzsche continues on the theme of self-forged depth, using the poetic image of a labyrinth for the structure created by active force turned against itself. This labyrinth is a “womb.” One reason this reversal of active force can happen psychologically, is that there is joy in cruelty, and so in cruelty to oneself. Nonetheless, that alone would constitute a negative sum economy. The psychic solution is to draw on the will to life as the ultimate value of the self-limitation, of the unegoistic. Nietzsche presents an esoteric answer to resolve this, signaled by the phrase “you will have guessed it” which immediately precedes the “womb” image. Read with

56 Compare “The Hammer Speaks” at the conclusion of Twilight of the Idols.
“labyrinth,” Nietzsche is telling the esoteric reader that the individual must draw on sexuality and rely on Ariadne to guide him to the correct application of active masochism.

In section 19, Nietzsche returns to the problem of creating enduring social organizations, particularly in a pre-literate society. This, Nietzsche argues, is accomplished by the conceptual ruse of treating a community’s ancestors as “creditors”—another meaning for the same old form, applying the methodology of section 12 yet again. The conceptual form of debt serves to make tradition enduring. As the power of the community grows, the debt grows and the traditions become more enduring. Eventually, the ancestors conceptually evolve into gods. Competitions among communities become wars of gods—the histories of nations are written into the mythologies—and eventually an all-powerful nation invents a single all-powerful god.

At the midpoint of the third movement, Nietzsche again introduces an important methodological point. The moral conceptualization of undischargeable indebtedness to a “creditor” god creates undischargeable guilt. From the perspective of general dynamics, this locks the individuals into worship of immutable tradition—an arrest of the dynamics of growth. The institution of the god-as-creditor concept locks the individuals into the masochism of the inferior stage and fails to advance to the masochism of the superior—the social institution fails to self-overcome. In the next essay, Nietzsche will argue that the will to truth ultimately undermines god and so atheism makes a second innocence possible. The second innocence is freedom from undischargeable guilt that, in the deficit psychic economy of ideals, must otherwise be atoned for by cruelly imposing the ideals of the god on oneself and others—psychic over-taxation on individual surplus for the benefit of blood-stage institutions.

The poetic image pattern in the third movement has a pregnancy, womb, or mother and child image in each section leading up to the “birth” of second innocence from the womb of the
labyrinth at the midpoint of the movement. However, Nietzsche argues that atheism in fact has
not lead to the birth of second innocence because the concepts of moralization still serve to lock
humans into the pernicious guilt psychology of an undischARGEABLE “iron” responsibility.
Nietzsche’s purpose can again be clarified through poetic image patterns. The Caesar type creates
society with hammer blows to “bronze” whereas the concepts of moralization are works in
“iron.” This invokes a preference both for the Bronze Age over the Iron Age and for the relative
malleability of bronze over the more rigid iron. 57 Indeed, in the next section of the movement
)section 22) Nietzsche sends an esoteric signal—“You will have guessed”—that the concepts of
moralization create a labyrinth of “fixed ideas” and that those readers with “ears” should
experience nausea at the prospect of an eternal “no exit.” 58 Nietzsche observes that the “god”
concept makes this “no exit” from the blood stage feel certain.

In the penultimate section of the movement, Nietzsche observes that the “god” concept
need not be one of self-limitation and self-blame. Indeed, the Homeric gods would take guilt
away from the individual when we perceive an act of human folly as possession by a
mischievous god. In this case, the community-level concept reverses the flow of active force: it
directs the individual away from self-limitation to self-activation. It promotes the strengthening
of the individual.

PlAINLY Nietzsche advocates atheism and does not advocate a return to Homeric god
concepts. The function of section 23 is to introduce the possibility of reversing the direction of

57 Nietzsche does not advocate a literal return to the “Bronze Age” psychology. This is evident from his imagery in
the Epilogue to Twilight of the Idols, “The Hammer Speaks”—itself an excerpt from Thus Spoke Zarathustra—
which the creators “write on the will of millennia as on bronze—harder than bronze, nobler than bronze.” Hence iron
is too rigid, but bronze is to be hardened.
58 Those with “ears” will also hear the shift from Bronze Age to Iron Age as marking the shift from matricentric
religion myth to patricentric religion. “It is also held by some that with the establishment of patriarchal communities
and states, the great goddess suffered an eclipse, pressed, as she now was, into the framework of a male-dominated
order.... The change took place, in the view of Joseph Campbell, at the end of the Bronze and at the beginning of
active force yet again, toward self-activation so that development is more like an ascending spiral than a pendulum.\textsuperscript{59} The purpose of this shift is set out in section 24: to breed individuals of “great health” who can cause masochism of the superior at the level of community institution. In Nietzsche’s poetic logic, this self-sacrifice within the blood-and-mercy cycle is always the summer solstice or the time of the bell-strokes of noon. Compared with the four-season structure of essay one, discussed below, it can be seen that the fourth movement of the second essay has been omitted. Rather, Nietzsche goes “silent” as a good philosopher should and refers us to Zarathustra as an Anti-Christ. The fourth movement, then, will be the self-undermining and self-overcoming of modernism at the instigation of anti-modern philosophers of great health, spurred by \textit{Thus Spoke Zarathustra}.

The importance of the missing fourth movement, for present purposes, is that Nietzsche identifies the need for a future reversal in the direction of active force. The individual has gone through a full cycle of self-activation, self-limitation and qualified self-activation. The community will to power goes through a staggered, complementary cycle that began with self-activation and then should go through one of self-limitation. Plainly the cycle would continue, such that the directions of active force would again reverse, once individual psychology had regained sufficient strength. These “over-humans” would become calculable in a new way, and so enable a qualitatively new sort of social institution to arise in the next cycle of the spiral. Therefore, one cannot say what the “logic” of justice would be after a cycle of reversing the direction of active force. (See figure 3.3.)

\textsuperscript{59} The spiral image is itself too simplistic as it might suggest a Darwinian expectation of inevitable progress. Nietzsche used the labyrinth image, which can appropriately convey the sense of fractalizing complexity.
Justice and Direction of Active Force

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\begin{align*}
S & \leftrightarrow S \rightarrow C \quad \text{Homeric Competition} \\
& \quad \text{Active forces of individuals keep each other in check externally; community is produced as a side-effect of the competition.} \\
C \uparrow \quad \text{Punishment} & \rightarrow S \quad \text{Regulative Justice} \\
\text{Innovation:} & \quad S \downarrow \quad \text{Bad Conscience (Masochism of the Inferior)} \\
C \uparrow \quad \text{Seduction} & \rightarrow S \downarrow \quad \text{Caesar; Moralization Lock-In} \\
\text{Innovation:} & \quad S \downarrow \quad \text{Zarathustra Counter-Ideal} \\
S \uparrow & \rightarrow C \downarrow \quad \text{Antichrist (Masochism of the Superior)} \\
\end{align*}
\]

\[
\begin{align*}
S \downarrow \leftrightarrow S \downarrow & \rightarrow C \uparrow \quad \text{Holmes; College of Cultural Physicians} \\
C \uparrow & \quad \text{Seduction} \rightarrow S \downarrow \quad \text{Institutional Health Care} \\
\end{align*}
\]

Figure 3.3 Justice and the Direction of Active Force

Nietzsche’s point may be made clearer by two analogous features of legal reasoning discussed in the previous chapter. First is the example of the “greenhouse” principle in contract law. After a phase of rigid enforcement of contract principles, the commercial principles have been “burned” into habit enough to afford the luxury of masochism of the superior and equitable experimentation to re-integrate competing values that had been overlooked during the greenhouse period. Hence, a judge such as Lord Denning can rediscover equitable principles in cases ante-dating the greenhouse period. These older values had magnanimously given way during the greenhouse period—masochism of the inferior. The equitable renaissance puts stress on the newly entrenched social institution, but once patterns are found within the stresses, the
subordinate values are again made calculable and the stability of the social institution is restored, even though the doctrines have become more complex.

The second example is more to Nietzsche's point. As the logic of legal reasoning evolves toward self-conscious proportional value reasoning, judges begin to universalize decisions differently. That is, if the judge must assume the notional social actor is a black-letter lawyer, then the judge will be more fearful that universalization could undermine the sensitive core of superior values. However, if the judge can assume the notional social actor will reason proportionally, then equitable experimentation and the uncertainty it creates would be much less likely to undermine established social institutions. Therefore, a reversal in the direction of active force adds depth to the order of rank of the notional social actor, which increases the presumable computational power of the social actor. Consequently, a more complex social actor becomes calculable. Once this new depth is achieved, the social institution may self-undermine its concepts to await a reconstruction based on a higher order of rank with greater nuance and context-sensitivity. In legal reasoning, one might mark such transitions as calls for "functional" approaches in preference to "conceptual" approaches. The folly, from the perspective of Nietzschean dynamics, is to assume locking into either a permanent conceptual or a permanent functional approach could produce continual progress. Nietzsche's most difficult point is that psychological calculability and logic itself will qualitatively transform each cycle. Consequently, both the concepts and logic of justice will self-transform each cycle of growth. There are no "fixed ideals" of justice, other than the general, open-ended constitutional dynamics of self-organizing criticality.

Nietzsche's task, then, is to be *agent provocateur* to the self-overcoming of justice in the modern mode. This task requires critique to undermine the forces that lock society into its blood
stage, and ipso facto, what locks individuals into an excessively self-limiting mode. Nietzsche identifies what he calls “decadence” as being responsible for that lock-in.

3.3 Poisoning the Ideals that Cultivate Individual Decadence

In the preface to *The Case of Wagner*, Nietzsche wrote, “Nothing has preoccupied me more profoundly than the problem of decadence...”60 Decadence means fear of great suffering due to weakness, both physiological and spiritual, which are close to being the same things, for Nietzsche, because of bi-directional causality between the two levels.61 For Nietzsche, when we are in a weakened condition our generally prudent aversion to suffering without purpose can become a pathological inability to accept “senseless” suffering—that is, suffering that cannot be justified by established concepts using the principle of sufficient reason. Because of this fear of suffering, the weak cannot endure the suffering required to gain the strength to overcome the fear. Further, the avoidance of strengthening exacerbates the weakness and fear. Instead, the decadent seeks palliatives. Mihalyi Csikszentmihalyi contrasts the palliative strategy of passive viewing of television with the complexification of self by building skills.62 By actively engaging in activity near the limit of our capability, we can generate a positive affect that Csikszentmihalyi calls “flow,” which corresponds to what Nietzsche refers to as “gay science.”63 Moreover, continually experiencing flow gives one a sense of profound satisfaction. However, many people

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60 Friedrich Nietzsche, *The Case of Wagner*, tr. Walter Kaufman (New York: Vintage, 1967) 155. [Hereinafter, cites to *The Case of Wagner* will be by section number.] Nietzsche’s use of the term decadence includes the ideas of the reactive type and ressentiment. Ressentiment is active decadence. The conceptual difficulty arises when decadent types use active forces for reactive purposes. As the complications are unnecessary to this thesis, this thesis will use the general term decadence. Gilles Deleuze presents a typology of active and reactive types in *Nietzsche and Philosophy*, tr. Hugh Tomlinson (New York: Columbia University Press, 1962, 1983).

61 “Aesthetics is tied indissolubly to these biological presuppositions...” *The Case of Wagner*, Epilogue.


instead fall into the television trap—too tired after a day of unfulfilling work, they seek relief by watching television. Csikszentmihalyi notes that such people feel even weaker after watching television, thereby creating a downward spiral of development. Martin Seligman claims that the downward spiral leads inexorably to increasing depression, which can be minimized or at least not accelerated by optimistic perspectives; however, self-esteem must ultimately derive from a real sense of increasing power. Tragically, avoidance of strengthening exacerbates the weakness and fear that initiated the downward spiral.

Nietzsche identifies a constellation of moral concepts that lock modernism into stagnant decadence notwithstanding the supposed death of the god concept. On Nietzsche’s analysis, the decadent’s fear of senseless suffering finds palliative solace in the fantasy that language could yield a complete causal explanation for every event. The fantasy employs a constellation of related concepts—especially guilt, free will and pity—that are all underwritten by the presupposition that complete knowledge is possible in principle. In other words, decadents have over-generalized the power of language to make us endure present suffering for future growth, into a complete solution for suffering—a promissory note for a future without any suffering. Nietzsche claims the promissory note is a bad debt that trades on the decadents’ fear of the risks of incompleteness, the possibility of senseless suffering.

The completeness assumption rests on the fallacy of the completeness of logical causation. In his early essay “Richard Wagner in Bayreuth,” Nietzsche distinguished logical causation from factual causation. Because of self-organizing criticality, it could never be the case that a set of stated antecedent conditions could fully determine the consequent effect. Yet, this is what the guilt economy of conceptual moralization requires. In this conceptual model, all

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effects have identifiable causes. Therefore, all suffering is for a reason—a failure to discover and apply the right antecedents. Therefore, all suffering is guilty, which justifies a right to blame and, most importantly, title to inflict cruelty in the form of punishment. Coincidentally, this right to blame and punish every chance occurrence provides ample opportunity for those decadents weakened by the social institution served by the moral concepts, to inflict punishment and partially regain a sense of power.

Nietzsche plainly detests this state of affairs as backward looking and cruelty promoting in a way that sacrifices the future for the present. For Nietzsche, each deed that involves self-organizing criticality will introduce happenings in excess of any set of conceptually well-defined antecedent causes. Nietzsche wishes to use conceptual atheism to reintroduce the innocence of becoming, the possibility of senseless suffering that need not be redeemed by blaming and punishment. On Nietzsche's analysis, the completeness fantasy also underwrites the notion of a completely sovereign "free will" or "soul" as the antecedent to every deed. A closed, blame-based psychic economy requires "free will" so that the individual can be blamed for every misdeed, and the soul damned to require redemption by the apotheosis of language and logical causation itself—God as word and first cause.

It follows that an important element of Nietzsche's task of justice is to undermine the completeness assumption implicit in the free-will concept. The first essay in *On the Genealogy of Morality* does just that in section 13, which infamously posits there to be no "doer" behind the "deed." This claim has become a cornerstone of ultra-deconstructive, author-less postmodern literary theory and philosophy. However, a close reading of the first essay that listens for the esoteric voice in the poetic images reveals Nietzsche's claim to be a deliberate overstatement.

There are at least four reasons for Nietzsche to attack free-will morality. First, the self-overcoming of justice requires separation of the criminal from the deed. The deconstructive attitude promotes treating the criminal as an unfortunate product of biology and social forces—"an irresponsible piece of fate" who should be treated rather than hanged or redeemed. Second, the free-will doctrine prevents the recognition of the creative element of the deed introduced by self-organizing criticality. Third, the free-will doctrine seduces the stronger into believing they have a will of infinite, metaphysical power that they voluntarily self-limit. The reality is that one only has a strong will only insofar as one has the capability to make promises that can be kept, to stand as security for a future. Such strength comes from "training"—a weightlifter who no longer lifts weights believing it takes even greater strength to curb his strength, is deluded. "Free will" poisons the appreciation of the need to train a strong will. Fourth, the free-will metaphysics conceptually blocks the formation of any development theory based on the dynamics of self-organizing criticality.

Compared to the rest of Nietzsche’s philosophy, Nietzsche overstates his case when he says there is no doer behind the deed and that there is no such thing as strength apart from the application of active force. How does Nietzsche signal the presence of overstatement to his esoteric readers?

In the second essay, a movement pattern could be inferred from changes in the direction of active force between community and individual and within individuals. In the first essay, the movement pattern is indicated by shifts in voice and pronoun inclusion from section to section.\textsuperscript{66} That in itself is highly suggestive of the presence of an esoteric message. Using this clue, the essay breaks neatly into a 4-4-1-4-4-epilogue structure. The first movement uses the "I" and

“me” voice. The second movement shifts to “our” problem for “few ears” and so many of “you” will have of course anticipated such and such—“you” did not, well that was because the priestly types used a “secret” art.

The midpoint is a speech by Nietzsche in quotations in yet another voice. This voice tells us that the conceptual poisoning by the Church was not all bad—it added depth to make us the promise-keeping animal and it added evil in the sense that we are able to die for ideals (ends in themselves as artifacts of language). Nietzsche says, “—apart from the Church, we, too, love the poison. —” Plainly, this is the naïve, straightforward Nietzsche speaking. Nietzsche the “honest” philosopher warns us: “Something that follows is poisonous.” The section ends in the savvy Nietzsche voice: “For at this point I have much to be silent about.”

Nietzsche warns his pupils about himself. The voice that continues in the next four sections, then, is the exoteric, poisonous Nietzsche. It is in this movement that Nietzsche makes the claim that there is no doer behind the deed. This movement is the foundation of ultra-deconstructive postmodernism, or what might be called phase-one postmodernism. There is an irony here in that the poison Nietzsche administers is one that disposes one not to sense a strong authorial will to power esoterically pulling the strings of the reader-puppet. If “no doer behind the deed” is the poison of esoteric Nietzsche, then the whole phase-one postmodern movement is based on a misreading of Nietzsche, albeit one he encouraged. Indeed, this thesis claims Nietzsche did not want his readers to unlock his esotericism until they had received the key from the Goddess Justice. Geoff Waite, for example, has found the lock but not the key.

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67 See Dawn, especially sections 255, 447 and 456.
68 Dawn, section 447: “Master and pupil. —It is part of the humanity of a master to warn his pupil about himself.” Notice also that in Nietzsche’s note at the conclusion of the Epilogue to The Case of Wagner he refers to On the Genealogy of Morality as a “touchstone” (perhaps a pointer to the name of the jester in As You Like It) for those with “ears” for his work. See the chapter “Para-Conceptual Rhetoric” for a fuller discussion of Nietzsche’s esoteric style.
69 See below later in this chapter at the end of the section “Theories of Justice and Sociobiology.”
After the midpoint of the essay and the point where the esoteric Nietzsche goes “silent”—self-sacrifices—and the poisonous exoteric Nietzsche continues with his serpent’s wisdom of there being no doer behind the deed in section 13. In terms of poetic image, in section 11 Nietzsche’s uses the image of a beast of prey being uncaged, an important lion image. The lion signals an immanent attack, which commences the fourth movement of the essay in section 14.

Nietzsche here shifts voice to act as mid-wife to his esoteric reader and student of Zarathustra. Here is the important point regarding “justice”—Nietzsche identifies it as the pre-eminent issue of the essay. Nietzsche then shifts to esoteric Latin to accuse the Church of being fundamentally revenge-motivated in its conception of “justice.” The movement concludes with a capsule history of the battle for and within the spirit. Nietzsche ends with Napoleon as a throwback noble beast, both inhuman and superhuman, perhaps a monster. Nietzsche leaves us in silence to ponder what would make Napoleon a human noble beast instead of an inhuman monster.

The epilogue is important because Nietzsche tells us that the moral question is ultimately one of science, especially physiology and evolution, to provide provisional solutions to the problem of values and their order of rank. This is precisely equivalent to the value matrix discussed in the previous chapter of this thesis, “Legal Reasoning.”

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71 In Pagan myths the lion is ambiguously the sun king or the agent of the crone-Goddess. Nietzsche resolves the ambiguity in the first section of *Thus Spoke Zarathustra*, making the camel the sun-king hero and using the lion for the nihilistic phase. In the nihilistic phase, the lion attacks as agent of the crone-Goddess.
On the Genealogy of Morals - First Essay
Voice and Image Correlation

**Prologue**  
Seeker of knowledge to explore meaning of twelve beats of noon. A prologue to all three essays.

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<td><strong>“I” voice</strong></td>
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<td>FEW EARS</td>
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<td>Two voices; One silenced</td>
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<td>SELF-SACRIFICE of voice of honest democrat, who confesses love of secret poison. Remaining voice warns that he has much to be silent about.</td>
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<td>LION UNCAGED</td>
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<td>“I” =&gt; “we”</td>
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<td>13</td>
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<td>LAMB. GREAT BIRD OF PREY. Assertion that there is no doer behind the deed.</td>
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<td>Midwife/reader</td>
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<td>Attack on secret source of ideals. JUSTICE</td>
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<td>Attack on secret source of Christian JUSTICE. FOREIGN TONGUE.</td>
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<td>Concluding remarks. Reflection on trans-millennial struggle of spirit.</td>
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<td>17</td>
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<td>ANCIENT FIRE. Prelude to a Philosophy of the Future. SILENCE.</td>
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**Epilogue**  
Appeal for BIRTH of new SCIENCE of JUSTICE.

Figure 3.4  
Architecture of *On the Genealogy of Morality*—First Essay

The 4-4-1-4-4-epilogue structure of the first essay of *On the Genealogy of Morality* therefore reveals that “no doer behind the deed” is a bit of strategic poison administered by Nietzsche in his Zarathustra, Anti-Christ persona. As such, an esoteric reader should read it as a noble lie and an overstatement.

In summary, Nietzsche signals that he intended “no doer behind the deed” as a poisonous overstatement and that the esoteric Nietzsche unquestionably understood himself as a strong authorial presence. Indeed, the whole thrust of Nietzsche’s Yes-saying philosophy is to strengthen the will of the individual self-consciously, and consequently, strengthen the institutions of society and make them more adaptive.
3.4 How Institutions Exploit the Cruelty of Ideals to Deficit Finance a Psychic Economy

Nietzsche’s emphatic objection to pity now becomes clearer. Pity is objectionable insofar as it purports to have achieved logical completeness in determining the context of its proper application. The assumed completeness of the blame logic means that all suffering is the result of something blame-worthy, and so the suffering victim warrants pity, instead of the suffering being critically celebrated as the means to growth (but not an end in itself, of course). The systole and diastole of an adaptive system requires masochistic suffering at the proper stage at the proper level. A religion of pity, for Nietzsche, is as nonsensical as keeping athletes from training. “Let me suffer—your free-will hocus pocus blinds you and me to my need to suffer which you could never fully appreciate. Your ‘pity’ is the sugared poison of palliative decadence.” Or as Nietzsche puts it in section 338 of Joyous Science:

Our personal and profoundest suffering is incomprehensible and inaccessible to almost everyone: here we remain hidden from our neighbor, even if we eat from the same pot. But whenever people notice that we suffer, they interpret our suffering superficially. It is the very essence of the emotion of pity that it strips away from the suffering of others whatever is distinctly personal. Our “benefactors” are, more than our enemies, people who make our worth and will smaller. … It never occurs to them that, to put it mystically, the path to one’s own heaven always leads through the voluptuousness of one’s own hell. No, the “religion of pity” (or “the heart”) commands them to help, and they believe that they have helped most when they have helped most quickly.

If you, who adhere to this religion, have the same attitude toward yourselves that you have toward your fellow men; if you refuse to let your own suffering lie upon you even for an hour and if you constantly try to prevent and forestall all possible distress way ahead of time; if you experience suffering and
displeasure as evil, hateful, worthy of annihilation, and as a defect of existence, then it is clear that besides your religion of pity you also harbor another religion in your heart that is perhaps the mother of the religion of pity: the religion of comfortableness. How little you know of human happiness, you comfortable and benevolent people, for happiness and unhappiness are sisters and even twins that either grow up together or, as in your case, remain small together.  

The effect of the cult of pity is to deter or seduce strong individuals away from cultivating their strength of will. The completeness logic of metaphysical pity arrests the developmental growth of strong individuals, and conversely arrests the developmental growth of social institutions to fulfill better an over-riding, will-to-life will to power.

To summarize, Nietzsche identifies the completeness assumption of logical, concept-based thinking as the conceptual poison that interferes with developmental growth at both the individual and social level. Nietzsche’s philosophy of justice spends much effort analyzing decadence at the level of the psychology of the individual, whereby someone seeks palliative present comforts at the expense of the future. *On the Genealogy of Morality* shows that the palliative is psycho-technically achieved by means of conceptual lock-in to an excess of prudent self-limitation. This psychic economy is driven by the joy in the cruelty of self-denial and the deep festive pleasure in cruel punishment, even of oneself. For the weak, self-punishment is the only title to cruelty available, apart from cruel infliction of moral ideals on others and the promise of an afterlife of ultimate revenge of eternal torment for those whose active forces are stronger.

The greater tragedy, for Nietzsche, is the institutionalization of this decadently excessive self-mutilation of life forces to lock social development within the blood stage of modernity,

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Christianity and, it will be argued below, capitalism. In terms of modernism and Christianity, Nietzsche argues that the free will and blame logic of moralization over-promotes the masochism of the inferior by cultivating a fear of ultimate pain and the hope of eternal, after-life relief. Consequently, the institution never has to make good on the promissory note of redeemed suffering. Further, the assumed completeness of the blame logic prevents the social institution from magnanimously self-undermining with the masochism of the superior—the doctrine of original sin withholds mercy until the afterlife.

In terms of institutional self-overcoming, then, the assumption of logical completeness that is manifest in an over-application of the will to truth is, in psychological terms, a palliative fantasy to alleviate the fear of the suffering entailed by change. Nietzsche dedicates the third essay of On the Genealogy of Morality and the whole of Book V of Joyous Science to exploring the completeness pathology regarding the will to truth, and even accuses himself of once having suffered from this pathology. After deconstructing the will to truth, the real problem becomes the one of skeptical faith identified by Holmes: how can one overcome the fear of uncertainty without being able to justify all suffering? Put this way, it is plain that the refusal to accept less than complete political legitimacy and the rule of law is another species of the completeness pathology and helps explain why legal theory has avoided heretical jurisprudence and has had much difficulty coming to terms with Holmes.

The problem of institutional decadence can be put another way. The completeness assumption is an assumption that development is a closed system. In this quasi-evolutionary model, development proceeds because of an omission in the prevailing logic—an axiom was missing or malformed—and so the prevailing thesis is challenged by the contradiction of antithesis. The self-undermining of the prevailing logic is one of self-exhaustion and realization
that the logic must be expanded to incorporate the antithesis synthetically. Development, in the closed system model, is simply how the expanded logic re-establishes coherency. The closed system then achieves a final equilibrium and all suffering ends, thereby redeeming transitional suffering.

In the Nietzschean universe of chaos theory, self-organizing criticality and Gödel’s Incompleteness Theorem, no set of language markers could ever achieve a closed system representation of reality. Therefore, there could never be an end of history or “afterlife” of no suffering that is certain to redeem fully the suffering of developmental growth. With each cycle of growth that improves the language system and makes our lives more comfortable, our sensitivity to pain re-calibrates to seek obsessively the sources of greatest stress. Being an open system, the suffering of development is never fully redeemed and, indeed, the alleviation of suffering is continually undermined by increased sensitivity to pain. Therefore, the hope of redeeming suffering entirely with a promised end of history is a fantasy that trades on our desire for total truth, which ultimately trades on our fear of suffering. Suffering, for Nietzsche, is plainly an ambiguous naturalistic psychological indicator. Nietzsche does not want to construct a moral order on the reactive premise that all suffering is to be minimized. Rather, he seeks to construct morality on the active premise that growth be encouraged and that this teleology should guide us to whether particular suffering is likely to be productive or not.

Nietzsche’s approach to the problem of institutional self-overcoming is to examine the psychological dynamics of masochism: why would people willingly suffer in an open-system psychic economy? The institutional problem can be put yet another way. Every institution has “metabolic” or “maintenance” needs and “functional” goals. In the greenhouse, blood stage, the

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73 On the Genealogy of Morality, II, 7. This is referred to below as the “Princess and the Pea” principle.
metabolic needs prevail at the expense of the functional. Indeed, as will be argued below, the
more successful institution will have an implicit logic that minimizes its contribution to the
metabolic needs of its constituent parts and to its functional goals. Rather, the institution subtly
steers resources toward its own metabolic needs to the extent it can. The institutional logic
attempts to reduce satisfaction of external needs to the point where further reduction would
indirectly undermine its own metabolic needs. For example, Marx argued that capitalism would
tend to drive wage-labour down to subsistence wage. Below that level, the failing metabolism of
the workers would pose a threat to capitalism itself. The Nietzschean problem, then, is that the
institutional logic initially has to promote metabolic greed in order to establish its own healthy
metabolism. However, that same institutional logic must then self-undermine to minimize its
metabolic extraction and maximize its achievement of functional goals imposed by a greater will
to power. The conceptual problem is that the presumption of a closed system based on a
complete logic blocks the transition to the magnanimous state.

Nietzsche found his solution in the case of the individual by examining evolutionary
dynamics and sexual reproduction. 75 In evolutionary theory, the overriding functional goal of
individuals of the species is reproduction of DNA. 76 The goals of the individual can be split in
terms of metabolic needs—the self and present comfort—and functional goals—the provision of
a healthy environment for one’s children’s children to do likewise. Evolutionary biologists
usefully distinguish germ-DNA from somatic-DNA, 77 so we might refer to two opposing value
sets as somatic-DNA or ego values and germ-DNA or eros values. Nietzsche implicitly observes

75 This is much of the focus of Joyous Science. See generally the discussion in the chapter “Nietzsche’s Horrible
Thought.”
76 A debate within evolutionary biology hinges on the degree to which this over-riding functional constraint
determines evolutionary dynamics. The reduction of evolution to this one functional imperative correlates to a naïve
functionalist approach in social theory. The methodological points Nietzsche makes in On the Genealogy of Morality
undermines any approach based on functionalist reduction.
that sexuality causes a modal shift of psychologically activated dispositions from ego values to eros values. Eros values cause the masochistic submersion of ego values for future life. In terms of an evolutionary model of human sexuality, for example, the male’s first general phase is a blood stage in which he attempts to amass as much present power as possible to be selected as a mate. Once the sexuality mode is triggered by female seduction, then the male sacrifices ego goals to eros goals. However, until then suffering is only calibrated as prudence in terms of the ego values. Seduction by a female into sexual mode, therefore, accomplishes the transition from the blood stage to the mercy stage (from the perspective of the will-to-life imperative). Nietzsche therefore created the eternal recurrence doctrine as a conceptual tool to ensure each person endeavors to find the appropriate moment to shift from the power-amassing ego-blood stage to the power-squandering eros-mercy stage. In sexual species, death is pre-programmed. The manifest inevitability of death causes the self-conscious ego unavoidable and intense suffering in the form of fear of death (which for the most part is a prudent survival mechanism). On Nietzsche’s analysis, the completeness assumption and the fantasy of terminating suffering, together lock people into a blood stage, leaving a surplus of power not expended on eros values. Rather, institutions have exploited the unredeemable promissory note of closed-system logic to promote the stockpiling of transferable wealth that bankrolls the institutions that remain locked in the blood stage.

Nietzsche believed the eternal recurrence doctrine could fully redeem suffering to eros values within the individual and guide the transition from the power-acquisition phase to power squandering. To understand how this is so requires an explanation of the dynamics of Nietzsche’s psychic economy. The main currency of this economy is a coin with two sides, happiness and

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suffering. Each is dynamically defined. Happiness is the perception of increasing power; suffering is the fear or pain of decreasing power. On an evolutionary scale, the invention of language is a disruptive event to the psychic economy because it projects human consciousness into the future so they can experience future pleasure and future pain in the present. To a person in the ego-mode, pre-programmed death is an economic disaster. Fear of death is generally quite prudent, but the certainty of future death confounds the ego logic and creates a surplus of suffering that must somehow be redeemed or perceived to be redeemable.

Nietzsche’s innovation was to see the psychic economy as an open system of self-organizing criticality. In his model, the psyche is like a sand-pile with each grain of sand being a frustrating experience that causes suffering. The order of rank of a person, in this metaphor, is the size of the tabletop receiving the sand grains. The larger the table, the more suffering that can be absorbed without reacting. The point Nietzsche drives home in the third essay of *On the Genealogy of Morality* is that there are a limited number of ways of discharging negative affect once the “sand-pile” is becoming or has become over-saturated relative to the order of rank of the table. In the metaphor, a saturated sand-pile is one that is due for a large avalanching discharge of affect, which implies there looms a large dose of suffering to be feared by a “weak” system. One strategy for psychic maintenance is hibernation. Here the ascetic seeks to alleviate suffering by avoiding the stimulus of life—“no more sand grains please!” Another strategy is mechanical activity of work or “immense marches... and constant toil.” Another means of re-establishing a sense of power is to make oneself feel superior to someone else. Nietzsche deconstructs the sublimation of this need within charitable acts of giving pleasure to others, which provide doses

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79 *On the Genealogy of Morality*, III, 17.
of the happiness of "slight superiority." Indeed, the thrust of the second essay is that the pleasure in cruelty to others arises from the feeling of power relative to others. A depressed psychic economy seeks inflationary stimulation by "kicking the dog." Because perceived superiority is the source of pleasure, Nietzsche argues that the compensating effect of cruelty increases when the social standing of the debtor is higher than that of the creditor. Much of Nietzsche's argument in the second essay is that punishment is a false economy that temporarily increases the happiness of the creditors at the expense of debtors but with a negative sum effect on the collective psychic economy. The genius of Christianity, for Nietzsche, is to multiply the nuance of transactions of petty cruelty and to incorporate them into acts of social utility. Indeed, Nietzsche lists the formation of a herd as providing a compensating sense of power, particularly when the herd formation divides the world into "we" (the good) and "they" (the sinful), now known as in-group out-group bias. In sum, for Nietzsche, the great psychic economy is a complex deficit economy that finances its herd-based religious/modern institutional state with the false promissory note of a redemptive afterlife/end-of-history.

A more benign psychic discharge would be laughter and gaiety. "I know no more heartrending reading than Shakespeare: what must a man have suffered to need to be a buffoon to this extent!" However, much of humour can be likewise be deconstructed into teasing or self-deprecation, thereby financing the discharge with cruelty. In the second essay of On the Genealogy of Morality Nietzsche writes, "... no noble household was without creatures upon

81 On the Genealogy of Morality, III, 18.
82 Shakespeare characterizes this in The Merchant of Venice.
84 Ecce Homo, "Why I Am So Clever," section 4. See also the end of Nietzsche's "Attempt at Self-Criticism" added as a preface to The Birth of Tragedy, which emphasizes laughter and refers to a related passage in Thus Spoke Zarathustra.
85 Joyous Science, section 200.
whom one could vent one’s malice and cruel jokes”—as parents still tease children, Nietzsche says indirectly in the subterranean counter-text to the essay. Nietzschean gaiety, by contrast, is earned and is an abundant overflowing of positive affect. “For cheerfulness—or in my own language gay science—is a reward: the reward of a long, brave, industrious, and subterranean seriousness, of which, to be sure, not everyone is capable.” How is this reward earned?

The key to Nietzsche’s psychic economics is that the psyche is driven by self-organizing criticality and is an open system. This leads toward two additional outlets to discharge the accumulation of negative affect. The first outlet is creativity, whereby the negative experiences become grist for self-transformations that increase the order of rank of the system, and therefore increase the capacity of the system to absorb stress and suffering. Csikszentmihalyi notes that “flow” entails the “reversal” of accumulated frustration into positive affect. Self-transforming creativity that is perceived to increase power, or the capacity to acquire power, is alchemic magic that turns lead into gold. For Nietzsche, such creativity with the prior accumulation of suffering experiences it requires is the only way to make the psychic economy grow. The dynamics of creativity, of course, are the dynamics of self-organizing criticality discussed at length in the chapter “Legal Reasoning.”

Another important outlet to discharge negative affect is sexuality in general and sexual orgasm in particular. Regarding the latter, the orgasm is a powerful discharge in the form of euphoric mourning. Jack Morin’s analysis explains the importance of fantasy and, in more extreme form, fetish as means to target the discharge of a pattern of frustrating experiences that

86 On the Genealogy of Morality, II, 6.
87 On the Genealogy of Morality, II, 4.
continually arise from the scars of pathological family power dynamics when the person was developing as a child.\textsuperscript{90} The fantasy-fetish structure activates the accumulated frustration experiences (that are created as the shadow cast by the psychic coping strategies unconsciously formed by the developing child) and then discharges them by means of the euphoric mourning of orgasm, which like "flow" reverses affect. Mourning, it follows, is another form of emotional discharge.\textsuperscript{91} The danger of sexual orgasm, from Nietzsche's developmental perspective, is that it discharges accumulated negative affect that could serve as useful grist for self-transformation so as to transform the now ill-suited coping strategies formed during childhood. Nietzsche's celebration of chastity for creative types must be read in this sense and not as a general edict against sexuality. Indeed, Nietzsche encourages stimulation of sexuality in general for two principal reasons. Sexuality shifts one from ego-centered values to eros-centered values. Sexual longing stimulates the creative search for means of bridging difference—romance.\textsuperscript{92} More importantly, like ideal-based promissory notes, sexuality underwrites present suffering and thereby underwrites masochistic self-undermining. However, only sexuality as the felt, active promotion of reproductive values—in the broader sense of providing for our children's children as opposed to amassing individual power—can fully overcome the present suffering of immanent death. Delusional perceptions of redemption of present suffering through an afterlife or end-of-history merely fuel a deficit economy. If not all suffering can be reversed by creative transformations, some would remain as senseless from the perspective of the will-to-life eros instincts. William Clark argues that with sexuality comes pre-programmed death to make room

\textsuperscript{91} Which accounts for the abundance of crying among toddlers, as they learn they are not omnipotent. As might be expected, patriarchy rues such discharges of "cruelty capital" and the manly ethic has been to curtail and suppress crying.
\textsuperscript{92} See especially, \textit{Joyous Science}, section 60.
for succeeding generations.\footnote{William C. Clark, \textit{Sex and the Origins of Death} (New York: Oxford, 1996).} This may mean there is an instinct for the Russian fatalism Nietzsche praises—\textit{amor fati}\footnote{\textit{Ecce Homo}, “Why I am so Clever,” section 10.}—so long as the body perceives it as making room for eros values. For this reason, Nietzsche celebrates voluntary death where one expects one’s death would contribute more to eros values than continuing to live and attempting to contribute another way. For Nietzsche, this eros instinct can fully underwrite the fate of senseless suffering in the psychic economy, so long as one has not invested in the false economy of the unredeemable promissory notes of idealism’s closed economy.

Nietzsche’s eternal recurrence doctrine therefore seeks to redeem suffering actively through means that expand the collective psychic economy, rather than running a deficit economy that multiples the types of petty emotional transactions and imposes a cruelty tax on each one. Nietzsche therefore examines subtly the relationship of creativity, language and sexuality. The eternal recurrence doctrine threatens one with reliving eternally the same life. This forces one to have fully redeemed all suffering through eros values before death, and to use death itself. Without an afterlife of closed system equilibrium, language promissory notes would stand unredeemed and senseless suffering would be experienced forever. The only escape from the horror of an imagined eternal recurrence of unredeemed suffering would be to maximize creativity, which reverses negative affect without necessarily funding the purchase by taxing someone else. However, the creativity itself must ultimately be redeemed by serving eros values. Furthermore, sexuality must be drawn upon ultimately to redeem fully the unavoidable senseless suffering of fate.

Using this model of the psychic economy, Nietzsche analyzes the task of training individuals of “great health,” by which he means individuals of expanding order of rank directed
toward life-affirming (eros) values. Nietzsche presents this model as Zarathustra, which in Ecce Homo he describes as the counter-ideal to the psychic economy based on the completeness fantasy that he criticizes in On the Genealogy of Morality. The Zarathustran training regime is fundamentally premised on the systole-and-diastole dynamics of self-organizing criticality within the creative individual. The training regimen is one of increasing one’s power by increasing order of rank. Of first importance, Zarathustra must seduce his disciples into self-discipline rather than imposing discipline through punishment. The negative, deficit economy of punishment is made clear by the second essay of On the Genealogy of Morality. Rather, seduction, in the general sense developed in the previous chapter “Legal Reasoning,” induces self-transformation as a self-perceived power-enhancing event, in place of negative-sum reactionary prudence. The Zarathustran disciple would also cultivate great “taste” and avoid sources of suffering that did not contribute to the power-enhancing growth cycle. “Taste,” “isolation,” “depression” and “hibernation” are all variations of the same theme of managing the accumulation of suffering by managing the input flow of stress events. The Zarathustran disciple must be discriminating to attempt to endure only suffering that can be made sensible, while in the growth-oriented phase. Nietzsche’s seemingly harsh exhortations for isolation of the strong and avoidance of pity must be seasonally adjusted. No one has a right to grant mercy until the growth phase of increasing order of rank has developed to the point where the shift from ego values to eros values calls for the power to be squandered in favour of eros values. Indeed, Nietzsche imposes a duty to build a strong self through prudent self-limitation to maximize the greatness of one’s sacrifice to the

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95 Ecce Homo, “Genealogy of Morals: A Polemic.”
96 On the Genealogy of Morality, III, 20.
Each person therefore has a duty to self-cultivate to contribute greatly to eros values. Nietzsche claims that as one fulfills this duty, one feels "gratitude."  

The difficult task for the Zarathustran disciple is how to know when to change phases from primarily self-development to full application to eros-goals. Plainly, in an open psychic economy in which language is necessarily incomplete, this is no easy matter to decide. The work-in-progress implicit in the accumulated experience of a person is not easily measured or understood, for the same reason one's pity for another is generally based on vulgar misunderstanding of the full nuances of that other person. Anything communicable in language or consciousness, put bluntly, is a vulgar simplification. The best Nietzsche can do is provide *Ecce Homo* as his analysis of himself as an example of "how one becomes what one is."

Nietzsche uses *his* suffering to develop himself and *his* task as his means of contributing to eros goals to exploit maximally *his* particular constellation of skills and psychological dispositions.

The latter point is essential for understanding Nietzsche's notions of "breeding," "order of rank," the "pathos of distance," social classes and the like. It is plain from Nietzsche's psychology that one's emotional development in childhood profoundly affects one's psychological needs and coping-strategies throughout life. Indeed, much of the self-overcoming Nietzsche continually refers to is self-overcoming psychological needs "bred" into us in early childhood, by such factors as whether one's parent still punish children to vent anger on the agent of some harm. Indeed, Kaufmann makes the erroneous yet insightful misinterpretation that Nietzsche was Lamarckian. However, Nietzsche is more self-consistent if read to mean that it takes three generations either to cultivate fully or remove entirely subliminal psychological

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97 Friedrich Nietzsche, *Beyond Good and Evil*, tr. Walter Kaufmann (New York: Vintage, 1966), 221-222 and 226, sections 272, 273 and 284. [Hereinafter, cites to *Beyond Good and Evil* will be by section number.]
98 *The Case of Wagner*, Epilogue.
99 The Preface to *Human, All Too Human* likewise addresses the problem of finding one's task and stages of life.
patterns conducive or detrimental to the regulation of the growth of order of rank in an individual. It is not biological determinism to say that by the time we assume responsibility for our own development, the range of our potential order of rank cannot be changed by "free will." Indeed, Nietzsche's method is to analyze all philosophers as though they were seeking a universal justification for their own peculiar psychological needs—Nietzsche instructs us to ask what kind of person would need a philosophy like that. Nietzsche was acutely aware of his own peculiarities and devotes Book V of Joyous Science and the third essay of On the Genealogy of Morality to deconstructing his own psychological need for the completeness of the will to truth.

If our capacity to absorb and discharge suffering through great creativity and great order of rank has been severely impaired due to the accident of family and tribal characteristics, then other means of discharge must be found, such as work.\textsuperscript{101} Nietzsche was concerned that individuals accept their aptitude for order of rank rather than stewing a pot of resentment: "if one is not rich one should have pride enough for poverty."\textsuperscript{102} While Nietzsche felt that some portion of communal surplus ought to be dedicated to cultivate greater order of rank in those with greater aptitude—"not everyone has the right to every teacher"\textsuperscript{103}—this must be read in light of Nietzsche's own extremely modest lifestyle and other passages where he criticizes the poisonous effect of large disparities in wealth. Nor does Nietzsche wish to create a life of privileged leisure for noble types, whom he counsels to forgo windfall opportunities. Nietzsche was not one to shirk industriousness and his Zarathustran disciples no less. Nietzsche recognized the need for convalescence and frivolity for everyone; however, in his psychic economy it was either

\textsuperscript{100} On the Genealogy of Morality, II, 4.
\textsuperscript{101} It seems that the technology of psychotherapy has been improving and in the future will improve dramatically, now that the free-will fiction is losing its grip. Nietzsche seems too pessimistic here, but it may be his way of making a class of his readers feel "chosen." Nietzsche's rhetorical strategy is discussed further at the end of the section of this chapter "Theories of Justice and Sociobiology."
\textsuperscript{102} The Case of Wagner, Second Postscript.
instrumental to growth (as an athlete must rest after stress) or an outburst of joy that could not be helped, and not pleasure as a palliative paid for at the expense of others.

### 3.5 Institutional Self-Overcoming

Having worked out in some detail the way of the Zarathustran disciple, Nietzsche sought means to solve the problem of institutional self-overcoming. Having fashioned the eternal recurrence doctrine for his Zarathustran disciples, what conceptualization would induce the mercy of masochism of the superior once an institution had achieved sufficient metabolic strength during its blood stage? Having entrenched a logic of maximum metabolic function with minimal accommodation of its functional goals and the metabolic needs of its constituent parts, what force would overcome the completeness assumption of that logic?\(^\text{104}\)

Nietzsche should not be misread as an anarchist, as an individualist or as anti-institutional. Nietzsche rarely wrote non-polemically on political matters, but his views show through in his later essay *The Case of Wagner*, in which he makes a parallel between political theory and art. Certain passages make it clear that Nietzsche seeks stronger individuals so as to produce "organically" developing social institutions of great organizing power that grow out of themselves—*la gaya scienza*, the great logic.\(^\text{105}\)

What is the sign of every literary decadence? That life no longer dwells in the whole. The word becomes sovereign and leaps out of the sentence, the sentence reaches out and obscures the meaning of the page, the page gains life at the expense of the whole—the whole is no longer a whole. But this is the simile of

\(^{103}\) *The Case of Wagner*, Second Postscript.
\(^{104}\) See *Joyous Science*, section 295, "Brief Habits".
\(^{105}\) *The Case of Wagner*, sections 7 and 10. The term "organic" has opposite connotations in science and humanities. Nietzsche intends the science meaning, that is, "organic" means growing out of itself and transforming spontaneously in the manner of self-organized criticality. Nietzsche does not mean "organic" in the sense of rigid functional roles.
every style of *decadence*: every time, every anarchy of atoms, disgregation of the will, “freedom of the individual,” to use moral terms—expanded into a political theory, “equal rights for all.” Life, *equal* vitality, the vibration and exuberance of life pushed back into the smallest forms; the rest, *poor* in life. Everywhere paralysis, arduousness, torpidity or hostility and chaos: both more and more obvious the higher one ascends in forms of organization. The whole no longer lives at all: it is composite, calculated, artificial, and artifact. — 106

In terms of political theory, though Nietzsche describes himself as a democrat, 107 he plainly does not ascribe to a democracy of hyper-individualism wearing the guise of “equal rights.” Rather, Nietzsche thinks in terms of duties, and imposes those duties according to order of rank. In Nietzsche’s art/politics metaphor, it is a declining culture that gives “stylistic” decisions over to the masses. 108 For Nietzsche, this is inseparable from vulgar inattention to the nuances of organic growth and is a sign of decadence as a sign of the decline in the power to organize. 109

Nietzsche, therefore, had in mind some hierarchy of duty and corresponding privilege according to order of rank. In Nietzsche’s democracy, decision-making power is to be better matched to decision-making skill, for making society more organically whole, subject always to the will-to-life will to power. Great persons, for Nietzsche, would cheerfully serve their duty out of exuberant health and gratitude. Indeed, Oliver Wendell Holmes, who tirelessly served his country as a cheerful skeptic and a judge for some 50 years, upon his death paid back all the judge’s salary he had received during his life. This theme will be developed further in the following chapter, “Joy in Duty.”

106 *The Case of Wagner*, section 7.
108 *The Case of Wagner*, section 11.
109 *The Case of Wagner*, Second Postscript.
Nietzsche's political philosophy, then, is a peculiar anti-individualistic meritocracy. Furthermore, the meritocracy is to grow spontaneously and organically as a whole. The growth is not to be "composite, calculated, artificial, and artifact," which implies that the growth should be a side effect of institutional-level self-organizing criticality. This strongly hints at capitalism; however, that would be a misreading of Nietzsche. There are palpable traces of Marx throughout Nietzsche's writings, which tend to be overshadowed by Nietzsche's ranting against socialism. However, it is plain to see Nietzsche places priority on the whole and not the individual, so equality and planned economics would seem misguided nonsense to him. Nietzsche is much closer to Marx by seeing humans as fundamentally communal, though for Nietzsche the communal aspect is derivative from the will-to-life imperative and is easily distorted by many developmental factors. That is, Nietzsche certainly did not think we are "naturally" communal and simply need to discover our "true" inner nature.\textsuperscript{110} Rather, it takes a lot of "blood" to breed humans as a higher communal species.

Marx's influence is perhaps most palpable in Nietzsche's early essays, especially "Schopenhauer as Educator." Nietzsche's critiques of the indirect incentives and disincentives of institutional forces owes much, if not all, its bite to Marx. Nietzsche read and summarized Marx for Wagner, when Nietzsche was, in essence, a research assistant to Wagner while Wagner was at Tribschen in the early 1870s writing and composing the \textit{Ring}. In \textit{The Case of Wagner}, Nietzsche describes how Wagner \textit{went wrong}:

Half of his life, Wagner believed in the Revolution as much ever a Frenchman believed in it. He searched for it in the runic of writing myth, he believed that in Siegfried he had found the typical revolutionary. ...

\textsuperscript{110} See, for example, \textit{The Birth of Tragedy}, section 3. Nietzsche continually attacks this aspect of Rousseau's philosophy.
...[Siegfried] overthrows everything traditional, all reverence, all fear. ... But his main enterprise aims to emancipate woman—"to redeem Brünnhilde." — Siegfried and Brünnhilde; the sacrament of free love; the rise of the golden age; the twilight of the gods for the old morality—all ill has been abolished.

For a long time, Wagner’s ship followed this course gaily. No doubt, this was where Wagner sought his highest goal—What happened? A misfortune. The ship struck a reef; Wagner was stuck. The reef was Schopenhauer’s philosophy; Wagner was stranded on a contrary world view. What had he transposed into music? Optimism. Wagner was ashamed. ...

So he translated the Ring into Schopenhauer’s terms. Everything goes wrong, everything perishes, the new world is as bad as the old: the nothing, the Indian circe beckons.

Brünnhilde was initially supposed to take her farewell with a song in honor of free love, putting off the world with the hope for a socialist utopia in which “all turns out well.”

Nietzsche is critical of Wagner, and perhaps himself,\footnote{The Case of Wagner, section 4.} for his turn away from socialist-inspired revolutionary optimism to Schopenhauer. Nietzsche’s memoir in The Case of Wagner shows that George Bernard Shaw’s interpretation of The Ring as a critique of capitalism is wrong, but insightful nonetheless.\footnote{In Ecce Homo, “The Untimely Ones” Nietzsche advises his readers to read “Richard Wagner in Bayreuth” as though it were about Nietzsche instead of Wagner. (This theme is developed in the chapter “Para-Conceptual Rhetoric.”) Nietzsche’s own detour through Schopenhauer invites one to read this criticism against Wagner in The Case of Wagner as criticism against Nietzsche as well.} Plainly, it was developing as such until Wagner’s ship (with its passengers) hit the Schopenhauer reef. Nietzsche’s later barbs against socialism, therefore, must be read as attacks against socialism for being simplistic by criticizing the “invisible hand” of capitalism without exploiting it to advantage. It follows that Nietzsche’s critique of Wagner for abandoning socialist sentiments is more anti-capitalist in origin than pro-socialist.
Indeed, Nietzsche’s communal meritocracy looks suspiciously similar to capitalism. However, Nietzsche’s will-to-life communalism makes him fundamentally opposed to the hyper-individualism of capitalism of the modern liberal democracy. One best reads Nietzsche as taking Marx’s critique of capitalism as given. The fundamental critical insight is premised on holistic causation and the spontaneity of self-organizing criticality. Marx was an avid reader of Spinoza and Greek tragedy as well. What is remarkable about capitalism is the capacity of the market’s “invisible hand” as an emergent calculation that promotes economic complexification. Holistic causation invites the hypothesis that capitalism spontaneously self-organizes to transfer power to those forces that contribute most to economic complexification that generates objective (i.e., transferable) wealth. The great insight of Marx, in Nietzschean terms, was to understand how this social institution spontaneously and unselfconsciously reinforces itself. For Nietzsche, one misreads Marx by denying the reality of the “invisible hand” effect and the efficacy of capitalism. Rather, capitalism is too good at its logic. For Nietzsche, capitalism is a runaway system governed by the perfection of its own logic as a will-to-power end-in-itself. Capitalism is stuck in the blood phase, seduced by the apparent completeness of its logic, which equates its metabolic requirements with its functional requirements.¹¹⁴

The essence of capitalism is that it exploits self-organizing criticality to accommodate minimally any value external to its metabolic requirements. Moreover, as in the logic of legal reasoning set out in the previous chapter “Legal Reasoning,” capitalism has spontaneously

¹¹⁴ Section 207 of Dawn shows that Nietzsche equates the problem of capitalism with the completeness problem. The section also betrays Nietzsche’s intellectual indebtedness to Marx.
influenced our code of concepts and images to accelerate this development.\footnote{Jean Baudrillard's analysis of this code and its resistance to seduction is exemplary, if somewhat disheartening. Jean Baudrillard, Symbolic Exchange and Death, tr. Iain Hamilton Grant (London: Sage, 1993); Jean Baudrillard, Seduction, tr. Brian Singer (New York: St. Martins, 1990).} The implicit assumption is that the system will spontaneously allocate resources according to merit, putting transferable power at the disposal of those best able to use it to create more transferable power.

The problem from a Nietzsche perspective is that not all power—defined from the perspective of will-to-life instead of the perspective of will-to-greater-stores-of-transferable-power—is transferable. Nietzsche plainly owes a debt to Marx’s distinction between “exchange value” and “use value,” but would reject any suggestion that use value could be completely defined. It seems that Nietzsche read Marx’s proposed “use value” as mere polemic.\footnote{See below and the chapter “Para-Conceptual Rhetoric” for the hypothesis that Nietzsche believed Marx’s socialism was a “noble lie” to undermine capitalism. That is, just as Marx poisons the “Horatio Alger” myth (economic free will) at the social level, Nietzsche poisons the free-will myth at the individual level.} Once one accepts nominalism, development is an unending open system of genealogical evolution, and not closed-system Hegelian dialectics to an end-of-history set of concepts that achieve equilibrium. Critical deconstruction of capitalist concepts such as exchange value, therefore, is like deconstruction of doctrinal concepts in legal reasoning, as discussed in the previous chapter “Legal Reasoning.” There is no ultimate “complete” language available to state the “true” value of things. Rather, one must apply the “residue” logic, which as noted above, Nietzsche sets out in his report of his shamanic call.\footnote{Jean Baudrillard's analysis of this code and its resistance to seduction is exemplary, if somewhat disheartening. Jean Baudrillard, Symbolic Exchange and Death, tr. Iain Hamilton Grant (London: Sage, 1993); Jean Baudrillard, Seduction, tr. Brian Singer (New York: St. Martins, 1990).} This, of course, leads back to the problem of order of rank.

Nominalism also reveals a fundamental flaw in the capitalist logic from the will-to-life developmental perspective. Nietzsche’s deconstruction of “pity” discussed above makes it clear that the problem with pity is that it implicitly claims full understanding of the role of suffering in the development of another person according to the “great logic.” However, the chaotic aspect of self-organizing criticality means that language is necessarily incapable of fully accounting for all
the minute experiences that contribute to the holistic properties of the system. Nietzsche continually emphasizes that consciousness and language are by their nature a vulgarization of the nuances of emotion and experience. Put another way, each individual has emotional “work-in-progress”—akin to “use value”—that is of value to creative processes, but there is no direct means of measuring this value, much less transferring it by communication or otherwise.

One might think capitalism, being a meritocracy of a sort, would learn to value the work-in-progress of self-organizing criticality. Plainly some legislative corrections have been attempted in the form of copyright and other means to recognize value in intellectual property. However, the comic application of copyright to grant monopoly control over trivial works, such as a business letter, for a lifetime plus fifty years or more, shows that measuring the value of creative capacity—order of rank and work-in-progress—is done poorly by capitalist logic. Indeed, critical studies are very effective when showing the absurd effects of market in the realm of art. As Nietzsche observed, appreciation of what is beautiful in the sense of promoting order of rank, belongs to the few.\[^{118}\]

The insidious ingenuity of capitalism is that, like compound interest, it gets increasingly effective at minimally accommodating external values. Jean Baudrillard shows how this makes capitalism almost immune from seduction, in the Nietzschan sense.\[^{119}\] A serious problem with this institutional domination is that many things that are essential to healthy individuals and social institutions are taken for granted. Therefore, capitalism will erode the allocation of resources to other values, until it becomes unmistakably evident that the metabolic needs of other values are insufficiently met. While this is good for paring waste, there is an inherent danger when the values taken for granted depend on nonlinear processes. Particularly relevant in modern

\[^{117}\] Human, All Too Human, Preface, 6; On the Genealogy of Morality, III, 12.
\[^{118}\] The Case of Wagner, section 6.
times is the eroding effect of reducing the time parents spend emotionally interacting with infants and toddlers, which Stanley Greenspan argues is having devastating effects on the development of the foundations of intelligence. The new models of child development of Greenspan, Esther Thelan, Katherine Nelson and others are ones of self-organizing nonlinear dynamics. In other words, a child develops in the same pattern of self-organizing criticality that happens on other levels—a continual, punctuated evolution of higher and higher orders of rank. Greenspan’s argument, in effect, is that the economic pressure of capitalism to participate fully in the materialistic consumer economy reduces the number of parental “sand grains” that go into the child’s development at critical developmental stages.

Applying Nietzsche’s eternal recurrence analysis, capitalism is not saved by its implicit individualism. That would only happen if consumers had transparent understanding of their germ-DNA needs and reflected this in market transactions. Indeed, as Herrnstein and Csikszentmihalyi show, consumer decisions are often palliative-driven and often irrational even from the perspective of economic rationality, much less the more subtle requirements of the work-in-progress of creative action.

The spontaneous genius of capitalism, in effect, shapes consumer values and concepts to promote the lock-in to the blood stage of its development. Capitalism spontaneously anticipates and diffuses potential seduction to external values with a somewhat spontaneously adaptive immune system. Capitalism fails to make its metabolic needs coincide fully with the functional

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121 This point will be developed further below in the discussion of sociobiology.
123 Indeed, the self-organized criticality paradigm is now being applied to model the human immune system.
imperative to serve will-to-life values external to its metabolic needs. Indeed, its self-perfecting logic of individualism amplifies the decadence, lowers the order of rank of individuals, and so tends to promote living comfortably in the present at the expense of the future. Nietzsche was no apologist of capitalism.

Capitalism’s spontaneous immune system presents a problem for self-overcoming. For Nietzsche, the will to truth self-overcomes out of its own logic and becomes manifest to human consciousness when applied with integrity. Beginning with the erroneous presumption that complete knowledge is possible in principle, intellectual integrity will launch a search for the ideal antecedent code. The will to truth will lead to science and the use of consequential logic and induction to discover antecedent code. However, once the will-to-truth logic studies itself as a means to knowledge, it must discover incompleteness theorems of mathematical certainty. Language cannot fully represent its own properties, and so must be incomplete in relation to reality, which is more complex (language being just one aspect of reality). This means that all antecedent codes must be provisional and subject to cyclic re-calibration based on experience. Consequently, the conscious application of intellectual integrity to the will to truth necessarily leads to its own self-overcoming and rediscovery of the “great logic.”

However, with capitalism, the immune system is spontaneous and it disciplines surreptitiously, as Michel Foucault ably demonstrates. The spontaneous logic of capitalism obscures its incompleteness and locks the social institution in the blood stage. For Nietzsche, justice cannot depend on social institutions spontaneously self-overcoming. The noble lies implicit in the concepts of the blood stage do not self-undermine. For this reason Nietzsche’s philosophy of justice requires a greater will to power to force capitalism into masochism of the

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124 C.S. Peirce would call this fallibilistic knowledge. There is a profound correlation between Peirce and Nietzsche that this thesis has not developed, other than implicitly through Holmes.
superior. Nietzsche, as discussed above, did not think capitalism should be replaced by rigid socialist idealism. Nietzsche’s alternative was some form of coordinated effort by strong, cultivated persons of high order of rank. These “cultural physicians” would have some form of de facto political influence to subordinate capitalism to the future interests of the will-to-life imperative.

One major task of the cultural physicians would be to “enculture” in the sense of seducing (not punishing) society away from blood-stage concepts, such as concepts of moralization. This is not an issue of finding truth, but one of promoting social health. Nietzsche demonstrates this attitude regarding Christianity: “One cannot refute Christianity: one cannot refute a disease of the eye. … The concepts ‘true’ and ‘untrue’ have, as it seems to me, no meaning in optics.” The main disease Nietzsche examines is decadence and he sought cures that cultivate cultural physicians of greater order of rank.

Stated more generally, the task for the cultural physicians is to manage the systole and diastole phases of institutional growth. The cultural physicians must “empathize” with values external to the dominant institutions and initiate masochism of the superior at the appropriate times in the appropriate instances. “Sympathy” is therefore one of the four virtues of Nietzsche noble type. This is the heart of justice, which must regulate the phased application of cruelty and mercy, fear and masochism. However, the incompleteness problem looms large as always. The order of rank of the cultural physicians is beyond the subtlety of language and so there is a necessary discretion in the heart of justice. Put another way, the suffering caused by discretionary decisions may be senseless. There could be no rational criteria to legitimate fully these discretionary decisions.

125 The Case of Wagner, Epilogue.
126 Beyond Good and Evil, section 284. It is important to distinguish sympathy or compassion from “pity.”
In sum, Nietzsche frames his philosophy of justice as the principles of institutional health care. Health means not sacrificing the future for the present. Health requires enduring institutions of great power. Health requires judicious management of the systole and diastole of institutional metabolism. Health requires the isolation and healing of decadent weakness, through seduction and regulation rather than punishment, to the extent society can afford. Because of the inherent incompleteness of language, refinements in psychology and the calculability of people will enable reversals in the direction of active forces from time to time. There will be a continual systole-and-diastole dynamic at both individual and social levels, each time creating new sets of ideals and conditions for the emergence of social institutions. All this implies that "justice" will always entail discretionary decisions as to the timing of phase shifts, and the "great logic" of justice itself will continually transform itself in a self-reflexive manner.

Two major problems plague Nietzsche's philosophy of justice. What kind of institutional procedures and safeguards would empower and police these cultural physicians? Why should these cultural physicians be trusted not to become inhuman strong types, like Napoleon?

Nietzsche gave no discernible answer to the first problem and gave an esoteric answer to the second. It is plain that Nietzsche's residue-logic coincides neatly with the logic of common-law legal reasoning as developed in the previous chapter "Legal Reasoning." Indeed, Nietzsche's dynamics of justice resemble principles of constitutional law. Hence the easy correlation from Nietzsche's philosophy of justice to Holmes's common law with its court of constitutional review. As noted in the previous chapter, Holmes's distinctive constitutional innovations all coincide with these dynamics.  

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127 Given that Holmes was more or less satisfied with the political structure of the United States, and less (though not a lot less) cynical about popular representation than Nietzsche, he did not seem disposed to look beyond American political institutions to a general philosophy of justice that would guide the formation of political institutions.
The political problem is one of due process. In terms of Nietzsche’s metaphor of dance as the process of suspending individuation and re-establishing community, how do we choreograph the spontaneous Bacchanalia and dance?\(^{128}\) Can it be choreographed at all? Even in terms of American and Canadian political institutions, the nature of due process varies with the generality and frequency of the decision and the relative budgets and expertise of the decision-making bodies. The system of constitutional courts shows that due process can be a hierarchical dance that involves both the public and cultural physicians of various orders of rank. There is wisdom in Nietzsche avoiding the problem altogether, lest substantive aspects of the philosophy of justice be too readily inferred and eternalized from necessarily temporal institutions. Indeed, Marx was hardly forthcoming with the institutional details of his post-revolutionary socialist state.

The more serious problem, from the perspective of Nietzsche’s evolutionary psychology, is how to ensure that the cultural physicians themselves could be trusted not to become institutionalized vampires who overpower the capitalist will to power with their own metabolic imperative.

As a psychologist, Nietzsche was too familiar with the power of rationalization to trust language and reason alone to police the powerful fully. Human consciousness is able to blind itself to absurdities.\(^{129}\) For example, the framers of the U.S. constitution could proclaim liberty and equality for “all” as a “self-evident” truth and mean non-black males. Indeed, a rough survey of the history of political organization across numerous large societies shows that whatever conceptual system is in place, the most powerful minimally concede resources to those who are

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\(^{128}\) The Birth of Tragedy, sections 8-10. This is an apt metaphor for self-organizing criticality.

\(^{129}\) See, for example, Antonio Damasio, Descartes’ Error: Emotion, Reason, and the Human Brain (New York: Putnam, 1994).
not in the dominant class. There is little evidence of sustained magnanimity once a society outgrows the ambit of personal relations. The only trickle-down expansion of enfranchisement seems to have been due more to economic complexification and the need to empower greater classes of people whose talents are required for economic growth. The conceptual system of political theory in place from time to time rationalizes and makes the de facto seem coherent. One could recast economic-political history as an adaptive system of minimal accommodation to the metabolic needs of the constituent parts, with capitalism being the most nuanced version with the greatest need for rewarding those with talent to increase economic complexity. Welfare capitalism is hardly magnanimous—it too can easily be characterized as a minimal accommodation to regulate insurrection. Indeed, recent welfare reforms demonstrate capitalism’s genius by reducing welfare for those who fail to return to work. Those least able to return to work are least able to organize resistance, and so the degree of magnanimous concession can be pared away.

For Nietzsche, the windfall opportunism of the powerful is a problem that transcends and defeats any procedural solution to the problem of justice. For Nietzsche, ever the evolutionary psychologist, even if the decadence of the weakened were cured and the consequential poisonous social concepts were transformed, an instinctively driven male disposition to exploit windfall opportunities subliminally would taint the inherent discretion of decision-making and concept invention. Nietzsche locates the origin of the male demonism problem in the male’s uncertainty as to whether he is the genetic father of his child. The purpose here is not to prove Nietzsche’s implicit adaptationist claim, but it should be observed that Nietzsche is plausible and finds strong

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130 This need not be proven for present purposes. The point of this paragraph is to establish a plausible view of social dynamics from which Nietzsche could infer male demonism as a pervasive, fundamental problem for the advancement of social justice.
support among some current evolutionary anthropologists. Richard Wrangham and Dale Peterson, in their book *Demonic Males: Apes and the Origins of Human Violence*, draw on game theory analysis and behavioral studies to conclude that male primates have an instinctive demonic tendency that can be quite subtle in its cultural manifestations. They offer an adaptationist explanation, which would suggest male demonism is as psychologically constitutional as, for example, the disposition to feel jealous or experience beauty, where what causes feelings of jealousy or beauty is highly variable from culture to culture but the fact these feelings are experienced appears culturally invariant. According to the game theory, adaptationist explanation, because males are intrinsically uncertain about parentage, it becomes advantageous from the individual’s perspective of maximizing replication of germ-DNA to pursue strategies despite their imposing net social costs. That is, from an evolutionary standpoint males instinctively pursue “free rider” strategies that have net social costs. Wrangham and Peterson argue the situation is no different in humans. Jared Diamond gives the example of hunter-gatherer societies where the males paradoxically hunt for game although the food-gathering strategy of females consistently yields more protein for the family unit. A leading explanation is that bringing home game creates a potlatch situation (because meat spoils and must be shared among families), and so males who are successful as hunters gain sexual favour from females. The cuckolding strategy pays off in terms of DNA replication of the individual male, but has a net social cost for the economy of the tribe. As noted above, the power of humans to rationalize is virtually limitless and so male-as-hunter is rationalized as “human nature.” Similarly, although

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131 Socio-biological issues will be discussed further in the following section of this chapter.
“equality” was a “self-evident truth” in 1776, it failed to enfranchise the majority of the American population.

Interestingly, Wrangham and Peterson argue that the Bonobo species of chimpanzee has evolved a political-hierarchical solution to alleviate the male demonism problem. The Bonobos short-circuit male demonism through abundant recreational sex (that is, done for purposes other than reproduction) and matriarchy. Because of the unique ecology of Bonobo habitat, unlike the other chimpanzee species the Bonobos were able to remain in groups while feeding. This political economy enabled a female network to resist individual male aggression through omnipresent surveillance—perhaps the first “pan-opticon,” applying Foucault’s terminology. Recreational sex was important to diffuse male aggression in general. Arguably, increased sexuality would also promote continual activation of germ-DNA values and the masochism (self-limitation of somatic-DNA values) it entails. Here is the link Nietzsche implicitly makes between sexuality and language. The availability of the masochistic mode (i.e., sexuality freed from literal reproductive goals) makes language possible as an effective means of enduring present suffering for an imagined future—the conceptual promissory note. Again, Nietzsche’s link between sexuality and language finds modern support. Based on the close evolutionary relationship of humans and Bonobos, Jared Diamond claims that language presupposes the advent of recreational sex.¹³⁴

Language, however, gives male demonism an important tool to attempt to regain control over females in the reproductive economy. Consequently, Nietzsche observes modern male human sexuality as being driven by the need for possession and control over females.¹³⁵ The conceptual poisoning Nietzsche deconstructs in On the Genealogy of Morality creates a new

¹³⁴ Ibid.

¹³⁵
technology for surveillance, this time for male sexuality to possess and control female sexuality. ¹³⁶ Nietzsche traces the psychological need to extend the will to truth to completeness as being driven ultimately by demonic male instinct.¹³⁷ Hence, the male instinctively favours complete logic and social institutions that possess and control sexuality, which exacerbates and locks in tendencies toward windfall opportunism. Furthermore, language will always rationalize the windfall opportunism that results. For Nietzsche, the resulting power structure would only erode as required to accommodate the accumulation of *de facto* power in others.

Nietzsche’s esoterically disguised solution is to promote activation of sexuality so as to condition males to submit to female intuition in matters of creative discretion. Put bluntly, Nietzsche trusts female discretion more than male discretion to not sacrifice community welfare for private gain, whether directly biased or corrupted to promote institutional lock-ins, because males are more disposed to require, and thus perceive themselves to act, with certainty. “Is *Hamlet* *understood*? It is not doubt, it is *certainty* which makes mad.”¹³⁸ In other words, doubt may be frustrating, but claiming certainty is madness, the need for certainty is madness. “[N]ow [the Dionysian man] understands what is symbolic in Ophelia’s fate…”¹³⁹

Nietzsche communicates his matriarchal solution via esoteric hints, breaking through the text’s surface like the tips of mythic icebergs. The Dionysus and Ariadne myth is discussed at length elsewhere in this thesis in the chapter “Para-Conceptual Rhetoric.” Nietzsche’s account of the mythic pattern of *The Ring* is also instructive. Nietzsche understood the originally intended mythic pattern to be a critique of capitalism that dramatized the overthrow of its pathological grip

¹³⁵ See for example, *Beyond Good and Evil* sections 194 and 238, *Joyous Science* section 363 and *Dawn* section 327.
¹³⁶ See *Joyous Science* sections 68-75 and *Beyond Good and Evil* section 194 in which Nietzsche asserts this need not be the case.
¹³⁷ See *Joyous Science* section 363 and *Dawn* section 327.
through the emancipation of Brünnhilde (Wotan—a personification of social contract—had used the power of his spear to enslave her\textsuperscript{140}) and redemption through free love (re-activated sexuality).\textsuperscript{141}

Ovid gives us a similar myth in the Esychthon story from \textit{Metamorphoses}. Esychthon is an enterprising logger who, despite warnings, cuts down a tree sacred to the Goddess. The Goddess curses Esychthon with an insatiable hunger.\textsuperscript{142} The conclusion is poetically inevitable; Esychthon consumes himself. The cutting of the Goddess’s sacred oak-tree and the insatiable hunger nicely represent the runaway metabolic logic of patriarchal institutions, which ultimately sacrifices future growth for present consumption.\textsuperscript{143}

Through his association with J.J. Bachofen, Nietzsche must have been aware of pagan myth in which the oak-king self-sacrifices by crucifixion on an oak-tree. In the pagan matriarchal religion, the alpha-male becomes king for a term with sexual access to varying numbers of temple priestesses.\textsuperscript{144} After his term, the king is sacrificed, in effect trading his life for enhanced replication of germ-DNA. On a political-institutional level, this is an almost literal projection of the eternal recurrence doctrine from the individual level. The male king sacrifices ego to eros and will to life is the prevailing will to power. However, once the kings begin using surrogate sacrificial victims and then get life-long terms of reign, matriarchy has been undermined and a new will to power has prevailed. In terms of mythic structure, the sun-king becomes representative of \textit{logos}, an undying sun god, which—Nietzsche claims in \textit{On the Genealogy of

\textsuperscript{139} The Birth of Tragedy, section 7.
\textsuperscript{140} The Birth of Tragedy, section 24.
\textsuperscript{141} The Case of Wagner, section 4.
\textsuperscript{142} See Nietzsche’s references to “craving” and “insatiable optimistic knowledge” in \textit{The Birth of Tragedy}, sections 15 and 16.
\textsuperscript{143} An interesting detail is that the sacred tree was an oak-tree. In pagan myth, the oak-tree was the tree upon which the sun-king self-sacrifices to ensure regenerating growth of the community.
Morality—becomes a new surveillance technology to entrench windfall opportunism at the expense of the will to life.

It is important to observe that Nietzsche nowhere advocates a literal return to pre-patriarchy. Nietzsche sought to reverse the direction of active force into what might be called post-patriarchy. Blood sacrifice is to be replaced by spiritual self-sacrifice. Moreover, in Nietzsche’s mythic logic, Dionysus and Ariadne self-sacrifice together, with Ariadne being the dominant of the two.

Another important source for Nietzsche was Aristophanes.\textsuperscript{145} The reason for Nietzsche’s affinity to Aristophanes can be inferred from \textit{Lysistrata}. That play begins with the men of Athens and Sparta having been at war for a long time, at great social cost. Nonetheless, the men stubbornly fight on. The women conspire to end the war by taking control of sexuality and imposing a sex strike until the men agree to stop the war. This works. An interesting detail is that the formal accord is resolved as a product of Dionysian revelry. The dance represents the due process in the formation of the political accord.\textsuperscript{146} The previous chapter “Legal Reasoning” shows that it can be hierarchical in both concept and staff and still give all values at play due consideration.

The due process of \textit{Lysistrata} is tremendously important for understanding two of Nietzsche’s most beguiling esoteric references. In \textit{Beyond Good and Evil} he writes: “And as for Aristophanes—that transfiguring, complementary spirit for whose sake one forgives everything Hellenic for having existed, provided one has understood in its full profundity all that needs to be forgiven and transfigured here—there is nothing that has caused me to meditate more on Plato’s secrecy and sphinx nature than the happily preserved petit fait that under the pillow of his

\textsuperscript{145} There are numerous positive references to Aristophanes in Nietzsche’s writings. In \textit{The Birth of Tragedy} sections 15 and 17 Nietzsche refers to Aristophanes’ instincts as profound and unerring.
deathbed there was found no ‘Bible,’ nor anything Egyptian, Pythagorean, or Platonic—but a volume of Aristophanes. How could even Plato have endured life—a Greek life he repudiated—without an Aristophanes?”

The second important esoteric clue is the reference to truth being “Baubo.” Baubo is an amazon demon who uses sexual comedy to revive the spirits of Demeter and replenish the fertility of life on earth. Nietzsche’s invocation of the goddess is not merely political, but a life philosophy as well, as will be discussed in the following chapter, “Joy in Duty.” Indeed, with Nietzsche as with Holmes, much of their inspiration is that they provide a philosophy of scientific justice that is at once a life philosophy, so that Soul and Justice can come into harmony.

In sum, for Nietzsche Justice is a Goddess. The systole and diastole of institutional development involves creative discretionary decision-making at four vital points in the life cycles of the individual and the institution. (See figure 3.1.) On the individual level, we accept the unfathomable faith of sexuality in spontaneous growth to overcome fear and the madness of certainty and allow judicious discretion to direct the transfer from the ego-phase of power acquisition to the eros-phase of using up power to provide for the future. On the institutional level judicious discretion must dictate when cruel harshness is in season and when to dispense mercy.

3.6 Theories of Justice and Sociobiology

Nietzsche’s theory of justice is fundamentally inconsistent with any theory of justice that assumes completeness of reason or a set of immutable concepts or ideals. Postmodern critique of
such “totalizing” theories of justice has been done and need not be reproduced here.\textsuperscript{148} However, this thesis contests the claim that every theory of justice must be totalizing in effect. Indeed, this is the whole point of Nietzsche’s theory of justice—though it is admittedly a difficult matter to grasp. The difficulty, however, is one inherent to the study of nonlinear dynamic systems.\textsuperscript{149}

Nietzsche provides a constructive alternative to totalizing theories of justice by analyzing the systole and diastole property of social institutions using principles of nonlinear dynamics. In Nietzsche’s systems theory approach to institutions, the passage from one stage to another is, in mythic terms, regulated by goddesses. Put in terms of the Greek four causes, this is another way of saying that the formal cause is always secondary to the final, material and efficient causes, which is another way of characterizing Gödel’s Incompleteness Theorem. Holmes’s implicit reliance on the Greek four causes in “The Path of the Law”\textsuperscript{150} and Nietzsche’s version of legal reasoning in the preface to Human, All Too Human, together provide a good guide to constructing an open system of judicial reason and institutional design. Institutionally, the passage from one phase to another is to be regulated by a college of “cultural physicians” who make discretionary decisions in the manner of common-law legal reasoning—developed extensively in the previous chapter—adjusted to maximize the scope of due process that is pragmatic to the context and nature of the decision.


\textsuperscript{149} Esther Thelan presents a most useful critique of established cognitive theories that, from the perspective of the new causal understanding in nonlinear dynamics, are built upon numerous fallacies of causal reason. See Esther Thelan and Linda B. Smith, A Dynamic Systems Approach to the Development of Cognition and Action (Cambridge, MA: MIT Press, 1994). Nonlinear dynamics forces scientists to reconsider what it means to have a theory. See Stephen H. Kellert, In the Wake of Chaos (Chicago: University of Chicago Press, 1993).

\textsuperscript{150} This is discussed briefly in the introductory chapter “Emerson’s Twins” and at length in the chapter “Para-Conceptual Rhetoric.”
It should be noted that “procedural” theories of justice are false resolutions to the totalization problem. Such theories of justice make a slight advance on static theories of justice by introducing a totalizing, procedure-based formal cause at the level of first order dynamics. This, in a sense, is the transition from Kant to Hegel.\footnote{In the spirit of Nietzsche’s recognition of the “law and literature” approach to jurisprudence, the point can be made by contrasting Mozart’s operas \textit{Don Giovanni} and \textit{The Magic Flute}. This will also serve to introduce how Nietzsche’s links justice with developmental psychology and sexuality. \textit{Don Giovanni} can be interpreted as projecting Mozart’s own relationship to tonality and atonality. Mozart, in effect, encountered G"odel’s Incompleteness Theorem in music, having exhausted the classical-tonal paradigm. \textit{Don Giovanni} (Mozart) declares at the supper: “This music is familiar to me.” To transform music he must leap into the abyss of “tonal Hell,” lest he become a statue frozen for all time. Nietzsche implicitly links tonality to Apollo and atonality (post-classical or romantic) to Dionysus. [This is Nietzsche’s reading in \textit{Dawn}, section 327.] For Nietzsche, there is an Apollinian sexuality in clinging to the internalized father figure (an un-evolving, no longer “living” commander). The father—who personifies the fantasy there is a formal cause that could survive generation to generation unchanged—characterizes the abyss as “Hell.” However, for Mozart, classical forms have become easy, passionless, lustful conquests that no longer satisfy his insatiable Apollinian sexuality. The angry father figure represents Mozart’s fear of violating the norms of classical tonality. However, to keep music living—to honour the will to life—Mozart must shed the illusion of an immutable formal cause (hero reproduces father) and allow the triple goddess who represents the final, material and efficient causes to reinvent the formal cause. To face the Apollinian fear of the death threatened by the defied father, Mozart must draw on Dionysian sexuality, which self-sacrifices to the goddess without total certainty of outcome because life is ultimately more important than the ego and self-survival. \textit{The Magic Flute} projects the outcome of Mozart’s leap. The male hero—formal cause and the principle of sufficient reason—must now yield some allowance to the necessity of efficient cause to make possible a growth dynamic. In this Hegelian solution, the misalignment of present formal cause from final cause generates a logic of contradiction. By courageously following enlightened procedures against the irrationality of the goddess (efficient cause), development is guaranteed to telescope toward a transcendental final cause. Kantians therefore need not fear Darwin, whose natural selection principle guarantees a ladder of developmental progress. [See \textit{Joyous Science}, section 357.]} \footnote{See \textit{Joyous Science}, section 357.}\footnote{The efficient cause has been tamed by formalizing a dynamic principle. Procedure allows a controlled amount of efficient cause to drive the system (Pamina), but the Queen of the Night (chaos) is still banished. The slight psychological slippage in the Apollinian omnipotence fantasy suffered by granting a small domain to efficient cause is shored up by forming a herd of courageous males. Initiation rites are required to test one’s courage to maintain procedural form despite the rage of the goddess—procedure will guarantee successful dynamics. [J.C. Smith refers to this as the “Herculean complex.” See J.C. Smith, \textit{The Neurotic Foundations of Social Order: Psychoanalytic Roots of Patriarchy} (New York: New York University, 1990) chapter 10. See also, \textit{On the Genealogy of Morality}, III, 18.]}\footnote{Procedure merely converts Don Giovanni’s father-statue into son-robot—it is still not a living form.}
institutions. The efficient cause is always the ultimate reality,\textsuperscript{154} not the final cause or the formal cause. No formal cause could be immutably fixed at any level without creating a tragic downfall later in the play. An open-system legal reasoning approach is required, which this thesis explored in the previous chapter.

Nietzsche’s critique makes sense in terms of self-organizing criticality. The adaptability of a “living” system can be measured by what Nietzsche calls “order of rank.” That is, over how many degrees of magnitude does the system exhibit chaotic self-reorganization? To enhance continually the adaptability of a person, community or species, the degrees of magnitude should continually increase. The development of the formal cause should be fractal-like, with developmental change occurring exponentially more often at the level of current detail, but always subject to periodic, and only probabilistically predictable, Kuhnian paradigm shifts at all levels.\textsuperscript{155} This might help explain why Francis Bacon has been a difficult case for philosophy of science—positivists have tried to tame his induction with a logic of mechanical first-order dynamics.

Each \textit{successful} development cycle at the highest level increases the order of rank of the system and turns attention to a more nuanced level of detail in commensurating conflicting values. As noted above, the ever-increasing degree of detail in the fractal-spiral development pattern has a correlating psychological equivalent in the phenomenon of relative pain.

\textsuperscript{152} Extending the metaphor, the top-down, linear dynamics of the robot-son only achieves the equivalent of “line-dancing.” The Dionysian dance of “due process” should produce the fractal complexity of bottom-up self-organizing criticality. Prospero, Wotan and Sarastro must refrain from calling the dance.

\textsuperscript{154} \textit{The Tempest}, Act 4, scene 1, lines 148-158. “...the baseless fabric of this vision...shall dissolve...and leave not a rack behind...” The roots of this will-to-power approach are apparent in Giordano Bruno, for whom the “world-soul” was “authentic efficient cause.” See Alfonso Ingregno, “Introduction” in Giordano Bruno, \textit{Cause, Principle and Unity}, tr. Robert de Lucca, and \textit{Essays on Magic}, tr. Richard J. Blackwell (Cambridge: Cambridge University Press, 1998) xvi.

\textsuperscript{155} As the scope of change increases, the frequency of paradigm shift of that scope decreases exponentially. Thomas Kuhn, \textit{The Structure of Scientific Revolutions} (Chicago: University of Chicago Press, 1962). Kuhn focussed on paradigm shifts of the broadest magnitude.
sensitivity—the "Princess and the Pea" principle. In other words, we are psychologically disposed to remain emotionally interested in further commensurating conflicting values to increase the system's adaptability. This insatiable desire, however, creates trouble once exploited by the culmination of the Apollinian procedural solution to development—capitalism.

The system logic of capitalism exploits efficient cause in the form of price "emergence" from a market of transactions. Here, principled market participants interact and a quantum advance in allocative utility is the magic result. The Apollinian allure of the capitalist model is that the businessmen need only be self-interested rational actors for the market to work its magic. The efficient cause has been tamed by the weakest imaginable formal procedure. The strength of neurotic denial should be directly proportional to the need to compensate loss of Apollinian certainty in yielding to the efficient cause. The problem with capitalism, from the Nietzschean perspective, is not the use of procedure, but the neurotic assertion of its completeness, which denies the need to subordinate its direct metabolic needs to external values that are critical to the adaptability of person, community and species.

Nietzsche's fusion of developmental psychology, social systems theory and open-logic legal reasoning is unique. Nonetheless, there are exemplars of each of these three main elements in current approaches to the problem of justice.

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156 On the Genealogy of Morality, II, 7.
157 If we remain on one level, we become Don Giovanni, to whom the music is familiar.
158 In the psychology of The Magic Flute, competing businessmen now comprise the herd of hero-initiates.
The method of Wai Chee Dimock's *Residues of Justice* is aimed at escaping the "totalizing" effect of theories of justice.\(^{160}\) The gist of her application of the law and literature method is to look to the narrative form to present the particular misfits or "residues" of a theory of justice as legitimate manifestations of human psyche. The power of this approach is that it makes palpable how each theory of justice "disciplines" and so shapes the human psyche into an implicit, preordained "normal" nature.\(^{161}\) This violence to disfavored natures, as will be argued below, is an unavoidable and implicitly socio-biological feature of totalizing theories of justice, which are constructed on a completeness assumption. Of course giving up the completeness assumption implies a legitimation problem—one cannot give absolute title to any decision, whether from categorical principles of reason or from procedure.

Dimock, however, does not go far toward constructing a science of composing, incorporating and extracting residues from narratives to create new doctrine. Rather, her appeal to literature is more in the nature of empathy conditioning than a scientific approach to the improvement of legal doctrine. Indeed, Dimock appears to claim that such an approach would be fundamentally misguided and ranks Holmes among totalizing theorists of justice. This thesis strongly disputes such a characterization of Holmes. Further, the chapter "Legal Reasoning" shows that it is possible to construct a scientific approach to finding residues and weaving them into the fabric of the law.

Richard Weisberg's approach to Nietzsche and justice emphasizes the constructive role of codification, in contrast to Dimock's dissent-based approach that aims to expose residues of

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\(^{161}\) The work of Foucault and derivative work is a variation of this approach, which makes the correlation to Nietzsche much clearer.
totalizing theories. Weisberg's law-and-literature sensibility intuitively embraces Nietzsche's epistemology in which text can display wisdom beyond literal conceptual content. Weisberg therefore avoids the trap of presuming the possibility of conceptual completeness in the manner of "totalizing" theories of justice. The warrant of a code is not an assumed immutability of truth grounded in conceptual completeness and rationality. Rather, the disciplining aspect of a code enables active growth based on positive community values and resists slippage into decadent nihilism. There is a heavier burden on the code dissident than merely to identify residues of the prevailing code. The dissident must embody the residues within a healthy and vital matrix of active forces and then obtrusively generate enhanced code to compel public scrutiny of the codifier as an exemplar of social-spiritual development.

Weisberg develops Nietzsche's insight that the hermeneutic process of interpreting text is itself an indicator of the health and vitalism of a will to power. An "active" will to power self-subordinates to great code because the discipline ultimately promotes personal and social growth. A "reactive" will to power cannot sustain the accumulation of suffering entailed by such discipline and, therefore, must decadently "unbend the bow" through the application of deconstructive interpretive technique. The decadent use of active force to such reactive purpose Nietzsche calls *ressentiment*. The use of hermeneutic technique, therefore, is moral deed. One

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164 Gilles Deleuze presents a useful categorization of active and reactive types within *On the Genealogy of Morality*. Gilles Deleuze, *Nietzsche and Philosophy*, tr. Hugh Tomlinson (New York: Columbia University Press, 1962, 1983). The details of the distinctions are not directly relevant to this thesis, which refers to the various manifestations of the reactive nature as decadence.
cannot purport to command text through deconstructive technique except by making a moral claim as an active, legislating will to power and standing as exemplar to warrant the claim. Weisberg's work reveals how undisciplined use of deconstructive hermeneutics, such as clever lawyering, lacks internal checks against drifting moral relativism.

Weisberg uses a literary approach to show that a great text—read as a whole—ironically yields the interpretive techniques appropriate to the text. "Text yields theory."\(^{165}\) The good, ruminative reader therefore submits to the disciplining techniques of the text itself to constrain the range of meanings generated by the text. Weisberg shows how the framers of the U.S. Constitution evidently desired a degree of deconstruction of the literal meanings in the text within the constraining discipline of word-skeptical interpretive techniques. A codifying judge may exercise authoritative status over constitutional meaning to situate legal norms within community, but such power must be earned with only partial assistance from legal verbalizing.\(^{166}\)

This thesis accords with Weisberg on many levels. This thesis generated its reading of Nietzsche by inferring the interpretive methodology appropriate to Nietzsche's texts from a sustained engagement with Nietzsche's text. In other words, the thesis presumed Nietzsche was an author of a great text that contained its own disciplining rules of interpretation. This experiment substantiates Weisberg's claim that Nietzsche's passages on textual truth and philological fidelity cannot be dismissed or ignored, as some postmodern readers of Nietzsche seem to do. This thesis also shows that principles of self-organizing criticality underwrite many levels of Nietzsche's text, including both the interpretive strategy demanded by the text, and the means of access to infer that interpretive strategy. These principles of self-organizing criticality


\(^{166}\) Richard H. Weisberg, "Text into Theory," supra, Part VI, especially at pages 992-993; "It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendhal," supra.
fundamentally accord with Weisberg's reading of Nietzsche that justice entails codification to enable active growth and to resist decadence. This thesis advances Weisberg's work by amplifying how codification is integral to justice and how reactive forces impede the development of justice.

Weisberg's reading of the role of "laws" to justice in section 11 of the second essay of *On the Genealogy of Morality* accords with Nietzsche's stated preference for "brief habits" in section 295 of *Joyous Science*. One must "believe in" or commit to a code of self-discipline as though it would be true forever. Eventually, however, each habit is surpassed by another—it would be an error to expect codes to be eternally immutable, although sometimes this is not a serious error. Nietzsche celebrated the Caesar who casts his will in bronze to discipline for millennia.\(^{167}\)

Weisberg notes Nietzsche's profound respect for the enduring social-spiritual discipline of Judaic people.\(^{168}\) A "brief" habit may be valid as empowering social-spiritual code for a very long time. Nietzsche ends the "brief habits" aphorism by stating that the failure to adopt any habits at all is far worse than eternalizing habits.

This thesis amplifies this insight in terms of the growth of knowledge through self-organizing criticality. A cycle of growth begins with reification into a codifying text that governs. By habituating to the code and "believing in" it, one enables a subliminal intelligence to explore the nuances of causation in relation to that code.\(^{169}\) The producer of quality text displays this intelligence through the deed of textual production—the wisdom beyond the literal conceptual knowledge it recites. The active will to power can both actively submit to the discipline of the code and accumulate the stresses of the anomalous residues without abandoning commitment to

\(^{167}\) See, for example, "The Hammer Speaks" from *Thus Spoke Zarathustra*, which Nietzsche repeated as the postscript to *Twilight of the Idols*.


\(^{169}\) See especially sections 218 and 188 of *Beyond Good and Evil*. 
the code. Only when a great codifier has actively incorporated sufficient anomalies to contain implicitly patterns that potentially generate enhanced code, can this Caesar legitimately claim title to legislate an enhanced code. The forces of self-organizing criticality within the codifier spontaneously generate great deeds as the byproduct of the enduring active self-discipline.\footnote{It is important not to read Nietzsche's observations about the passivity of the creative deed as an endorsement of the reactive over the active. The active nature proactively stages the preconditions for self-organizing criticality.}

The reactive type, by contrast, cannot maintain commitment to the code of discipline. The decadent cannot sustain absorption of the stresses of the anomalies and must react before suffering the incorporation of a full pattern of causal nuances. The reactive type might proactively block the accumulation of stresses necessary to guide the development of the code. The reactive type might proactively transform the code for relief or windfall exploitation, rather than transform the code to enhance it—the future has been sacrificed for present repose. All decadence is ambiguous, or put differently, all reactive forces can adopt proactive measures that in another context could be appropriate for justice. Proactive decadence—ressentiment—can be difficult to distinguish from healthy active legislation.

The self-organizing criticality model yields a range of criteria to identify reactive, resentful, decadent or bad faith abuse of power. The reactive type suffers from a weakness that compulsively deploys subliminal intelligence to block any given aspect of the developmental process. Nietzsche examines the will to truth itself as possibly motivated by fear of uncertainty and a need to avoid suffering. Emotional intelligence and emotional balance is important to the anomaly-gathering process—any lack suggests a disposition to be reactive. A disciplining taste is crucial to manage the scope of the anomaly-gathering process—indifference to taste suggests a disposition to be reactive. The capacity to incorporate entails self-subordination to text as other and to values external to oneself—the fear of risking oneself suggests a disposition to be reactive.
The capacity to endure suffering without reacting is required—fear of all suffering suggests a disposition to be reactive. The transformation of code is an outgrowth or self-overcoming of existing, enduring social values—lack of reverence for tradition or historical sense suggests a disposition to be reactive. This list can be multiplied to elaborate how the public might scrutinize the great codifier who offers himself or herself to public scrutiny to stand as credit for his or her deed. Thus, Nietzsche ends his grand legislative text with *Ecce Homo*.

In sum, Weisberg finds justice to be a central theme within Nietzsche's text. Weisberg understands the need for codification best from the perspective of resisting the drifting moral relativism of *ressentiment*. However, Weisberg relies heavily on sound literary intuition to avoid the epistemological traps of conceptual rationality. This thesis arrives at a similar intuition through causal analysis of self-organizing criticality and so suggests a way toward a more general science of justice than the ineffable literary intuition applied by Weisberg.

"Totalizing" theories of justice are likewise rejected by Drucilla Cornell in her *Philosophy of the Limit*, which builds on the work of Jacques Derrida. Cornell notes an affinity between Derrida and the recent move of John Rawls away from Kantianism toward a liberal analytic jurisprudence that emphasizes tolerance in place of categorical norms. Nietzsche's theory of justice accords with Cornell in claiming to go beyond Rawls by always actively seeking to keep "open the 'beyond' of currently unimaginable transformative possibilities precisely in the name of justice." This accordance follows because Nietzsche's "open system" concept of justice correlates to Cornell's understanding of the importance of time and the responsibility not to rely on an appeal to what "is." Cornell invokes the systems approach to social theory of

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Justice, like happiness, is a side-effect of a healthy, active nature.


Niklass Luhmann. Luhmann focuses on the recursive (time-dependent, self-modeling and self-modifying) nature of social systems, which he calls “autopoesis.” This is the crucial feature that distinguishes a “nonlinear” dynamic system from a linear system and makes the whole science of nonlinear dynamics (chaos theory, self-organizing criticality and complex adaptive systems) applicable. This implicitly recognizes the unending series of procedural derivatives discussed above in distinguishing Nietzsche from procedural theories of justice. A legal system, therefore, is a time-dependent system that develops into the future as something more than its past, which cannot be fully captured by an appeal to what can be knowable about what “is.” Justice is necessarily a future-oriented open system—more a process of growth than the product of growth from time to time.

Cornell also accords with Nietzsche by distinguishing between the phenomenological symmetry of an “other” and the ethical asymmetry of an “other.” An example illustrates the distinction. A man must respect a woman as a person, but not reduce her to a mirrored image of him. Rather, the man should experience “wonderment” and respect the unbridgeable uniqueness of the woman having to suffer the denial of an abortion—he should feel “humility” before the “otherness” of the other. These two conflicting attitudes are central to Nietzsche’s theory of justice. In Nietzsche’s communitarian vision, one must view each “other” as a co-contributor to the project of justice. However, the incompleteness of communicable thought and experience and the importance of incommunicable work-in-progress to creativity mean that humility is imperative. Lack of humility to other-ness is the target of Nietzsche’s critique of


\[174\] Stephen Kellert, in effect, transforms Cornell’s notion of the incompleteness of “is” into the language of chaos theory. Stephen H. Kellert, *In the Wake of Chaos* (Chicago: University of Chicago Press, 1993). In Nietzsche’s language, autopoesis means that logical causation (reasoning from what “is”) cannot fully account for factual causation (the nonlinear, creative element of “becoming”).
"pity." For Nietzsche, each person's "task" is his or her own and one cannot presume to understand fully another's task as co-contributor. Finding one's own task—how one becomes what one is—is difficult enough. Indeed, one should celebrate the unbridgeable "distance" of an other as an inexhaustible well of frustrating experiences to spur one's self-development.

Cornell also accords with Nietzsche on the fundamental role of patriarchal gender hierarchy in blocking self-transformation and the task of Justice. However, important differences will be discussed below.

Nietzsche differs from the approach of Cornell in one fundamentally important respect. Cornell appears to follow Derrida by remaining within the realm of philosophy, outside of science, whereas for Nietzsche, Justice is science. The source of Cornell's move to stay within the "quasi-transcendent" world of philosophy seems to be predicated on a desire to avoid a presumed "is" of science. This is not problematic for Nietzsche because reality becomes, and so does any science of nonlinear dynamics. Focussing on science therefore does not annihilate or even obscure the process of Justice in always questioning the other to transform our conceptualizations in dialogue with the other. Nietzschean science pursues an ever-receding limit, recognizing that the distance between self and other will never be fully overcome. Indeed, in Nietzsche's psychology, the Princess and the Pea principle continually re-calibrates and drives the Nietzschean scientist to desire overcoming conceptual limits repeatedly. The Nietzschean science program moves from chaos theory (recognition of the openness of the system) to self-organizing criticality and complex adaptive systems. It therefore becomes possible to find

176 Cornell, The Philosophy of the Limit, 177.
177 Ecce Homo; Human All Too Human, Preface.
178 Joyous Science, section 60.
179 The differences will be discussed below after further discussion of Nietzsche's views on sexuality and self-transformation.
continually a more complex, more nuanced understanding of an other—be it a woman to a man, a woman to another woman, or a scientist to the environment—even realizing one could never fully understand the other and might at any time have to re-conceptualize radically one’s understanding of the other. Moreover, Nietzsche’s method of science provides constructive, empirical, inductive heuristics, such as extracting a bandwidth of plausibly relevant experience from narratives that can reveal patterns for poetic fusion into new concepts. As a result, a sustained encounter with an other over time can generate more nuanced criteria to suspect plausibly that other either of exploiting in bad faith one’s generous humility or of acting from decadence. Nonetheless, as Nietzsche noted of his encounter with Wagner, signs of decadence and growth are often difficult to distinguish, which explains Nietzsche’s emphasis on humility. Indeed, Nietzsche emphasizes this humility so much that his philosophy is generally classified as extreme individualism.

The difference in positions regarding science is important from a psychological perspective. While Cornell recognizes that childhood development typically results in a patriarchal ego that neurotically fears sacrificing itself to the allure of an other, Nietzsche would argue that merely delegitimating through philosophic textual strategies is psychologically naïve and not respectful of the biological rigidity of neural structures. Nietzsche’s strategy will become clearer after a closer examination of the interaction of biology and culture in developmental psychology, which will also be used to contrast Cornell’s position and Nietzsche’s position on the necessity or desirability of gender hierarchy.

Much of the strength of Nietzsche’s theory of justice comes by profoundly linking psychology and social theory. As such, Nietzsche’s social theory is usefully compared to action

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theories in the social theory literature. Particularly instructive is the affinity between Nietzsche and the thinking of John Dewey. Dewey’s approach productively examines cycles of habit revision and recognizes the opportunity for individually managed self-transformation as a fundamental aspect of meaningful democracy. These goals accord well with Nietzsche; however, Dewey’s approach remains locked within the first-order linear dynamics of an individual’s direct, conscious, rational control of habit revision. In Nietzsche’s psychology, habit revision is creative self-transformation and is a much more complex, emotional process largely beyond the direct control of conscious rationality. The implications of this difference percolate up to recast fundamentally Dewey’s approach to education and political process. Hans Joas, in a social theory context, has more recently applied Nietzsche’s focus on creativity to amend this shortcoming in Dewey’s approach. This thesis applies this richer conception of the creative process to recast legal reasoning and justice as constructive empirical processes.

Nietzsche’s scientific focus on the psychological prerequisites for creative action and decision-making as a core issue for a theory of justice align him with Robin West’s *Caring for Justice.* West asserts that humans have irreducible, primordial concerns for children and for social connections that are evident in our deep fear of losing them. West asserts these are central to our identity and add richness and meaning to our lives. West goes on to argue at length how our current system of norms systematically fails to foster sufficiently the cultivation of “good” social relations and overprotects “bad” ones. In particular, our system of norms has a paring effect on parent-to-child nurturing, and norms of “privacy” keeps community intervention from actively weakening bad social connections. West argues that the cultivation of children and good social relations requires a more dynamic approach that recognizes the emotional and creative aspects of habit revision.

social connections has been taken for granted by our capitalist system of norms. West observes that the responsibility for such cultivation has not been given sufficient value in capitalism and the under-compensated burden for this has been borne primarily by women. Indeed, in a move that suggests "sociobiology," West refers to this task of cultivation as "women's work." In *Caring for Justice*, West explores how pervasive exclusion of women's interests and voices impairs this task of cultivation.

The focus of West's *Caring for Justice* is therefore orthogonal to this thesis. A profound correlation to Nietzsche becomes evident by shifting focus from critique of existing legal norms toward application of the nonlinear dynamics systems approach to examine empirically the cognitive development of children. Indeed, there has recently been a major paradigm shift occurring within the field of developmental psychology toward nonlinear dynamic models. One recent methodological insight, for example, is the realization that a child's perceptions depend on an implicit world-model and self-model that undergoes periodic advances in complexity. This parallels Nietzsche's insight that one cannot project a late form of judgment and inference to an earlier stage of cognition. Indeed, after stating this principle in *On the Genealogy of Morality*, Nietzsche's immediately implies its application to criticize how parents still treat their children. There is also a strong parallel between Nietzsche's concept of "breeding" of character and capacity for creativity and Katherine Nelson's observation that early cognitive development is heavily dependent on the frequency and quality of early emotional and

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186 Katherine Nelson, *Language in Cognitive Development: Emergence of the Mediated Mind* (New York: Cambridge University, 1996); Terrence W. Deacon, *The Symbolic Species: The Co-evolution of Language and the Brain* (New York: W.W. Norton, 1997) [Hereinafter cited as "Deacon, Symbolic Species"]. In other words, the mind is an autopoeic system.
social transactions. As noted above, child psychologist Stanley Greenspan argues strongly that a foundation of emotion and social connections in the context of stable and developing personal relationships with the infant/toddler/child is integral to the development of intelligence, emotional robustness and creativity. Moreover, psychologists have noted other “critical periods” for achieving high competence in certain skills—such as the ability to master a grammar—which are learned much more slowly or not at all later in life.

These recent, Nietzschean approaches to understanding child development connect West’s emphasis on children and social connections to a science of the developmental prerequisites for creativity and creative action. Therefore, there is a deep correlation between West and Nietzsche’s concern about the “work-in-progress” of creativity and the management of social experiences it presupposes (West’s “good social connections”). By assigning this task primarily as “women’s work,” West brings to mind one of Nietzsche’s infamous aphorisms of advice to women: “Let your hope be: May I give birth to the overhuman!”

Given the premise that Nietzsche’s theory of justice works better in proportion to the creative rank of the members of its colleges of cultural physicians, quality child development and “good” social connections become pre-eminent features of Nietzsche’s theory of justice. This thesis extends West’s critical approach to seek a constructive mode of legal reasoning and principles of institutional design.

The positions of West and Nietzsche raise the issue of what has come to be labeled “sociobiology” or “essentialism.” West surveys feminist arguments against essentializing

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188 In Nietzsche, good “breeding” means good early upbringing. Due to Nietzsche’s emphasis on the in-elasticity of early development, his position might be described as psychological Lamarckism.
190 Deacon, Symbolic Species.
191 Thus Spoke Zarathustra, Book I, “On Little Old and Young Women”.
192 Essentialism in philosophy means something entirely different than essentialism in the sense used in this context. Essentialism in this context means something like genetic or biological roots to explain general observed differences in the average behavioral patterns of males and females.
genders in this way. West’s analysis and response need not be reproduced here, except to note her general conclusion that the existence of differences does not imply the differences are impervious to the effects of culture and indeed may require the active intervention of culture. Put another way, ruling out the possibility of gender differences in advance is bad science and, by turning attention away from rehabilitative intervention, is bad social policy.

West’s response can be expanded here by arguing that Nietzsche’s developmental approach to cultivating creative capacity is designed to minimize and overcome biological determination of character. By refusing to acknowledge the possibility of differences generated from biological sources, the “free will” presupposition of humanist approaches paradoxically restricts human development potential. Any totalizing theory of justice with transcendental concepts implicitly favours a particular constellation of biological tendencies and condemns those who are different to their biological predestination, foreclosing inquiry into the means of self-overcoming.

It is therefore useful to explore in what sense Nietzsche’s position could be labeled sociobiology. The label “sociobiology” is imprecise. Within the humanities, it has come to mean some variant of genetic or biology-based anti-humanism. “Sociobiology” has become a political curse word that labels someone as an apologist for agendas to promote “racial superiority” and “eugenics.” More scientifically understood, the critique of sociobiology is a critique of direct inferences of the origin of behavioral patterns from adaptive natural selection.193 The nub of this critique is that biological functions can arise as side effects or otherwise are commandeered to new purposes that differ from the reason for the origin—for which Stephen Gould has coined the

term “exaptation.” This critique of sociobiology, however, is none other than Nietzsche’s critique of the “English” (that is, Darwin-influenced) psychologists who infer the origin of a form from its current utility.

But all purposes, all utilities, are only signs that a will to power has become lord over something less powerful and has stamped its own functional meaning onto it; and in this manner the entire history of a “thing,” an organ, a practice can be a continuous sign-chain of ever new interpretations and arrangements, whose causes need not be connected even among themselves—on the contrary, in some cases only accidentally follow and replace one another. The “development” of a thing, a practice, an organ is accordingly least of all its progressus toward a goal, still less a logical and shortest progressus, reached with the smallest expenditure of energy and cost,—but rather the succession of more or less profound, more or less independent processes of overpowering that play themselves out in it, including the resistances expended each time against these processes, the attempted changes of form for the purpose of defence and reaction, also the results of successful counter-actions. The form is fluid but the “meaning” ever more so....Even in the individual organism things are no different: ....

Nietzsche applies the same genealogical critique to biological evolution, moral evolution and the cultural-psychological development of an individual. Nietzsche’s critique shows that the humanist moralists who infer the true “nature” of humans from ideals of rationality or goodness are the ones guilty of socio-biological fallacies. For Nietzsche, justice as science requires full

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195 On the Genealogy of Morality, I, section 1.
196 On the Genealogy of Morality, II, section 12.
197 The socio-biological reduction is in the other direction, inferring what human biology must be from culture, rather than culture from biology. A nonlinear developmental approach effaces any meaningful separation between the influence of nature or nurture.
investigation into the effect of both biological factors and cultural factors on the development of human potential.

There are three major body-conditioned or biologically influenced strands in Nietzsche’s thinking. The first is that creativity is a non-consciously controlled bodily (primarily neural) skill that is cultivated with indirect strategies, similar to how an elite athlete trains for a skilled sport. Training must be consciously managed and take into account the relative rigidity of neural structures developed during childhood in response to social-emotional interactions and goals perceived as pressing and relevant from the child’s immature perspective. It is Nietzsche’s recognition of the relative rigidity of neural structures (biologically enduring cultural conditioning) that challenges the free-will fantasy of humanism. Nietzsche therefore attacks the free-will myth and argues there are only “strong and weak wills,”¹⁹⁸ with the strongest wills belonging to persons who have an elite, trained capacity to transform neural structures periodically. Nietzsche’s focus on biology is therefore necessary to reduce the degree of biological determination, but earns him the sociobiology label.¹⁹⁹ However, as will be argued in greater depth presently, Nietzsche does not rely on genetics or an adaptationist program or suggest eugenics in anything other than the sense of individual self-improvement.

Nietzsche’s second important biological strand does reach down into genetics, asserting fundamental behavioral differences between male and female humans. As observed already, Nietzsche asserts male humans have an instinctive, pre-conscious “free rider” intelligence with respect to matters that have any direct or indirect bearing on reproductive success—male demonism. That is, as unconscious “rational actors” in the grand reproductive economy, males subliminally find—and rationalize within conscious awareness—sub-optimal strategies from a

¹⁹⁸ *Beyond Good and Evil*, sections 18 and 21.
¹⁹⁹ Nietzsche having been badly misappropriated by the Nazis exacerbates this impression.
communal perspective. Put another way, in the discretionary realm of the leading edge of justice, there are good reasons to suspect unchecked male instinct. Likewise, in the realm of cultivating creativity, which by its nature involves subjective judgment, there are good reasons to suspect the subliminally exploitive intelligence of male instinct and therefore give women ultimate authority over “women’s work.” For Nietzsche, “women’s work” would include overseeing the regulation of the trade-off between capitalism and cultivating creative capacity.

The third biological strand in Nietzsche concerns the interrelationship of sexuality, creativity and sense of self (ego). Here Nietzsche contrasts Apollinian (patricentric or Oedipal) sexuality from Dionysian (matricentric) sexuality. For Nietzsche, each is a developmentally contingent psychic configuration that arises from the interaction of biology and culture and is captured in neural structures that demonstrate resistance to transformation. Nietzsche differs profoundly from Sigmund Freud’s “Oedipal” analysis by not deeming the patriarchal Apollinian sexuality as either necessary or normal.\(^{200}\) Indeed, in Nietzsche’s psychology, only a grammar-worshipping culture imposes a Cartesian concept of ego that sets up what Freud calls the “Oedipal crisis.” An understanding of the self as a composite personality avoids the need for the child to re-establish the safety of the omnipotence of the mother through logos and father authority.\(^{201}\) Implicit in Nietzsche’s rhetorical strategy is the claim that a series of deep, creative self-transformations implicitly relies on the self-sacrificing aspect of sexuality to overcome the psychic fear of ego-death and so gradually transforms one toward a Dionysian sexuality of self-sacrifice and away from Apollinian sexuality with its neurotic need safeguard the ego through


eternal, infallible ideals. As Nietzsche said of Hamlet—certainty is madness.\textsuperscript{202} To this point, Nietzsche's analysis of sexuality has not required any innate, immutable biological differences between male and female. However, Nietzsche goes on to link the neurotic need for certainty to male obsession over certainty of parentage.\textsuperscript{203} Nietzsche links observed behavioral differences between males and females to a biological conflict between male and female reproductive strategies. However, Nietzsche was careful to distinguish the underlying instinct from its cultural amplification by means of the Oedipal crisis, a point that will be analyzed further below. Moreover, innate biological conflict does not entail fixed gender roles. On the contrary, from a nonlinear dynamics perspective, it is the presence of an unbridgeable difference between instinctive male and female reproductive strategies that enables production of a fractal-like kaleidoscope of gender configurations. That is, biology guarantees that Cornell's "Philosophy of the Limit" will always apply to the conflict between the sexes. For Nietzsche, "love" is the desire to overcome difference and "romance" is the activity of attempting to overcome difference. Without innate gender difference to guarantee a never-ending battle of the sexes, gender roles would eventually evolve into static, transcendent ideals upon an Hegelian end-of-history—the death-knell of romance. Again, for Nietzsche, it is only by focussing on biology that a greater range of self-determined gender creation becomes possible.

To help clarify how Nietzsche's biological focus is necessary to overcome biological determinism as much as possible, it is helpful to contrast evolutionary forces at the species level from developmental forces at the cultural and personal levels. Evolutionary theory usefully contrasts genotype from phenotype. Evolutionary theory has identified two principle selective forces within genotype—natural selection and sexual selection. (See figure 3.5.) Evolutionary

theory, however, has overlooked the profound significance of the developmental plasticity of the brain by assuming a strong genetic link to brain organization, capabilities and behavior. However, as Terrence Deacon forcefully argues, the genetic determination of brain is only at a general level of development, especially in the cerebral cortex, and the brain itself is a highly evolving developmental process in response to interaction with the body, itself developing, and culture-environment. Put another way, there is an incredible potential for post-genetic developmental evolution of the phenotype without presupposing any need to alter the genotype. (See figure 3.5.) Nietzsche's project of justice can be conceptualized as expanding the range of phenotype expression to promote the future of the human species. This is not eugenics.

In terms of human evolution, then, Nietzsche implicitly recognizes two new selective mechanisms and two corresponding new "types": cultural selection and culture-types, and personal selection and person-types. (See figure 3.5.) When Nietzsche refers to "breeding" "race," "blood" or similar ambiguous expressions, they should be understood in the sense of active management of cultural selection and personal selection and not genetic selection.

The concept of cultural selection and a culture-type is well illustrated by Terrence Deacon's discussion about the evolution of language as a cultural artifact. Once one appreciates the holistic, agent-less causality of self-organizing criticality, it makes sense to start conceptualizing cultural products as being spontaneously evolving entities. Deacon observes

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203 Freud does so implicitly, which is reflected in the asymmetric outcomes of the Oedipal passage for a male child versus a female child.
204 Deacon, Symbolic Species.
205 Ibid.
206 Even an evolutionary materialist such as Richard Dawkins sensed the need to introduce the concept of "memes" to recognize the irreducibility of some cultural phenomena to biological. This appreciation that different levels cannot be fully reduced to each other using principles of logical causation should not be considered philosophical idealism. This approach is merely empirical recognition of the inadequacy of language and the human need to conceptualize different levels of reality as independent sources of causation. Richard Dawkins, The Selfish Gene, 2nd ed. (Oxford: Oxford University Press, 1989). Deacon and Nelson argue that the "meme" mechanism is not required for cultural selection to work.
that imprecision of concepts, communication errors and other annealing factors can easily account for unintentionally directed change in language. Deacon makes a powerful argument that languages must evolve to be learnable by developing children. Any language that strayed too far from learn-ability would not be reproduced from generation to generation. Therefore, in the case of the syntactic-semantic structure of language, the combinatorial symbolic patterns must be learnable in a hierarchy of stages of increasing complexity. Personal-level developmental capabilities therefore put selective pressure on what cultural innovations are viable, in addition to a variety of other constraints that make social theory an interesting discipline. It follows that a viable cultural-type will likely exploit neural-psychological development in a way that shapes early neural plasticity into later rigidity to promote discipline and unconscious self-surveillance. The “endurance” of cultural institutions is a major psychological issue for Nietzsche.

For Nietzsche, the project of justice entails that humans increasingly assume self-conscious management of the evolution of culture-types. Particularly with the effect of modern capitalism on the environment, cultural-types must become more adaptive to respond to sudden, nonlinear changes in the environment. However, Deacon’s language example shows that “legislative” free will is a fantasy—attempts to impose “rational” culture-types, such as Esperanto, in place of “living” culture-types have typically failed.\textsuperscript{207} For Nietzsche, self-conscious management of cultural innovation requires highly creative individuals to compose new, viable cultural forms that adequately accommodate the multiple dimensions of selective constraint affecting a culture-type.

For Nietzsche, great creative capacity requires a sustained self-conscious effort to develop the capacity to self-develop. It is therefore useful to conceptualize an independent source of

\textsuperscript{207} The same may be said of efforts to “improve” developing societies. See, for example, D. Trubek, “Toward a Social Theory of Law: An Essay on the Study of Law and Development” (1972), 82 Yale Law Journal 1-50.
phenotype variation—personal selection and the person-type. (See figure 3.5.) The creative person-type becomes an essential requirement for accelerated innovation of viable culture-types. However, Nietzsche argues that there is an inherent conflict when the maintenance of a culture-type is achieved through punishment, or its conceptual sublimation through the use of a morality based on a free-willing Cartesian ego responsible to a table of conceptual ideals according to the principle of sufficient reason.\textsuperscript{208} Personal selection must overcome the disciplining effects of cultural maintenance in order to generate the possibility of greater cultural innovation, without undermining the stability of culture-types that personal selection takes for granted.

It should be clear that cultural selection and personal selection in no way depend on genetic innovations. However, Nietzsche's approach does posit a profound and enduring behavioral effect from early personal, familial and social experiences in the cognitive development of a person. Culture, in effect, transcribes itself into rigid neurological structures. Culture burns into body.

Recent developmental psychology confirms this effect and has begun to explore the mechanisms involved.\textsuperscript{209} For example, Terrence Deacon notes that much of the early development of the brain uses a biological strategy of selective elimination. Selective elimination circumvents the need for detailed genetic blueprints by over-producing neural connections and then eliminating the ones that appear least relevant in meeting the pragmatic tasks presented by the developing internal body-context and the emotionally mediated external social-environmental context.\textsuperscript{210} Consequently, significant features of neural brain structure, such as the location of various functionalities, can vary from individual to individual in response to holistic effects. As Merlin Donald observes, the major cultural innovation of shifting from oral culture to symbolic

\textsuperscript{208} Which is further entrenched by means of Apollinian sexuality.

\textsuperscript{209} The psycho-therapy industry and the self-help sections of bookstores are proof enough of this phenomenon.
literate culture has caused a major change to neural architecture, without any necessary genetic change.\textsuperscript{211}

Moreover, as Terrence Deacon and Katherine Nelson each emphasize with respect to the development of the brain of an infant-child, the general neural structure and functional capability at time T-1 conditions how the experiences are perceived and interpreted at time T, creating a nonlinear system of development—autopoesis. The development of neural architecture therefore can be chaotically sensitive to modest variations in social transactions and how the child emotionally deals with them. Nelson explores at length how the emotionally mediated feedback of early social experience is crucial to attune development of emerging cognitive capacities toward relevant, power-enhancing strategies and conceptualizations. The frequency and quality of early social interactions is therefore of fundamental significance in cognitive development. Through early social interactions, culture "programs" itself into the biological branching of brain structure, and because measurable neural growth and selective elimination slows down progressively until ending at about six years of age, the constitutive effect of early cultural experience is transformed into increasingly more resilient biological structure.

The task of personal selection, therefore, is to assume active self-management in the development of cognitive structure and skills. Creativity, in particular, is the active self-management to enhance one's capacity to alter rigid neurological structures, or at least find the more useful "task" compatible with the neurological structure of such a person-type.\textsuperscript{212} Personal selection therefore aims to expand the space of developmentally viable phenotype expression. Once one understands the biological-cultural interaction implicit in development, effective

\textsuperscript{210} Deacon, Symbolic Species, especially at 202, 204-205.
means for enhancing developmental possibilities appear in unexpected forms. Merlin Donald notes that a major innovation in human capacity to learn skills was asymmetric hemispheric plasticity. Whereas the lower brain tends to mirror its structures on either side, in humans the cerebral cortex can develop the ability to form neural structures for functional tasks on one side and not the other. It seems that by having a function carried out primarily within one compact neural structure, this enables an exponentially greater number of neural connections of shorter length, which enables faster processing of greater orders of magnitude. Glen Doman’s extensive work with brain-injured infants has shown that the complete development of asymmetric hemispheric plasticity and hemispheric dominance requires a sufficient amount of cross-pattern crawling, creeping and walking during the period of accelerated neural growth. Prophetically, Nietzsche emphasizes the importance of walking for creative thinking. Doman’s work and the well-know “critical period” for children to learn grammar shows that there can be significant path-dependency effects in development which we have hardly begun to understand. Indeed, the widespread immobilization of infants in swings and so forth for the convenience of parents overburdened by the pressures of capitalism, juxtaposed with the apparent increase in levels of dyslexia and attention deficit disorder, together suggest that the under-valuation of “women’s work” may well precipitate a cognitive crisis, as Stanley Greenspan argues is happening, and undermine our capacity for cultural innovation in response to environmental changes.

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212 This explains Nietzsche’s late fascination with the criminal type as described by Dostoevsky as hewn from hard wood and, therefore, having great potential. See Twilight of the Idols, “Raids of an Untimely Man,” 45.
213 Glen Doman, What to do About Your Brain-Injured Child (Philadelphia, PA: The Better Baby Press, 1990). Based on work with thousands of brain-injured infants, Doman’s research now claims to have determined a maximum distance per day of cross-pattern crawling (150 feet), creeping (400 yards), walking (200 feet, 40 feet non-stop) and running (3 miles, 1 mile in 30 minutes) required to be achieved by six years to fully achieve asymmetric hemispheric plasticity sufficient to prevent dyslexia. Reported at a lecture on 8 November 1995, The Institutes for the Advancement for Human Potential, Philadelphia, PA.
The concepts of cultural selection and personal selection help to make Nietzsche’s understanding of justice clearer. The task of justice involves active management in the iterative interaction between cultural selection and personal selection. On Nietzsche’s reading, Plato’s task in writing *The Republic* was to engineer poetically concepts for a psychosocial technology to achieve cultural endurance and thereby enable the iterative ratcheting up of the attainable complexity of social architecture. This would be a long process, with dead ends, as an increasingly complex culture must also evolve to become learnable, which is best done by exploiting existing forms, such as myths, and altering them to new purpose. Nietzsche’s goal as author of *Thus Spoke Zarathustra* was to increase the attainable complexity of personal neural-psychological architecture. Nietzsche was clear that the development of a high order of rank of personal selective capacity requires a cultural context. Nietzsche, as democrat, was concerned that culture fails to provide “education” in the sense of cultivating personal developmental capacity. Nietzsche, respectful of nonlinear dynamics, realized that no fixed developmental rules were possible. Indeed, the developmental rules themselves would develop, and so on and so on, in response to their own development and, over time, in response to the changes in the culture-type that shapes the early development of the infant-child. (See figure 3.5.)

Figure 3.5 summarizes the distinct concepts of natural selection, sexual selection, cultural selection and personal selection. Nietzsche’s concern was that the effect of cultural maintenance has been progressively undermining the development of developmental self-autonomy. Nietzsche exposes the pernicious effects of moral ideals and the free-will fallacy, in particular, as blocking inquiry into the developmental roots of creativity.
Cultivating Justice

Genotype

Phenotype

Environment narrows possible gene-space to niches

Niche not fully exploited

Genotype not fully exploited by phenotype

Intra-species dynamics increases the achieved gene-space to help fill niche with "plausible" variations

Level of Free Will Fantasy

Culture-type

Person-type

Sexual Selection

Individual Development

Natural Selection

Cultural Selection

Rationalist Education/Discipline

Cultural Institutions

Personal Selection

Zarathustra (Nietzsche)

Cultivating Creativity
Cultivate neural reifications
that promote complexity

Cultural Maintenance
Exploit neural reification for
discipline & institutional stability

Nietzsche's Task:
Create a cultural institution to cultivate personal selection, so that institutions of cultural physicians can prevent over-discipline by institutions and thereby make culture more adaptive to respond to its effect on the environment and expand the range of culturally acceptable phenotypes. Cultural maintenance will increasingly depend on seduction of sublimated sexuality instead of discipline based on fear.

Figure 3.5 Cultural Selection and Personal Selection

It is understandable, therefore, that Nietzsche would target the "free will" concept of moral responsibility as the greatest threat to his understanding of justice as a managed interaction between cultural selection and personal selection. The free-will fallacy implicitly posits undiminished developmental plasticity over the life of an individual so that everyone becomes morally responsible and, therefore, punishable. The eroding effect of such discipline on the development of personal selection is reinforced because it suits the cultural maintenance function of the dominant institutions. The free-will fallacy serves to convince those who are weak in developmental self-autonomy that they are in fact supremely strong and that they merely choose not to exercise that strength, thereby steering them away from means to strengthen themselves.
There is no end to human ingenuity in rationalizing lack of capability.\textsuperscript{215} The "humanist" political agenda likewise demonizes the concept "genius" and any efforts at developmental peak performance. Glen Doman reports that his research efforts toward enhanced achievement of human development potential have been strongly resisted and even shunned. The humanist political agenda demonizes such aspirations as "sociobiology" or "eugenics" although the preceding discussion shows such labels to be improper usage of the terms. The humanist political agenda also relies on a series of developmental fallacies to rationalize belief in a moral free will, which I call "Disney Hedge Fallacies."

A typical argument for free will is to infer from the variety of developed types that development is therefore independent of biology or culture. In terms of Disney hedges, the fact one sees Mickey Mouse, Goofy, Tinkerbell and other shapes, implies any shape is possible. The hedge analogy shows that both biology (shrub) and culture (gardener) are involved, that culture gets converted into biology and that despite the infinite variety of possible configurations, not all biological configurations are viable. The free-will fallacy gets stronger with the implicit assumption that because another hedge is in the shape of Goofy, Mickey Mouse can be transformed into Goofy. However, the hedge analogy shows that because of progressive rigidification of neural branching structure with relevant use, the transformational options decrease with developmental maturity. Cultivating Goofy requires early cultural intervention for suitable branching patterns and these cannot be significantly altered later in development. For

\textsuperscript{215} This was perhaps most strikingly illustrated by the misfortune of Mr. Justice William O. Douglas of the U.S. Supreme Court. Despite obvious paralysis from a stroke, because of the damage his brain was also unable to update its bodily self-image directly and so he pathetically rationalized his inability to function for some time. See Antonio Damasio, \textit{Descartes' Error: Emotion, Reason, and the Human Brain} (New York: Putnam, 1994).
example, if feral children do not internalize a grammar by six years of age, they never develop full grammatical capacity\textsuperscript{216}—the free-will fallacy notwithstanding.

It must be emphasized that free-will fallacies are politically ideological and pathological to developmental democracy. One might distinguish "conservative" humanists from "liberal" humanists in the following sense. Liberal humanists have begun to acknowledge somewhat rigid developmental effects from cultural conditioning, such as self-destructive behavior, but presume well-funded legislative efforts would reverse the effect. Any acknowledgement of developmental rigidity might interfere with the funding agenda and so the "sociobiology" charge seems to come most strongly from politically oriented liberal humanists. This cannot be excused as bad science but good politics. The paradox is that by denying the role of biology in development, such efforts typically make the problem worse. A series of examples illustrates the point.

Martin Seligman argues that the "self-esteem" movement in education has noticeably backfired.\textsuperscript{217} On Seligman’s analysis, the premise of the self-esteem movement was that objective measurement labeled some students as failures, which in turn undermined their self-esteem and led to resignation. The cure, it was reasoned, was to remove competitive testing and tell children how wonderful they were. The result, Seligman argues, was that in the absence of objective milestones of achievement as feedback, the children failed to improve their skills significantly. This in turn increased their sense of powerlessness and, combined with the absurdity of being told they were capable when they were not, confirmed and amplified a sense of pessimism, which has contributed to what have become unprecedented rates of depression in children. Seligman is in accord with Nietzsche and the peak performance psychology of

\begin{footnotesize}
\textsuperscript{216} Deacon, \textit{Symbolic Species}.
\textsuperscript{217} Martin E. P. Seligman, \textit{The Optimistic Child} (Boston: Houghton Mifflin, 1995).
\end{footnotesize}
psychologists such as Csikszentmihalyi, who all observe that it is a sense of increasing power that best improves self-image.

The second example is gender-based variation in mathematical abilities. Some psychological studies showed that in post-pubescent boys and girls that boys on the whole did better at math than girls, which was reported in a popular book called *Brain Sex*. Specifically, brain scans showed that when the boys did math the neural activity was clustered in one area on one side of the brain, whereas in the girls the activity was spread across both hemispheres. From the above discussion on asymmetric hemispheric plasticity, it is not surprising that the boys outperformed the girls. Plainly, the source of the difference in performance was biological. The media response to the *Brain Sex* book was interesting. One camp interpreted it as proof that boys were “innately” better at math. The anti-essentialist humanist camp was simply in denial and continued to promote equal treatment and “female role models” as a solution to the gender difference. However, given Doman’s findings on the effect of early cross-pattern movement on asymmetric hemispheric plasticity, it can been seen that the assumption of gender equality, equal treatment and abundance of female role models would be as counter-productive as the self-esteem movement. Indeed, a biologically informed, anti-humanist strategy would counsel the hyper-nurturing of females with cross-patterned movement before six years of age. Anecdotally, a Romanian mathematician informed me that in Romania females do very well at math, but also confirmed that most girls in Romania are put into gymnastics very young. This example illustrates two principles. First, not all biological differences are developmentally necessary. Second, a slight genetic or early developmental variation in a characteristic—suppose boys are

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219 This discussion has not focussed on criticizing the position that cognitive performance differences are innate. It seems self-evidently unfounded. Nietzsche’s position would be that very few, if any, cognitive differences are innate.
slightly more disposed to crawl and run around in early years—can result in significant, seemingly unrelated, biologically entrenched differences in later development. Foreclosing inquiry into such differences almost guarantees that relative performance abilities would be determined by genetic variation.

This last point is well illustrated by Deacon’s example of colour naming in different languages. As we now know colour to be a continuum of wave frequency variation in the spectrum of visible light, the nomination of colour boundaries in languages appears almost entirely unconstrained. However, Deacon cites research that shows that although languages differ in how many colours they discriminate, there is a surprising universality across all cultures. After black and white, colours are added in fixed order with very similar frequency ranges. Deacon argues that this reflects a co-evolutionary convergence between language and how neural processors detect and compose colour perceptions. As a side effect of neural colour perception algorithms, communication errors are slightly reduced by favouring certain primary colours and using them to define opposite colours. In the absence of other factors constraining colour assignment, the weak neural pre-dispositions predominate and, indeed, Deacon notes that the categorical distinctness in word assignment becomes more pronounced than the neural distinction that underlies it. Therefore, in the absence of strategic intervention, the spontaneous processes of personal development and cultural selection can reinforce and amplify small genetic variations. The free-will myth, therefore, can serve to reinforce and amplify biological differences blindly by denying such differences exist.

The final example illustrates how the denial of the emotional and biological nature of development can be both misguided and cruel. Stanley Greenspan has explored the importance of a high frequency of emotional interactions between infant and a primary caregiver to whom the
child is closely bonded for developing competent emotional self-regulation, creativity and intelligence. Studying autistic children, Greenspan shows how the rational-cognitive approach to intellectual development, which discounted emotions and genetics, effectively condemned autistic children to their condition. Greenspan reports that by actively hyper-nurturing autistic infants from a very early stage, cognitive development progressed normally. Greenspan suggests that autism appears to be an unfortunate genetic variation that makes those infants less disposed to demand emotional interaction with a parent spontaneously. Without sufficient nurturing in a "critical period," the adverse developmental scar can be permanent. Greenspan argues that the same developmental principle applies to all children and that the skill level of emotional self-regulation, and therefore creativity and intelligence, is highly dependent on the frequency and quality of early emotional interactions. This example illustrates that even major genetic variations, in the context of strategic hyper-nurturing, can become irrelevant in terms of cognitive development. On the other hand, strategies derived from rationalist cognitive models of the mind and the free-will myth condemn individuals to the slightest of genetic variations. Moreover, cultural selection can amplify the effects of these genetic variations. In this sense then, Nietzsche's psychology of personal selection is the least biologically determined and, therefore, the most democratic in a substantive sense.

Not surprisingly, this new nonlinear systems development paradigm is being viewed as a challenge to the "humanism" of our free-will "common sense" folk psychology. The recent book *Dynamics and Indeterminism in Developmental and Social Processes* raises issues of free will and indeterminacy. Interestingly, there appears to be no mention of Nietzsche's understanding of nonlinear dynamics anywhere in this compilation, even though I have yet to find a single

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concept in nonlinear dynamics not already implicit in Nietzsche and worked through completely in terms of his project of justice.\textsuperscript{221} In terms of the humanist free-will myth, after the completion of this emerging paradigm shift, the humanists' literal belief in "free will" will surely seem as outrageous as the early Greek's literal belief in the myths of Homeric gods.

Having found it is the nonlinear developmental interaction of cultural selection and personal selection that underwrites Nietzsche's psychological social theory, Nietzsche's project of justice can be put into perspective in terms of the natural history of human cognition. This history of cognition will suggest that Nietzsche happened upon a clever methodology for discovering means to enhance one's development of creative capacity, which could be called "Neuro-Mythic Archeology."\textsuperscript{222} It will also present an analytic framework to examine more precisely Nietzsche's understanding of the relationship between sexuality and will to truth. Finally, this discussion will reveal reasons Nietzsche might have considered himself as the first true philosopher since Plato and why Nietzsche adopted the rhetorical strategy he did.

Merlin Donald's innovative work \textit{Origins of the Modern Mind: Three Stages in the Evolution of Culture and Cognition} presents a convergent synthesis of numerous sources of information, including neuro-biological, psychological, archaeological and anthropological, to examine the co-evolution of brain and culture.\textsuperscript{223} Both the topic and methodology are akin to Nietzsche's, and Donald's work is helpful to unpack Nietzsche's understanding of the co-evolution of justice and cognition. Furthermore, the work of Katherine Nelson, which builds on Donald's innovations, shows that the development of child cognition broadly follows the same

\textsuperscript{221} There is one reference to \textit{Dawn} to note that Nietzsche recognized the role of chance in development. See \textit{Dynamics and Indeterminism in Developmental and Social Processes}, 45.

\textsuperscript{222} This approach is plainly similar to anthropology but differs in emphasis. It seeks not so much to understand another culture as to mine its myths for insights into how to develop greater creative capacity.
stages of development, which suggests that insight into how one might "educate" creative capacity could be found in historical cognitive artifacts, such as myths.224

Donald’s underlying thesis is that there were three major cognitive transformations producing three uniquely human systems of memory representation interwoven with three layers of human culture. Donald calls the stages mimetic culture, mythic culture and literate culture. A major theme driving this pattern of cognitive development is the progressive externalization of products of human cognition, which allows iterative refinement of representation systems.

Regarding the first major transition, Donald observes that primates have remarkably good episodic or event memory. The human innovation was a revolution in motor skill to use the whole body as a mimetic representational device. This is event-scheme gestalt modeling where body movement becomes a holistic metaphor to imitate or represent events. A critical adaptation was that humans attained a capacity to decontextualize the mimesis from the pragmatic application of the environmental conditioning. Donald calls this self-triggered or auto-cued rehearsal. Moreover, the brain became able to decontextualize the mimesis from the specific movement system, producing within the brain an abstract rhythmic contour. Repeated rehearsal of mimesis externalized in movement enables iterative refinement and, eventually, implicit parsing of the whole. Katherine Nelson argues that human infants, as primates, have pre-established context-free perceptive ability to parse experience which, through emotionally mediated social interaction, gets attuned to parse mimetic gestures. Donald argues that communal rehearsal enables standardization, generalization and variation of rehearsals of the mimetic event-


224 Katherine Nelson, *Language in Cognitive Development: Emergence of the Mediated Mind* (New York: Cambridge University, 1996). Nelson is wise to the pitfalls of the simple formula that ontogeny recapitulates
movement-representations. This enables rhythmic extraction to manifest the pattern in any body movement system, creating a multi-modal modeling system. This enables mimetic self-reference, creating a nonlinear dynamic modeling system, which, as Nietzsche would say, is pregnant with a future.

Self-modeling arises because rehearsal of mimetic representation is a \textit{dynamic} event representation, which enables the rehearsal dynamic to be a representation of the rehearsal itself.\textsuperscript{225} A rehearsed movement pattern is a representation model and so is implicitly a model of a model that can be self-triggered for rehearsal. Multi-modality means the brain can eventually rehearse within the mind without literal movement production. Multi-modality therefore enables an auto-cued, voluntarily accessible self-image. It should be noted that the movement-based event-mimesis modeling capacity is capable of modeling nominative reference, linear dynamics, nonlinear dynamics and self-reference, which will be important in terms of the foundations of creative capacity. Over time, mimetic culture slowly achieved a growing repertoire through iterative refinement, accumulation and a ratcheting of increased nuance. Accumulation could occur because, as studies of language acquisition by apes show, we can learn pre-existing conventional sign systems more easily than we can create them. Propagation is easier than invention.\textsuperscript{226}

The first stage introduces auto-cued mimetic representations that enable nomination by mapping movement (gesture) forms to meaning. (See figure 3.6.) This new capability was supplemental to prior routines of gesture communication. The origin of the mimesis capacity lay

\textsuperscript{225} This is comparable to the LISP programming language in which programming structures are processed as data strutures.

\textsuperscript{226} Again, Nietzsche fully anticipates the need for this methodological caution in section 12 of the second essay of \textit{On the Genealogy of Morality}. 
in social transactions and mimetic capacity is encultured through social transactions. Nelson confirms the continuing importance of early emotionally mediated social transactions to attune a sense of relevance in early stages of the cognitive development of modern humans.

The first stage of development enables the beginnings of a proto-language based on reference truth. The transformation to mythic culture, Donald’s second stage, comes with the emergence of the modeling of word relations. The increased differentiation and scope of gesture-movement repertoire becomes like a case-precedent database from which to inductively support an auto-cued (conscious) recognition of the invention of new “words.” Increasing the granularity of referential articulation leads to a proliferation of word-markers and selective pressure for high-speed neural processing, which appears to lead to phonology as the dominant high-speed movement producer/processor. The pre-established capacity for auto-cued, self-referential, multi-modal mimesis enables representational recursion. The pre-established implicit parsing generates models of the relations of words within models. The implicit discovery of relations among words (and, eventually, morphemes and phonemes) generates hierarchical and recursive word relations. As Deacon notes, cultural selection would favour hierarchical complexity to make the language learnable by developing infant-children. As Deacon further notes, once word relations begin to model linear causal relations in the world, words are no longer directly derived from social-transaction experience. Lexical invention is thus further decontextualized from pragmatic social-transaction experience. It should be noted, moreover, that the word relations are linear, which makes the new coherence-truth language system a less powerful representation.

226 In terms of computational theory, a hallmark of an NP-complete problem is that while invention is beyond the polynomial time class of algorithms, verification of a correct solution can be done in polynomial time. This is highly suggestive that the creative process is in part driven by self-organizing criticality at the neural level.

system than mimesis and narrative in terms of capturing nonlinear causalities. (See figure 3.6.) This is an important point in terms of Nietzsche’s understanding of justice and creativity.

In the second stage, language becomes grammatical. The growing repertoire of the language culture-type enables induction to support an auto-cued (conscious) recognition of the invention of grammatical relations. This in turn enables auto-cued rehearsal of the invention of words by the application of grammatical variation, giving rise to a new explicit, auto-cued thought dynamic. Humans thus attain self-aware, syllogistic word invention and syntactic inferencing. Again, by expanding repertoire and decontextualizing further from social-bodily roots, humans attain self-triggered conscious inferencing and deductive invention. These inventions can then be tested for pragmatic quality within the linguistic market, advancing the process of cultural selection.

Donald notes that non-grammatical lexical invention remains a neurological puzzle. This is the process that incorporates the implicit, social-bodily crafted sense of relevancy criteria to test lexical invention. A rudimentary capacity for this is required to test the products of grammatical invention. Non-grammatical invention re-parses repertoire subsets and hierarchies to produce revised meaning-form-value mappings with respect to pragmatic routines. This might be called contextualized lexical invention, in contrast to grammatical invention. This thesis, in the chapter “Legal Reasoning,” postulates that contextualized lexical invention is the essence of legal reasoning and that this is a nonlinear process of self-organizing criticality.

The repertoire of the language culture-type can then accelerate its standardization, refinement and accumulation. Word inventions are continually tested on the linguistic market, with nonlinear lexical inventions having a higher probability of acceptance (at least prior to the advent of grammar-worshipping literate culture). Word markers and their meaning relations are
accumulated within the culture-type and propagated (encultured) into individuals through evolving paradigm narratives (myths) as implicit vehicles for enculturation. Mythic enculturation exploits humans' fundamental, exceptionally good event memory as a mnemonic aid to achieve what Nietzsche calls cultural "endurance." (See figure 3.6.) Nonlinear, contextual lexical invention enables implicit multi-functional integration within forms that have now been freed from the requirement of literal, associatively conditioned, nominative representation. Creative invention of myth can then serve as a means of structuring early, formative social-transactions and implicitly regulating more complex, stable architectures of social relations.

The second stage gives rise to a conscious effort to improve modeling dynamics—science. Auto-cued nomination leads to a conscious search for new experience-differentiating words. The biblical Adam has been born. As noted already, implicit, inductive parsing leads to auto-cued use of grammatical word relations to generate new words consciously and to do syntactic reasoning that models linear causal relations consciously. A syntactically coherent model that achieves representational completeness within a domain enables total abstraction from the social-experiential transactions and their mimetic neural representations. Abstract models can now be auto-cued for conscious, calculative manipulation and inferencing can be implicitly premised on the completeness of the model. Abstract modeling enables abstraction of self-image from the formative social transactions that are emotionally mediated with bodily needs. This process of decontextualizing from the roots of cognition in social living and body process enables formation of the abstract concepts of individual and soul. However, while the task of word invention is by this stage consciously attempted, nonlinear creativity is still an implicit and necessary skill. Moreover, mythic enculturation remains implicit.
The cumulative advance of the second stage creates selective pressure for greater word-marker production, recognition and refinement. It also gives rise to a growing need for better mnemonic, computational and enculturation technology. The fast internal decay of working memory becomes a severe bottleneck, as well as mnemonic capacity.\(^{228}\) The growth of the culture-type also becomes limited by representational capacity, with phonology providing the greatest degree of refinement and communicative bandwidth.

This important constraint on the growth of culture-types puts selective pressure on societies to generate mnemonics and other cognitive strategies to enhance capacity for calculation and creativity. Cultural selection would then favour the development of myths for myth making. Nietzsche’s early project, which he announced in *The Birth of Tragedy: Out of the Spirit of Music*, was to reinstate through music and opera (mimetic movement and narrative), myths for making myths.\(^{229}\) In this context, it is clear that Nietzsche looked to ancient myth and ritual for insight as to how to cultivate an individual’s capacity to perform language-transforming lexical invention. Nietzsche sought to create new mythic and mimetic ritual as myths for myth making. Nietzsche called this “Dionysian” knowledge, and for Nietzsche, the “tragic myth” is the myth that expresses Dionysian knowledge in symbols.\(^{230}\) For Nietzsche, Dionysian knowledge erupts from ritual, dance and the “music” of narrative gestures.\(^{231}\) Indeed, Nietzsche sought to


\(^{229}\) See especially *The Birth of Tragedy*, section 17. Nietzsche uses Greek allusion in *Ecce Homo*, “The Birth of Tragedy,” section 4, in which he refers to the necessity of counter-Alexanders who will retie the Gordian knot of Greek culture. Graves explains that Alexander’s cutting through the Gordian knot symbolizes the political victory over the Eleusinian Mystery-cults, King Gordius being a devotee of the Orphic Dionysus. See Robert Graves, *The White Goddess: A Historical Grammar of Poetic Myth* (New York: Noonday, 1975) 12 and 461. Again Nietzsche uses imagery that connects the transition from Bronze Age to Iron Age with the decline of the political power of matricentric shamans.

\(^{230}\) *The Birth of Tragedy*, section 16.

\(^{231}\) Sexuality should be added to this list. The role of sexuality is discussed below.
achieve the Dionysian effect in his readers through his gesture-based writing style. The crisis of modernity, for Nietzsche, is that the completeness presumption of linear, grammar-based lexical invention and inferencing undermines the Dionysian capacity for mythic reinvention and, therefore, cultural adaptation. (See figure 3.5.) With Donald's next stage of cognitive-cultural evolution—literate culture—rational thinking comes to predominate. Nietzsche seeks to solve this crisis, in part, by looking back for evidence of myths to promote the capacity to create myths. The reason this Neuro-Mythic Archeology could be effective is that cultural selection would favour culture-types that spontaneously evolved myths to enculture the capacity to adapt myths creatively to accommodate evolving functional constraints. One would therefore expect enduring, adaptive mythic cultures to have had myth-making myths woven into their foundational myths. This thesis postulates that Nietzsche sought, found and exploited these myth-making myths for his own personal development and made them an implicit theme of his works. In particular, this thesis postulates that the Eleusinian Mysteries were for Nietzsche a prime source for these myths of myth making.  

According to Donald, the essential event in the transformation to literate culture was the externalization of representations into enduring media. This externalization enables explicit, communal engineering of the representational model, which in turn enables cultural selection to achieve iterative ratcheting and accumulation. (See figure 3.6.) Donald notes that the functional demands of literacy fundamentally alter neural architecture, which should be expected to occur in

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232 This claim is explored in the chapter "Para-Conceptual Rhetoric."

233 The effect would be more pronounced in myths from areas where there was a continual confluence of cultures and, therefore, a greater selective pressure for mythic adaptability.

view of Deacon’s findings on the holistic, path-dependent nature of brain development, discussed above. With new working-memory demands for visual-symbol processing, new neural architecture is required to promote the downloading of explicit represented knowledge. Externalization relieves the selective pressure for representational mnemonics and leads to externalization of indexing as well, which can be expected to degrade the performance capacity for nonlinear, lexical invention and mythic creation.

More importantly, the growing repertoire triggers an explosion in the capacity for nominative representation and the complexity of enduring, codified social relations. The explosion in the capacity for enduring rational coherency motivates the externalization of syntactic (linear) inferencing. This important development Donald associates with the Greeks. Nietzsche specifically attributes the effective promulgation of this development to Plato, through the literary figure Socrates. Externalization of calculation enables communal verification, leading to calculative efforts of greater magnitude, hierarchy and an ever-accelerating pace. There is a ratcheting effect in communal rational skills, culminating in the development of computers where the entire calculative dynamic has been externalized. The advent of computers dramatically reduces the selective pressure for internalized computational and mnemonic skills.

The increasing power of this rationalization eventually produces a growing illusion of pan-scopic completeness of decontextualized rationality to model reality fully. (See figure 3.6.) In terms of educational goals, fundamental pre-rational skills—the entire left side of figure 3.6—are downgraded and taken for granted. Cognition is totally decontextualized, obscuring its origins in movement and emotionally mediated social-bodily transactions. It obscures the need for developing the capacity for nonlinear creativity, which presumes nuanced movement modeling, a

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235 The Birth of Tragedy, section 1: “the sounds of the chisel-stroke of the Dionysian world-artist rings out the cry of the Eleusinian Mysteries...” See also “The Hammer Speaks” as the epilogue of Twilight of the Idols, which closely
solid foundation of early emotionally mediated social-bodily transactions, internalization of sets of mythic narratives, cultivated mnemonic skills, and cultivated computational skills.

With the rationalist paradigm of cognition comes the dominance of download learning, as the greater part of education is spent absorbing explicit cultural knowledge that has already been accumulated. Direct, objective, rational communication in well-defined concepts is favoured as enabling the “rule of law,” leading to the atrophy of skills to propagate knowledge not represented by concepts through narrative incorporation and inductive discovery. Now grammatical invention and rationality gain authority over pragmatic acceptance within the linguistic market, and rationality attacks the legitimacy of myth. For Nietzsche, this leads to the hyper-reification of social forms and spontaneous cultural selection in favour of psychologically disciplining mythic forms in the form of ideals. For Nietzsche, Plato moved the history of cognition from the Bronze Age of mythic malleability into the Iron Age of conceptual rigidity.

Nietzsche’s theory of justice and his rhetorical strategy as a philosopher-legislator now become clearer in purpose. The logical incompleteness of rationality is the cornerstone of Nietzsche’s entire philosophy. (See figure 3.6.) The presumption that rationality and the skills of rational thinking can generate a complete model of reality has moved humanity from the Bronze Age into a dangerous Iron Age. This cognitive Iron Age is undermining and endangering the roots of creativity, which self-directed cultural selection takes for granted. As the Iron Age nears its own destruction by the perfection of its trend away from mythic, narrative, gestural and ritual-based knowledge formation, the next stage in the development of human cognition should be the self-aware cultivation of creativity within individuals—what Nietzsche calls “education.” (See figure 3.6.) In terms of Nietzsche’s theory of justice, this education is a pre-requisite for his...
colleges of cultural physicians. They must be of great order of rank to be effective as mythic poets—shamans—who become the engine of cultural selection in response to matters such as the impact of capitalism on child development or the accelerating impact of culture on the environment.

Nietzsche defines “just” in a manner that produces three distinct stages of justice. For Nietzsche, “just” means a partial restriction on oneself to enable greater units of power so as not to live in the present at the expense of the future. A partial restriction is an enculturation of neural rigidity that enables greater units of communal power, but in a way that simultaneously promotes nonlinear self-modification by individuals. The three stages of justice for Nietzsche, then, are mythic, rationalist and creative, which relate to the evolution of human cognition as shown in the following figure. (See figure 3.6.) Nietzsche therefore considers himself and Plato to be the two pre-eminent philosopher-legislators of the human species. With The Republic and Socrates, Plato hammered rational justice into the mythic foundation of modernity; and with Thus Spoke Zarathustra and his other writings, Nietzsche sought to hammer in a new mythic foundation by externalizing the myths of myth making to launch human cognitive evolution into a qualitatively distinct phase.
The preceding discussion shows that Nietzsche’s theory of justice, to this point, does not involve sociobiology. Likewise, Nietzsche’s reliance on myth and general turn toward un-conceptualized body-knowledge is a plausible strategy for finding means to educate one’s neural capacity for creative inventiveness. Nietzsche’s turn away from logical positivism toward myth and body is neither sentimentality nor nihilism. Indeed, there is arguably an urgent need to enhance cultural adaptability as the rationalist myth undermines the preconditions it takes for granted. Nietzsche’s communitarian ambitions depend on the cultivation of highly creative individuals who can work with the complex foundational myth structures of modern society.\footnote{One can view “ideology” neutrally as the psychological “programming” of a society to prioritize and remain focused on the pragmatic problems of the day to the exclusion of counter-productive issues. For a view of ideology}
This manifests Nietzsche’s profound concern to enable all individuals to overcome biological
determination as much as possible, and in this sense Nietzsche was fundamentally “...an honest
animal, as he has richly betrayed, moreover a democrat...”  

Was Nietzsche “honest”? As the preceding discussion suggests, Nietzsche must have
understand his task as philosophical legislator to be to undermine the Platonic stage of cognitive
history and rational justice. This chapter has argued that Nietzsche therefore administered his
infamous “no doer behind the deed” poison as an attempt to undermine the free-will myth of
morality. Nietzsche must have thought that by initially encouraging us to reduce human behavior
to the intersection of cultural and biological determination, this would eventually shift the agenda
toward seeking means to strengthen each individual’s capacity to overcome such forces.
Nietzsche’s “no doer behind the deed” poison is therefore a “noble lie” in the Platonic sense.
Nietzsche is “honest” in the sense of providing ample esoteric markers to confirm that the poison
was in fact intended as poison. Nietzsche, in the dual-persona passage in section 9 of the first
essay of On the Genealogy of Morality, therefore reminds us that the free-spirit voice is being
“honest” but, speaking as a canny social psychologist who gently rebukes the naïve free spirit,
Nietzsche reminds us that shamans may have to use noble lies to overcome established
ideologies.

Nietzsche gives numerous indications that he considered Plato a noble liar as well. One
such passage is Dawn section 250—Night and Music. In the context of sections 215-256 it is
clear that by “music” Nietzsche means esoteric text and by “ears” he means a reader who

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as an ordinary mechanism of human thought, see Jack M. Balkin, Cultural Software: A Theory of Ideology (New
237 On the Genealogy of Morality, I, 9.
238 Nietzsche explains “honesty” in Dawn, especially sections 255, 447 and 456. See also Beyond Good and Evil
section 227 which makes honesty the highest virtue of a “free spirit” but allows for the use of “devils” to aid the
“god.” Nietzsche’s esoteric style is discussed in the chapter “Para-Conceptual Rhetoric.”
“understands” esoteric messages buried one, two or more levels deep. In section 250 Nietzsche refers to the ear as an organ of fear—heretics like Giordano Bruno were burned at the stake—which “could have evolved as it has only in the night and twilight of obscure caves and woods, in accordance with the mode of life of the age of timidity, that is to say the longest human age there has ever been: in bright daylight the ear is less necessary. That is how the music acquired the character of an art of night and twilight.” Nietzsche, of course, writes his night music in the “twilight of the idols.” In the context of this section of Dawn and Nietzsche’s style of esoteric techniques, the references to “cave” and “woods” are unmistakable references to Plato and the Eleusinian Mysteries. In Beyond Good and Evil, Nietzsche observes that nothing had caused him ponder on Plato more than the little fact he died with a volume of Aristophanes under his pillow. In the context of Nietzsche’s understanding of the history of cognition and justice, Nietzsche must have seen Plato as administering a necessary poison in order to make grand social architecture possible. Plato legislated a multi-millennial blood-stage psychology that made Rome and modern civilization possible. Nietzsche, it seems, thought Plato knew better. Plato was a Dionysian poet who paradoxically condemned tragic art in favour of Apollinian, and he put a volume under his pillow as a sign that he was an Eleusinian initiate. Plato must have understood that the completeness fantasy of calculative rationality was a blood stage that society must go through, and then it must reinvigorate its ritual-mythic roots. However, Plato could not know how long the blood stage should last, and therefore left Aristophanes under his pillow as a

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239 See especially Dawn section 255.
240 See Beyond Good and Evil, section 25.
242 Beyond Good and Evil, section 28.
243 The Birth of Tragedy, section 14.
sign for the next great philosophical legislator. Nietzsche, of course, considered himself that next
great philosopher-legislator.\(^{244}\)

Nietzsche’s theory of justice, Neuro-Mythic Archeology (especially the Eleusinian
Mysteries) and rhetorical strategy do delve, however, into the realm of genetic differences
between male and female sexuality. Here there is cause for concern about Nietzsche falling into
simplistic socio-biological or adaptationist conclusions. In terms of Nietzsche’s use of myth, one
must be careful not to overstate the case, as the pagan mythic structure uses goddess images to
represent the final, material and efficient causes in the causal paradigm of self-organizing
criticality. Nonetheless, it is clear from Nietzsche’s writings and his enthusiasm for August
Strindberg’s *The Father*, that Nietzsche both observed male demonism as an existing fact to be
reckoned with and as instinctively present due to adaptationist pressure from the dynamics of
sexual selection.\(^{245}\)

As noted above, a corollary of male demonism is the greater suitability for women for
"women’s work," as West calls it. It should be noted that Nietzsche’s theory of justice calls for
far greater value to be accorded to women’s work regardless of the issue of male demonism. It is
one thing to say the burden of cultivating the preconditions of creativity is downgraded by the
rationalism of “Enlightenment” thinking, which prefers “objective” to “subjective” knowledge; it

\(^{244}\) This should be qualified to note Nietzsche’s implicit recognition of Marx as another great philosophical legislator.
In the case of Marx, socialism was the noble lie to break the grip of capitalism. In an important sense, Marx made
Nietzsche’s project possible and Nietzsche seems to have recognized this. Marx pierced the veil of the “Horatio
Alger” economic free-will myth; Nietzsche went after the psychological free-will myth. Indeed, it seems that, like the
ancestors, Nietzsche saw history in terms of saeculum cycles and saw the saeculum that would culminate in World
War II as Marx’s (labour versus capitalism). Therefore, Nietzsche wrote his works to be born posthumously in the
following saeculum—the current one (gender versus capitalism). An argument on the relationship between Marx and
Nietzsche goes beyond the scope of this thesis and is not set out here. At the textual level, Nietzsche implicitly
identifies Marx in *Dawn* section 457 as an esoteric philosopher and tells us he will remain totally silent on Marx,
which he does, even though Nietzsche manifestly owed a substantial intellectual debt to Marx’s critical methodology.
Nietzsche’s silence on Marx is deafening.

\(^{245}\) This point is dealt with in the chapter “Nietzsche’s Horrific Thought”
is another thing to say women are inherently more trustworthy not to abuse the discretion inherent in the cultivating task.

Nietzsche means to say women are trustworthier. Given Nietzsche’s complete anticipation of modern critique of adaptationist reasoning and his manifest brilliance as a psychologist, his position warrants serious empirical investigation. Indeed, Nietzsche presents male demonism as a falsifiable, scientific hypothesis. Nietzsche claims to have empirically observed the psychological phenomenon, and at least some strands on modern science supports his claim that its origin lay in competing male and female interests in sexual selection.\(^{246}\) Wrangham and Peterson show how male demonism appears in ape species, with its manifestation varying according to the political economy of the niche of the specie. Whether or not the adaptationist claim as to origin is scientifically falsified, widespread evidence of male demonism in human practice implies that safeguards should be explored. Nietzsche’s position invites the scientific question as to how it might be possible developmentally to overcome the subliminal tendency of male demonism, which appears to develop in the absence of strategic nurturing to overcome it. Even if the instinctive component is a weak factor in development, failure to strategically address it allows it to become amplified in the same sense Deacon describes how language spontaneously evolves to amplify modest colour processing biases at the neural level. Indeed, Nietzsche implicitly argues that rationalism has just such an amplifying effect on male demonism, and that rationalism is neurotically powered by culturally sexualized male demonism—the “Don Juans of knowledge.”\(^{247}\) A scientific approach to this question would, for example, seek to determine from what part of the brain male demonic impulses originate, at what


\(^{247}\) See, for example, *Dawn 327, Joyous Science 60, 62, 363,* and *Beyond Good and Evil 194, 238*
stages of child development they begin to manifest themselves, and whether nurturing strategies can short-circuit their development so as not to taint creative discretion insofar as the brain can subliminally detect windfall opportunities regarding reproductive economics. For example, if the hunter-gatherer division of labour is an example of subtle male demonism, then it shows that the subliminal intelligence can be quite discerning and continually ahead of the capacity of objective knowledge to police discretion. Given such evidence, it would be anti-empirical and irresponsible to assume equality. Indeed, as previous examples relating to self-esteem, girls’ abilities in math, colour differentiation in language, and autism show, such denials can be counterproductive.

The same may be said of Nietzsche’s theory of justice in general—it is an empirical claim that is falsifiable through scientific methods being refined in the science of self-organizing criticality. In contrast, totalizing theories of justice that silently impose a completeness claim are not empirically testable; in their best light they are context-dependent strategies intended as noble lies. The universalization of such theories of justice eventually locks the community into a blood stage and so forecloses further personal development (they are anti-democratic) and disables communal adaptivity. In this respect, Nietzsche’s open-ended theory of justice accords well with Cornell and Derrida. However, Nietzsche’s concern with male demonism and its cultural amplification and reification appears to have convinced Nietzsche that a more psychologically powerful rhetorical strategy was required, particularly regarding gender hierarchy. To appreciate Nietzsche’s position, one must distinguish instinctive male demonism from its cultural manifestation in Apollinian sexuality.

Cornell builds on the work of Jacques Lacan to link a neurotic need for positivist theories and immutable ideals to a male need for certainty and potency to replace lost omnipotence of
mother love during the cognitive crisis of the Oedipal passage. Nietzsche understood the full implications of patricentric sexuality, which can be inferred from, among other passages, his interpretations of Don Giovanni, The Oresteian Trilogy ("the ancient misogynist Aeschylus") and Hamlet. However, it is equally clear that Nietzsche considered this outcome to be culturally contingent. In section 75 of Beyond Good and Evil, he writes "The degree and kind of a man’s sexuality reach up into the ultimate pinnacle of his spirit." This both recognizes the fundamental importance of patricentric sexuality and implies it need not be so. Nietzsche is more explicit in section 194 of Beyond Good and Evil and in sections 68-75 of Joyous Science where he suggests that men’s and women’s sexuality can be re-made and the gender hierarchy reversed.

Nietzsche understood matricentric Dionysian sexuality as the alternative, both as a means to avoid the blood-stage epistemology of patricentric, Apollinian sexuality — "And might not one add that, fundamentally, this world has never since lost a certain odor of blood and torture? (Not even in good old Kant: the categorical imperative smells of cruelty.)" — and as means to manage the non-culture-specific instinctive male demonism.

The essence of a Dionysian solution to the Oedipal passage is for the male child to accept that he can still fundamentally depend on his mother’s affections (to overcome fear, including fear of death) even though in some modes of her being she has sexual relations in which the child cannot participate. Within the Cartesian ontology of subject ego that implicitly makes the decontextualized grammatical “I” a god, the mother becomes guilty and an unreliable source of mother-love, so omnipotence must be replaced by eroticized male authority based on

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248 Cornell, Philosophy of the Limit, 172-173.
249 Dawn, section 193.
251 This point is developed at length in the chapters "Nietzsche’s Horrific Thought" and "Para-Conceptual Rhetoric."
unimpeachable ideals. To alter the outcome of the Oedipal crisis Nietzsche must attack the free-will guilt paradigm so the child need not judge the mother guilty and unreliable. Indeed, in some children’s myths, such as *Little Red Riding Hood*, an anti-Cartesian understanding of the self is promoted by having the wolf swallow the grandmother and child, with the woodsman later cutting open the wolf and releasing the grandmother and child, miraculously intact. The psychological function of the story is apparent from the following remark of a three-year old child, after trying the patience of her mother, “Daddy, there is a wolf in the bed. Cut it open and let mommy out!” For Nietzsche, the wolf functions as a Homeric God who humanely bears the guilt instead of just the punishment. The mother is absolved from guilt for her lapse in the provision of unconditional mother love—it was the folly of a possessing wolf-god—so the child

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254 Erich From provides a clear description of the Oedipal crisis in a way that recognizes it as dealing with what the child perceives as a threat to the child’s source of maternal love with either patricentric or matricentric solutions. See Erich From, *Love, Sexuality and Matriarchy: About Gender* (New York: From International, 1997).

255 “Mother” means primary care-giver, who is usually female. The Oedipal passage is simply one of several stages of weaning. Upon becoming aware of his or her own sexual feelings and the lack of this plane of bonding with the primary care-giver, the child must adjust his or her model of power dynamics to assuage the trauma of an increased sense of separation and vulnerability. It is unnecessary to project dark desires of incest and killing the father into the child’s immature mind with consequent guilt feelings to explain the Oedipal crisis. Moreover, such projections make it conceptually tortured to account for situations where the primary care-giver is the same sex as a heterosexual child or the opposite sex of a homosexual child. Jack Morin (*The Erotic Mind*) shows how adult fantasy structures (both heterosexual and homosexual) reveal how, when children become sexually aware, family power relations and attitudes “imprint” into enduring erotic structures. That is, the child’s immature mind uses emerging sexuality as the means to resolve the trauma of the weaning process. Freud’s psychoanalytic approach makes the serious methodological error of projecting a mature form of moral consciousness into the child, which the nonlinear dynamic systems approach of Nietzsche (*On the Genealogy of Morality*, II, 4) and Nelson exposes as fallacious. Indeed, the psychoanalytic approach systematically back-projects rational agencies to invent an “unconscious” and so forth. This is symptomatic of the “modern” tendency to model all of reality in terms of language-based rational agency. The mimetic and mythic narrative levels of neural cognition cannot be ignored, so the psychoanalytic movement invents “hidden” agencies that “speak” indirectly through distortions in conscious-level rationality, but overlooks direct communication and cognition through mimesis and, to a lesser degree, mythic narrative. (There is some attempt to use dream narratives and mythic analysis, but this use is likewise tainted by back-projection. Morin’s work shows that erotic fantasy narratives are extremely valuable empirical data without the need for such back-projection.) Back-projection by the psychoanalytic approach does both too much and too little. Mimesis and narrative cognition lack the full intentionality of rational consciousness (so presumptions of agency invite unwarranted inferences), but mimesis and narrative cognition are capable of representing nonlinear causalities and are grist for nonlinear lexical invention (which the linear conscious cannot do). Put bluntly, psychoanalysis is unscientific. For this reason, this thesis uses the term “Apollinian” sexuality instead of “Oedipal.” Indeed, the use of “Oedipal” itself is a mythic corruption by Freud because, as Nietzsche notes, Oedipus is a mask of Dionysus. (*The Birth of Tragedy*, section 10.)

256 In *Orestes*, Athena betrayed the mother and judged in favour of a patricentric, Apollinian sexuality. Hence Nietzsche judges Aeschylus as a “misogynist.” See *Dawn*, section 193.

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257 *On the Genealogy of Morality*, II, 23.
can be mythically encultured to “condemn the fault and not the actor of it.” This anti-Cartesian outlook prepares the child for the Oedipal crisis to accept a time-share role in the family love triangle without the need to restore a primal sense of security by eroticizing logical certainty and other authoritarian power relations that could control a “guilty” mother. Interestingly, the “Enlightenment” corrupters of children’s myths purge the mythically essential “violent” and “fantastic” wolf-transitions, reflecting how rationalist education erodes the mythic intelligence still evident in a three-year old.

Nietzsche therefore sought to undermine free-will, guilt-based morality and grammar-based subject ontology. However, for Nietzsche this was not enough. Nietzsche understood that as a writer he had to undermine Apollinian sexuality within the reader and convert the reader to Dionysian sexuality. Nietzsche attempted this in two ways. First, Nietzsche understood that neural ego-death and rebirth was the essence of the bodily process of creativity. Nietzsche therefore sought to administer a “slow cure” to his Apollinian readers by presenting his philosophy in a number of stages or levels. For Nietzsche, by taking his readers through a long series of progressively larger, creative self-transformations, he hoped to erode their patricentric, Apollinian sexuality and dispose them toward matricentric, Dionysian sexuality.

In terms of writing technique, Nietzsche appears to have deliberately layered his writing in the same manner that Terrence Deacon claims language itself is structured. Deacon explains that the so-called “critical period” of a child’s acquisition of grammar may be explained in part by the child’s immature short-term memory. If the language itself is structured hierarchically in

\[257\] For Nietzsche, Plato used the literary Socrates to turn youth to an Apollinian sexuality that eroticizes the will to truth to overcome fear of death. See *The Birth of Tragedy*, section 13: “But that he was sentenced to death, not exile, Socrates himself seems to have brought about with perfect awareness and without any natural awe of death. ...his drowsy table companions remain behind to dream of Socrates, the true eroticist. *The dying Socrates* became the ideal, never seen before, of noble Greek youths....”

\[258\] *Dawn*, section 462.
layers of syntactic-semantic coherence, with the most general levels being the simplest and most relevant to tasks that highly motivate a child at that stage of development, then impaired short-term memory can paradoxically help the child inductively assimilate a grammar. Deacon reasons that when the child is learning to process syntax at a particular level in the developmental hierarchy, the signs from deeper levels of grammatical relations generate what Deacon calls “interference effects.” If the child attempted to learn the grammar inductively from full utterances, the task of induction would be computationally overwhelming. Paradoxically, poor short-term memory therefore helps the child by dropping signs that seem less relevant. Simpler patterns at general levels are emphasized by parallel constraint systems such as prosody, nursery rhyme structure (rhythm, rhyme and tonality) and so forth. Nietzsche’s “staged writing” works on the same principle, overloading the over-precise reader with the “interference effects” of contradictions and stray imagery. Access to the full content of his philosophy requires passage through several levels of selective reading, and until then, the reader does not have “ears” for Nietzsche’s “night music.” Indeed, in *Dawn* section 255 Nietzsche tells his reader that more than two ears will be required. As a parent uses nursery rhymes to assist a child to learn grammar inductively, Nietzsche uses parallel constraint systems—rhythms of voice, pronoun inclusion or affect tonality, Greek allusion, pagan canonical forms—to reinforce patterns against the background “noise” of the text. By requiring a major self-transformation to move from level to level...

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260 For example, “no doer behind the deed” flatly contradicts Nietzsche’s critique of the myth of an “unfree will” in *Beyond Good and Evil* section 21. The contradiction, however, is resolved. See the analysis earlier in this chapter.
level, Nietzsche both trains his reader toward Dionysian sexuality and an interest in matricentric myths and keeps his readers from the key to the inner room of his philosophy until they are both disposed to accept it and responsible to use it.

Nietzsche’s second rhetorical attack on Apollinian sexuality was to present an alternative resolution to the Oedipal crisis. For this, Nietzsche relied on the pagan myth of the Queen and two consorts. In this mythic structure, the hero accepts that the Queen will cyclically shift the attention of her affections between the hero and the anti-hero. The hero understands that the seasonal loss of affection is a necessary and temporary phase that manifests a deeper commitment to life-enhancing growth. This solution promotes an eroticized self-subordination that suits both Nietzsche’s creativity agenda and his concern to cultivate cultural physicians disposed to self-sacrifice for life-affirming principles and defer to the discretion of elite females.

Nietzsche, of course, could not present such a heretical philosophy or solution directly and be taken seriously. Granting his hypothesis regarding creativity and Dionysian sexuality, his strategy is ingeniously crafted. Nietzsche esoterically imbedded his positive matricentric agenda within the “interference effects” of the text. No one would have “ears” for the matricentric elements until they had undergone several deep self-transformations and, by

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261 See Beyond Good and Evil section 295 where the “genius of the heart” knows how to “descend into the underworld of every soul” to guess “hidden and forgotten treasures” of “every speck of gold that has long lain buried” and “from whose touch everyone goes away richer...” Thus, every act of creativity induced by Nietzsche brings out a speck of gold—a small dose of long-hidden Dionysian sexuality.

262 The hostile academic reaction to J.J. Bachofen and to Nietzsche’s own book The Birth of Tragedy made that plain enough. For further discussion, see the chapter “Nietzsche’s Horrific Thought.”

263 Given that the Oedipal passage can be expected to be more pronounced for a first-born male, the work of Frank Sulloway may be cited in support of Nietzsche’s contention. Frank J. Sulloway, Born to Rebel: Birth Order, Family Dynamics, and Creative Lives (New York: Pantheon Books, 1996).
hypothesis, become more disposed to accept and have “ears” for the next levels of the philosophy.264

Nietzsche also exploited the craft of “spells,” “curses” and “satire” to hide his matricentric elements in plain view. The previous chapter “Legal Reasoning” set out in some detail how legal reasoning evolves from to fuse to underlying value hierarchies. In the dynamics of legal argument, each side seeks words that alter which term serves as the base concept to be adjusted to context, thereby shifting the onus and burden of proof. A “spell” is an enthralling or catchy rhetorical form that subliminally primes the hearer with an associated value ranking. A “curse” strategically seeks to undermine a spell. “Satire” undermines either a spell or a curse by mocking its artificiality as rhetorical form or through use of wit to assuage the breach in psychic order that the spell or curse otherwise presents as an horrific threat to the presumed Apollinian completeness.

Nietzsche’s understanding of this heretical craft can be inferred from his devious use of the “whip” trope. Nietzsche’s sister made him realize that his Apollinian readers would be locked into a powerful gestalt that would dispose them to presume subliminally that an ambiguous reference to the use of a whip would mean use by a man on a woman and not vice versa.265 Nietzsche invites a misogynist misreading in order to bring his Apollinian readers on board for the journey—Thus Spoke Zarathustra is a book “for all.”266 Only when the journey has

264 Chapter Five—“Nietzsche’s Horrific Thought”— argues that Nietzsche had an esoteric matricentric agenda. Chapter Six—“Para-Conceptual Rhetoric”—argues that Nietzsche wrote esoterically and examines some of the techniques.

265 A common, by now stale, riddle exploits this gestalt. “A boy is in a car accident in which his father is killed. He is rushed to the hospital. The surgeon enters and says “I cannot operate on this boy, he is my son.” How is this possible?” The riddle worked because of the subliminal, gestalt-induced disbelief that the mother could be the surgeon.

266 The subtitle of Thus Spoke Zarathustra is, “A Book for All and None.” This might be read as meaning the book was designed as a training manual for any level of reader, but contains an esoteric philosophy for which no one was yet ready.
progressed along in its effect will the reader begin to notice that Nietzsche was carefully ambiguous and perhaps intended that the woman was to use the whip.

In Nietzsche's esoteric style, he always provides image-confirmation of his esoteric substantive points. Nietzsche again exploits the heretical craft of spell-curse-satire with the infamous photograph of Nietzsche and Paul Rée pulling a wagon in which sits Lou Salomé holding a whip. This photograph was considered uproariously funny in its day, subjecting Nietzsche to ridicule among the Wagnerians and, based on my recent participation on discussion groups on the Internet, is still considered hilariously funny by modern readers. In the spell-curse-satire logic, the photo is representative of the myth of the Queen and two consorts and must have been intended as a curse that inverts the values of the biblical version of the Eve-Adam-serpent ménage-à-trois. However, Nietzsche learned from his sister's strong "whip gestalt" that strongly Apollinian readers would instead experience the photograph as "satire" of Nietzsche's intended "curse." Only after the Apollinian sexuality had been undermined and the underlying value ranking inverted would the reader "hear" the image as a curse and not satire. Nietzsche could thereby ensure his work would get by his present-day censors to become "born posthumously." 267

It is crucial to understand this rhetorical technique to understand fully Nietzsche's strategic application of his theory of justice. Nietzsche was obviously impressed by Plato's use of Aristophanes as a pre-programmed, posthumous "wake-up call." Likewise, Nietzsche would not have wanted to undermine his "poisoning" of the free-will myth with "no doer behind the deed" until it had had sufficient effect. Nietzsche's test for this would be whether the reader had sufficiently internalized the matricentric view such that the pagan mythic patterns became internalized enough for the structure to become apparent in the first two essays of On the

267 "Wouldn't an antithesis be a more fitting disguise if the shame of a god were to walk abroad?" Friedrich Nietzsche, Beyond Good and Evil, tr. Marion Faber (Oxford: Oxford University Press, 1998) 38, section 40.
Genealogy of Morality. Only then does Nietzsche allow the reader to “hear” his theory of justice. Nietzsche elsewhere in his works denigrates concern with state and politics as unworthy of his readers, thereby keeping them from a premature concern with issues of justice and state. Nietzsche’s theory of justice requires a college of cultural physicians who have fully internalized Dionysian sexuality and the eternal recurrence doctrine. Only with these principles psychologically in place would Nietzsche want to suggest any state institutions.

Nietzsche likewise begins the journey “for all” with what appears to be extreme individualism. Again, Nietzsche must ensure his readers have a psychologically ingrained respect for the sanctity of the individual and humility in pretending to understand another individual. This explains his sustained attack on “pity,” which presumes to understand the suffering of another. Nietzsche is adamant that each individual is the best person to develop and understand his or her own task. Nietzsche must root out arrogance in its most sublimated, compassionate form—pity. Then, and only then, does Nietzsche want his readers to understand that the task is to be fundamentally communal, as dialectic between cultural selection and personal selection. Otherwise, the unchecked power of the state would presume to dictate personal development and descend into anti-democratic tyranny. On the other hand, Nietzsche’s sustained attempt to develop a critique of decadence is intended to generate better criteria to discern bad faith abuse of the privilege of personal autonomy. Nietzsche, in this sense, fully accords with West’s concern to redraw public/private distinctions to intervene to rehabilitate “bad connections” in what is now considered the private realm. Finally, Nietzsche’s passages on “free death” must be interpreted in this way.
Nietzsche’s dialectic of community and individual is reflected in a passage of *Twilight of the Idols* regarding the terminally ill. Nietzsche suggests that doctors should point out the shamefulness of staying alive and draining community resources. This prescription is subtle. Nietzsche’s communitarian philosophy recognizes other individuals as persons who cannot be fully understood. It follows that their task and potential as co-contributors cannot be fully understood. One cannot know how another, however weak they may seem, might contribute to the task of justice. Therefore, no one can presume to end the life of another. Nietzsche has doctors minister advice to the ill to shield them from family, who can have conflicting economic interests. The doctors, on the other hand, have an economic interest to sustain the life of the patient, so Nietzsche has subtly structured the prescription so that conflicts of interest work in favour of the self-determination of the patient. In any case, the patient decides whether his or her concern with life-affirming principles favours voluntary death. Dionysian sexuality favours self-sacrifice in such situations.

Nietzsche’s theory of justice and state, substantively, provides a strong critique of capitalism and its effect on both human development and the environment and a constructive solution toward building a life-affirming community.

Nietzsche ultimately confirmed his matriarchal solution to the runaway logic of capitalism using the whip image, pagan myth, and Wagner.

Nietzsche provided two striking visual images, both of which involve a whip. The first image is the Salomé-Rée-Nietzsche photograph. In writing to Georg Brandes by letter dated May

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268 *Twilight of the Idols*, “Raids of an Untimely Man,” section 36. It should be noted that *Twilight of the Idols* is structured in pagan canonical form and the “Raids” are in the season of the Crone’s charge. This architecture gives notice that Nietzsche’s “Raids” will be one-sided, strategic attacks that would be qualified from a fuller perspective.

269 Based on the second essay of *On the Genealogy of Morality*, Nietzsche would qualify this to say, in general, that killing might be justified where the survival of the community is at stake. It is hard to imagine this ever applying in the case of the terminally ill. For a community of sufficient strength, Nietzsche was plainly against the death penalty.
4, 1888, Nietzsche responded to Brandes’ request for a photograph by noting his general reluctance to have his photo taken.\(^2\) This suggests Nietzsche was singularly excited about posing the Salomé-Rée-Nietzsche whip photograph and that he meant to keep that image singular. The second striking whip image is the event of Nietzsche’s “breakdown.”\(^2\) The reported event is that Nietzsche witnessed a tired carriage horse being whipped by a coachman. Nietzsche intervened by throwing his arms about the horse, weeping and then falling unconscious. This is the perfect image for Nietzsche-the-philosopher self-sacrificing, offering his work to prevent capitalism from abusing nature, and then expiring before seeing whether his deed had succeeded. Moreover, it is noteworthy that in the first image the whip is held by a female, and in the second by a male. While it might seem too much a coincidence for Nietzsche to happen upon such a street scene, it must be remembered that horse-drawn carriages were common then and a tired horse being whipped was surely a common sight. Moreover, in a letter to Reinhardt von Seydlitz dated May 13, 1888 (days after the letter to Brandes regarding photographs), Nietzsche describes a street scene where a cynical old carter is pissing on a horse and the poor abused creature is looking back gratefully.\(^2\) Nietzsche writes that this is what Diderot would call a scene of maudlin morality. Nietzsche probably rehearsed in his mind what the street scene should have been.

This interpretation of the two images finds textual support. Nietzsche’s mythic animal-scheme does not appear to feature the horse. However, there is a strong scene in Dawn section

\(^2\)The dynamics are changed somewhat with state-funded medical service and doctors on salary. Nietzsche would probably re-write this section in response.


\(^2\)The scare quotes indicate doubt as to whether Nietzsche’s madness, or at least his breakdown, was deliberately staged. While I personally favour the latter hypothesis, even if the breakdown was organic in origin, there is arguably method in his madness, in that the insane Nietzsche would produce behavior symptomatic of his inner thought processes.
255 in which Nietzsche describes his esoteric text-music and associates it to Wagner’s music.\footnote{274}{The association is not directly in the text of section 255. However, in the context of sections 9-11 of “Richard Wagner in Bayreuth” and the subliminal effects of sections 226 and 240 of \textit{Dawn}, just prior to 255, one is lured into reading Wagner between the lines.} Nietzsche refers to the composer introducing his theme: “Is it a beautiful woman? a beautiful horse?” This is highly suggestive of two inter-related myths: the Demeter myth and \textit{The Ring}, as Nietzsche in his “Turinese Letter of May 1888”\footnote{275}{The subtitle to \textit{The Case of Wagner}. This dating (May 1888) suggests that once Nietzsche realized, through Georg Brandes, that his work would be read seriously, he went into an “endgame” mode leading to a planned breakdown. He would therefore have written \textit{The Case of Wagner} to explain esoterically the imagery of the planned “breakdown” scene. It is curious that in \textit{Ecce Homo} lists \textit{The Case of Wagner} last among Nietzsche’s books.} tells us \textit{The Ring} should have been.

The allusion to \textit{The Ring} in \textit{Dawn} section 255 is straightforward. Brunnhilde is the beautiful woman and her horse, Grane, is the beautiful horse. Wagner felt the horse significant enough to name it.\footnote{276}{Richard Wagner, \textit{The Ring of the Nibelung}, tr. Andrew Porter (New York: W.W. Norton & Company, 1976) 144, 261, 280, 290 and 359.} The allusion to Demeter is more obscure. In this myth, Demeter looks for her daughter Persephone without success, falls into depression and will not eat.\footnote{277}{Robert Graves, \textit{The Greek Myths} (New York: Penguin, 1992) 90 and 92-93.} Demeter is a fertility goddess and so the earth becomes barren. To revive Demeter’s spirits, Baubo uses bawdy humour by flipping up her skirt and giving mock birth to Demeter’s son, Iacchus (Dionysus). In a variant of the myth, Demeter is pursued by Poseidon (that is, he is attempting to rape her) and she escapes by transforming into a mare.\footnote{278}{J.G. Frazer, \textit{The Golden Bough: A Study in Magic and Religion (Abridged Edition)} (London: Papermac, 1987) 471.} The mare-Demeter falls into depression, arresting the fertility of the earth, until Pan (Dionysus) revives her spirits.\footnote{279}{Nietzsche refers to Pan in \textit{The Birth of Tragedy}, section 11.} Nietzsche refers to Demeter in \textit{The Birth of Tragedy},\footnote{280}{\textit{The Birth of Tragedy}, section 10.} in the context of Demeter “once more” giving birth to Dionysus. In the late preface to \textit{Joyous Science}, Nietzsche announces that he means to speak through the Greeks when he refers to “Baubo.” By reading Poseidon as “capitalism,” the reference makes sense in

\begin{footnotes}
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\footnotetext[275]{Nietzsche refers to Pan in \textit{The Birth of Tragedy}, section 11.}
\end{footnotes}
the context of Dawn section 255 because the topic of the book up to that point is primarily a critique of both modern culture (symbolized by woman) and commerce (symbolized by the horse). Nietzsche, composer of text-music, will present a beautified version of each.

The mare-Demeter myth correlates with Brünnhilde and Grane. Mythically, Demeter is a triple aspect Goddess, but when juxtaposed with Iambe (nymph figure) and Baubo (crone figure) her mother or life aspect is emphasized.\(^{281}\) Brünnhilde in The Ring functions as a triple Goddess in mother, bride and crone roles in relation to the hero Siegfried. Brünnhilde poetically gives birth to Siegfried by rescuing the pregnant Sieglinde so Siegfried could be born.\(^{282}\) Then Brünnhilde poetically marries Siegfried when they sanctify their union by exchanging gifts. Finally, Brünnhilde poetically does in Siegfried when she blesses the spear that kills him. The Ring myth also connects Grane strongly to Brünnhilde in each of the Goddess roles. Grane helps Brünnhilde transport the pregnant Sieglinde, thereby being part of the mother-Goddess role. Brünnhilde gives Grane as a gift to Siegfried upon their poetic marriage, and so Grane is part of the bride-Goddess role. Finally, Brünnhilde rides Grane into Siegfried’s funeral pyre, which Brünnhilde had just ignited, and because Siegfried was not fully dead yet in poetic terms—he had just raised his arm—Grane participates in the crone-Goddess role.

Given the mare-Demeter myth, it is understandable why in The Case of Wagner Nietzsche says The Ring was supposed to be a critique of capitalism until Wagner read Schopenhauer and went astray from his earlier socialist (anti-capitalist) sentiment. The mythic structure of The Ring still relied heavily on the mare-Demeter and consort-and-Goddess mythic structure, which for Nietzsche symbolized the need for a Dionysian solution whereby female sexuality redeems capitalism. Nietzsche was thus able to tie together Wagner, matriarchal myth

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and whip incidents from his life to confirm that his philosophy ultimately presents a theory of justice to counterbalance the institution of capitalism. In Nietzsche’s Justice, female sexuality has the greater legitimacy to use the discretion necessary to manage the systole and diastole of institutional growth.

In *The Birth of Tragedy*, Nietzsche refers to Moira as justice. Moira refers to the three fates: Clotho (spinner of life’s thread), Lachesis (measurer of the thread) and Atropos (snipper of the thread). The Athenian version of this myth has Aphrodite—symbolic of female sexuality—as the eldest of the fates. The icon for justice, then, is a beautiful woman (Aphrodite) holding scales (Lachesis) and a sword (Atropos). In the preface of *Dawn* Nietzsche refers to the need for science to self-sacrifice by relying on joy. Reading joy as active or decisive sexuality, then justice is science (measurement) in action (sword; decision) for life (female sexuality), or *Joyous Science*. Poetically, Nietzsche confirms that justice is the ultimate concern of his philosophy.

### 3.7 Holmes—Cultural Intern

This chapter ends with a few words on Holmes and philosophy of justice. Holmes never produced a systematic account of his philosophy of justice. Plainly, Holmes accepted the American system of elected legislators and court of constitutional review as a reasonably good political institution through which to manifest his understanding of justice. Nonetheless, the

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283 *The Birth of Tragedy*, sections 3 and 9. Nietzsche refers to Moira as the vulture/eagle who is enthroned above Prometheus. In *The Birth of Tragedy* section 10 Nietzsche considers Prometheus to be a mask for Dionysus. It seems Nietzsche’s mythic template became multi-valent among Moira-and-Prometheus, Demeter-and-Poseidon, the Queen-and-two-consorts, and Ariadne-and-Dionysus, depending on rhetorical context. The Moira-Prometheus valence underscores the pre-eminence of “justice” in Nietzsche’s mythic field.


285 Nietzsche’s writing implicitly includes the following colour scheme: yellow = sexuality; blue = science; red = action/decision. Using the colour wheel, this generates purple for monarchy (state, law), green for tropical growth and brown for justice. The latter is reflected in the use of wood for courtrooms, particularly the diaz.
American political structure is a reasonable manifestation of numerous philosophies of justice. To see below the surface of the Holmesian landscape one must be attuned to characteristic surface details that indicate deeper formations.

Holmes was a democrat and quite respectful of the legislative process. However, like Nietzsche, Holmes was more aristocratic in sentiment—the young Holmes once referred to shaking hands with the “thick-fingered” hands of the proletariat. It seems for Holmes, equal vote was more a barometer of discontent to be respected as a negative vote—a veto against failing paradigms which, as a skeptic, Holmes would respect. Holmes differs little from Nietzsche in substance.

Holmes’s speeches “The Path of the Law” and “Law in Science and Science in Law” show that his understanding of legal reasoning fundamentally coincided with Nietzsche’s residue logic. Where Holmes and Nietzsche differ is on the role of artifice and the systole and diastole of doctrinal evolution. Holmes’s historical analysis of common law is close to Nietzsche’s genealogy in all material respects. Holmes, notwithstanding his nominalism, appears to have expected science to transcend the cyclic pattern of doctrinal artifice and transformation by seduction. Holmes gives no reason for this expectation and it runs counter to his analysis—perhaps it is a bit of rhetorical “poisonous optimism” administered to nurture hope and faith in the system. Holmes’s practice on this score was mixed. His conservative common-law decisions that restricted innovation to “interstitial movements” were better placed within a common law that was subordinate to legislation. At the level of constitutional review, Holmes was less deferential to precedent and, indeed, was arguably sensitive to the “season” of systole and diastole. For example, Louise Weinberg sharply criticizes Holmes for inconsistency and failure
to be proactive regarding federal injunctive powers. On the other hand, she acknowledges that at the time of the earlier decision, \textit{de facto} enforceability was plausibly a real concern. Holmes, who was profoundly shaped by his Civil War experience, seems to have had respect for the cost of mistiming the blood stage of an institution. However, Holmes, both in deed and word, was not one to shy away from blood when duty called. The great cost of the duty Holmes was ready, even eager, to impose shows how close his will-to-life philosophy of justice was to Nietzsche with its clear priority for the future of the community over individual comfort.

One of the areas Holmes’s philosophy of justice motivated him to resist strongly was free speech. The previous chapter “Legal Reasoning” discussed how free speech is a foundational principle of the dynamics of legal reasoning that would qualify as constitutional. What is significant for present purposes is the fate of Holmes’s conception of free speech in the subsequent development of constitutional law. Novick observes that Holmes’s formulation has waxed, waned and waxes again. This should not be dismissed as a defect of judicial reasoning. The systole-and-diastole dynamic of social institutions suggests that perhaps free speech principles should wax and wane. In other words, awareness of these dynamics should lead to seasonal adjustment of constitutional principle. For example, the current “political correctness” attitude that in Canada has lessened protection of free speech might be justified as seasonally responsive. As Holmes observed, free speech is meaningless unless it raises the ire of the \textit{status quo}. “Political correctness” by its nature is intended to protect the feelings of historically disadvantaged groups—a kind of emotional affirmative action. Without getting into the imbroglio of affirmative action, a better way to characterize it might be “blood stage.” While the

\footnote{286 Louise Weinberg, “Holmes’s Failure,” 96 \textit{Michigan Law Review} 691 (1997) 702-705. This issue is discussed in the chapter “Legal Reasoning.”}

courts may well be singularly incompetent to devise means of affirmative action, a Nietzschean feel for the seasonal timing of institutional vampirism might better serve constitutional law than a futile debate over competing ideals.

Where Holmes and Nietzsche appear to clash most directly is on the matter of the matriarchal solution to subliminally directed windfall opportunism. I have found only the slightest hints that Holmes might have been disposed to such a suggestion, but nothing to indicate he was. For example, Holmes plainly preferred the company of intelligent women. Shortly after arriving in Washington D.C., Holmes attended a “male” party in which President Roosevelt showed film footage of a wolf hunt. Holmes did not enjoy the brutish company and rather felt sorry for the wolf.  

It is not clear why Holmes, who was psychologically astute, failed to consider matriarchy. Holmes plainly understood the benefit of activating his own sexuality in terms of creativity and his joy in duty. This had little direct influence on his political philosophy, but did profoundly shape his life philosophy, which is arguably now the more enduring and compelling aspect of Holmes.

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The rule of joy and the law of duty seem to me all one.

Oliver Wendell Holmes, Jr.\(^1\)

Unconcerned, mocking, violent—thus wisdom wants us: she is a woman and always loves only a warrior.

_Thus Spoke Zarathustra\(^2\)_

### 4.1 Introduction

The previous chapter explored a definition of justice as open-ended dynamics that ratchet up the future robustness of communal living. For Nietzsche, this could be done by alternating between phases of building the strongest social institutions compatible with the current psychology of individuals, then using social institutions to enrich qualitatively the psychology of individuals, who would in turn qualitatively enrich social institutions, and so on _ad infinitum_. From this perspective, the term “just” is ill defined as equality, equilibrium, or an attained state of being. A community is “just” to the extent the _dynamics_ of justice are pursued in good faith. The emphasis on dynamics is crucial to the life philosophy of Holmes and Nietzsche. If justice were a set of ideal outcomes, then no state would be just. A concerned individual in such a community would

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be condemned to pessimism and resentment. However, if justice were good-faith dynamics, an individual could achieve justice in any community.3

The problem for the life philosophy of Holmes and Nietzsche was to understand why an individual who is a skeptical pragmatist would commit, or indeed sacrifice, his or her life to justice. How is an individual to pursue and endure suffering for the future cheerfully without the illusion that complete redemption of suffering through knowledge is a possibility? Why would an individual dutifully suffer for values beyond himself or herself without understanding how such actions might possibly be redeemed, if at all? In addition, regarding Nietzsche, why would males accept and defer to the intractability of the discretion of elite females? In heretical rhetoric, how could individuals be seduced to accept masochism as "the good life"?

Nietzsche and Holmes claimed to have found not only a viable life philosophy, but also the most compelling one. Moreover, they implicitly claim that this life philosophy is the one that best promotes justice. Nietzsche and Holmes therefore claim no less than a philosophy that achieves complete harmony between individual and society—Soul and Justice. That is, the life philosophy of Nietzsche and Holmes is premised on the psychological claim that an individual derives the most psychologically fulfilling life from self-managed development of his or her power and good-faith application of that power to cause just development in his or her community.

A central concept for understanding Nietzsche and Holmes is task, role or duty. Their dynamic definition of justice means that any person within any society is capable of creating a task as an agent of justice. One has a duty to oneself to find or create the most effective task that is suited to one's aptitudes and talents. Indeed, one's duty to oneself entails cultivating power,

3 This definition of justice has important implications for judging prior societies and helps elucidate Nietzsche's understanding of "historical sense." Nietzsche can therefore praise the dynamics of the pre-Socratic Greeks relative
including the critical skill to craft a task that most plausibly advances justice using one’s cultivated power to maximum effect. Then, one pursues that task with blind resolve.

The most difficult concept in the writings Nietzsche and Holmes is this blind resolve—
*amor fati* or the Soldier’s Faith. Both Nietzsche and Holmes were struck by Albrecht Dürer’s etching *Knight and Death.*

One who is disconsolate and lonely could not choose a better symbol than the knight with death and devil, as Dürer has drawn him for us, the armored knight with the iron, hard look, who knows how to pursue his terrible path, undeterred by his gruesome companions, and yet without hope, alone with his horse and dog.

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.

These passages, and numerous like them that celebrate blind suffering, are direct, unavoidable challenges to the individualistic and utilitarian foundations of liberalism. Holmes and Nietzsche were not liberals and cannot be made into liberals.

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5 Friedrich Nietzsche, *The Birth of Tragedy*, translated by Walter Kaufmann (New York: Vintage, 1967) 123, section 20. [All following cites to *The Birth of Tragedy* shall be to the Kaufmann translation by section number.]

The plausibility of Holmes and Nietzsche rests on resolving two paradoxes. How could Holmes—arguably the founder of critical jurisprudence in 20th century common law—and Nietzsche—arguably a co-founder (with Marx) of 20th century critical studies—both advocate blind self-sacrifice to unknowable purposes? How could such a life philosophy be psychologically plausible? Once again, it has been more fruitful to study Nietzsche for the “how” and then to read Holmes for more inspiring statements of the “what” after having clarified through Nietzsche just exactly what the “what” means.

The first paradox has a simple solution that becomes complex in the details of its application, namely, the Soldier’s Faith applies once one has in good faith developed and applied one’s critical capacity to discern one’s task, role, or duty in accordance with one’s aptitudes, developed powers and social circumstances. Having determined one’s task with as much certainty as a skeptic reasonably can, one pursues it with blind resolution.

The second paradox—psychological plausibility—is only implicitly resolved by Holmes, but for Nietzsche it became a principal, if not the principal, theme of his philosophy.

4.2 Dionysian Joy

Nietzsche’s preoccupation with the psychological plausibility of faith in justice is evident as early as The Birth of Tragedy, in which Nietzsche draws noticeably from the Orphic tradition. In the Orphic myth, the Goddess Night was courted by the Wind and laid a silver egg in the womb of darkness. Eros hatched from this egg and set the universe in motion.

Most significant for The Birth of Tragedy is that Night displays herself in triad: Night, Order and Justice. In terms of self-organized criticality and evolutionary dynamics, it is plain that

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Night would be chaos, Order would be static form, and Justice would be the dynamics of complexification. Also plain in hindsight is that Eros would be the will to power that uses history to create by destroying, transforming or converting the use of existing static forms to produce more complex structures. Nietzsche's evolutionary dynamics has implicitly linked Eros to sexual selection—"love as the deadly struggle between the sexes"\(^8\) that seeks an impossible unification and generates limitless creative growth as a side effect of the dynamic. Nietzsche's psychology therefore posits romance—a fundamental reproductive instinct shaped by culture and individual experience into sexuality—as the driving force underwriting blind faith in Eros. For Nietzsche, faith in the dynamics of Eros must be ultimately grounded in sexuality in order to be psychologically viable.

In section 20 of *The Birth of Tragedy*, after presenting the image of Dürer's faith-driven Knight, Nietzsche describes it as a faith that Prometheus—a mask of Dionysus—will touch the red dust with Dionysian magic on behalf of the "mothers of being" whose names are Delusion, Will and Woe.\(^9\) These correspond to the Orphic triad Order, Justice and Night, but after *The Birth of Tragedy* Nietzsche's work moves in the direction of providing a naturalistic psychological account of this mythic and philosophic wisdom. Put another way, for Nietzsche, who claimed to have coined the phase "meaning of life," the problem was how to cope with suffering in life. Nietzsche's concept "order of rank" can be thought of as the amount of suffering a person can accumulate without having to react. This ties into self-organized criticality because increasing one's order of rank requires one to accumulate painful experiences, find patterns

\(^8\) *The Case of Wagner*, section 3; *Ecce Homo*, "Why I Write Such Good Books," section 5.

implicit therein, and then creatively transform oneself to a higher order of rank. The spiral 
process of increasing order of rank therefore presupposes an initial and an increasing capacity to 
endure suffering. Indeed, after a transformation, a great person whose task included self-
empowerment would seek suffering in order to accumulate experience for the next self-
empowering transformation, much as an athlete masochistically trains for an event.

The psychological means to endure suffering that Nietzsche posits correlates to the 
original triad and the three mothers of being. Indeed, to understand Nietzsche’s psychology it is 
helpful to make a table of rough correspondences.10

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<th>Orphic: Order</th>
<th>Justice</th>
<th>Night</th>
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<tbody>
<tr>
<td><em>Birth of Tragedy:</em> Delusion</td>
<td>Will</td>
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<td>Mythic: Bride</td>
<td>Mother</td>
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<td>Nietzsche: Apollo illusion</td>
<td>Joyous Science</td>
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<td>Psychology: pragmatic gestalt</td>
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<td>Physiology: rationality/habit</td>
<td>emotion &amp; experience</td>
<td>body (sexual instinct)</td>
</tr>
<tr>
<td>Zarathustra: Wisdom</td>
<td>Life</td>
<td>Chaos-Eternity</td>
</tr>
</tbody>
</table>

Figure 4.1 Three Mothers of Being—Table of Correspondences

In *The Birth of Tragedy* Nietzsche makes clear three psychological strategies to overcome 
the sufferings of life: the repose of order within chaos, the exuberance of creating new order from 
experience, and a “metaphysical” faith that over time life will eventually destroy and make use of 
all prior forms for the continuing growth of life.11 *The Birth of Tragedy* is marred by Nietzsche’s 
early reliance on Schopenhauerian metaphysics, which he later replaces with psychology. Later,

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10 This table is slightly flawed by conflating formal cause and material cause (i.e., equating Bride/Wisdom to Apollo/rationality). This ambiguity arises across fields because at the beginning of each cycle after the “marriage of hero and bride,” the formal cause and material cause are closely aligned. The different fields emphasize one or the other.

11 *The Birth of Tragedy*, section 18.
Nietzsche provides psychological explanations for all three—illusion; gaiety; and *amor fati*—and why they are all necessary to a life philosophy.

For Nietzsche, life requires action and action requires the veil of illusion. In the language of *The Birth of Tragedy*, Apollinian consciousness veils the overwhelming nuance and detail of Dionysian reality from the field of vision.\(^{12}\) Hamlet's tragic flaw was to tear away at these veils incessantly and so he was paralyzed.\(^{13}\) Stated in more naturalistic terms, we tend to perceive the world through the filter of a system of gestalts. These gestalts simplify and organize perceptual input into patterns that are manageable for conscious calculation and pragmatic habits for guiding action. Having a gestalt to find useful concord within the discord of reality gives one a sense of repose, and so a source of comfort. Indeed, the utility of a code of gestalts provides a warrant to endure present suffering for future utility.

However, an unwarranted completeness presumption elevates the necessity of illusion into an Apollinian ambition to redeem *all* suffering by seeking the knowledge to end all future suffering. Nietzsche calls this Socratic optimism, which seeks eternal forms through knowledge. Now enters a neurotic, eroticized "will to truth" that, by divide-and-conquer positivism, seeks to compartmentalize reality into an ever more complete eternal code. Jean Baudrillard defines "obscenity" as a festive celebration of the apparent completeness of a naturalistic representational code that strips away all veils.\(^{14}\) A feeling of total visibility "casts a spell over the eyes" and prevents them from penetrating deeper into the nuances of reality.\(^{15}\) Within Socratic optimism the syllogism becomes a lever that is an absolute source of power, "which celebrates a triumph

\(^{12}\) *The Birth of Tragedy*, section 2.
\(^{13}\) *The Birth of Tragedy*, section 7.
\(^{15}\) *The Birth of Tragedy*, section 24.
with every conclusion.” Socratic optimism purports to become a total panacea for suffering through the image of the dying Socrates, who by demonstration offers love of knowledge as liberation from fear of death. Then, science becomes the *deus ex machina* of the tragedy that makes all suffering comprehensible and avoidable.

Within Nietzsche’s psychology, Socratic optimism is a course headed toward disaster, for both the community and the environment. As argued in the previous chapter, *On the Genealogy of Morality* asserts that the completeness illusion creates a negative sum economy of cruelty. The incompleteness of any code means that the feeling of absolute power in the syllogism is a fantasy purchased by an exchange transaction of cruelty, either against oneself, someone else, or the environment. This deficit-financed psychic economy tends to lock institutions in their “blood stage.” Moreover, the hyper-grammatical nature of the logic of moral agency emphasizes individuation, and so individualism, in a way that undermines creative transformation of community relations. The result is a “higher egoism” that purchases individual, temporary relief from the burden of suffering at the expense of the future.

In *The Birth of Tragedy* Nietzsche proclaims the rebirth of tragic insight as an alternative remedy for suffering. The production of tragic art is a creative deed. Within a “complete” knowledge of Socratic optimism, one plans action within the logical scheme and then executes it as a syllogism. However, with self-organized criticality comes the possibility of a creative deed where the action cannot be fully justified—there is a necessary gap in the principle of sufficient reason. *Because one creates*, the creation cannot be fully justified by the creator. Creation is an

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16 *The Birth of Tragedy*, section 14.
17 *The Birth of Tragedy*, sections 13 and 15.
18 *The Birth of Tragedy*, sections 17 and 18.
19 *The Birth of Tragedy*, section 17.
20 *The Birth of Tragedy*, section 17.
21 *The Birth of Tragedy*, section 15.
act of the body, not of conscious thinking. Much like the “bad man” who interprets case narratives in Holmes’s “The Path of the Law,” Nietzsche says we must read Hamlet in terms of his deeds.

... [the Greek dramatists’] heroes speak, as it were, more superficially than they act; the myth does not at all obtain adequate objectification in the spoken word. The structure of the scenes and the visual images reveal a deeper wisdom than the poet himself can put into words and concepts: the same is also observable in Shakespeare, whose Hamlet, for instance, similarly, talks more superficially than he acts, so that the previously mentioned lesson of Hamlet is to be deduced, not from his words, but from a profound contemplation and survey of the whole.

Creative deeds are required to fill the necessary gaps in the principle of sufficient reason that underwrites Socratic optimism, and also provides a source of positive affect—gaiety or cheerfulness—to replenish and overwhelm the affect deficit inherent in Socratic optimism. As noted in the previous chapters, Nietzsche’s exuberance corresponds precisely with “flow” in Csikszentmihalyi’s psychology of optimal performance. “Flow” reverses the negative affect of stored frustrations into an outpouring of positive affect—a process of euphoric mourning. In Nietzsche’s psychology, the “breeding” of an individual is a spiral ascension of alternating Apollinian discipline and Dionysian self-transformation “in new births ever following and mutually augmenting one another.” Like Holmes, Nietzsche in The Birth of Tragedy was drawn to the Prometheus myth.

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22 The Birth of Tragedy, section 12.
23 Ecce Homo, Thus Spoke Zarathustra, section 4.
24 The Birth of Tragedy, section 17.
25 The Birth of Tragedy, section 4.
26 The Birth of Tragedy, section 9.
healed by the “saving sorceress” of creative deed. Indeed, a corollary to the exuberant flow is joy in the pain that was a necessary precondition to the creative happiness and joy in the destruction of previous forms implicit in the creation of the new form. The creator becomes unconcerned over death and tragedy. Indeed, the exuberant creator looks for tragic art as a stimulant, as grist for further creative action that enhances one’s order of rank.

Nietzsche observes that there is a state of intoxication that comes with creative euphoria and suggests there may even be a neurosis of abundance. Happiness, for Nietzsche, is the perception of increasing power. In the exuberant condition of creative deed, one wants to discharge power to confirm its presence. The creative type plays naively from overflowing power and abundance with squandering acts of superhuman benevolence and involuntary parody of all that was previously called holy.

The gaiety of creative flow, however, is not a complete solution to the problem of suffering. First, there is the bootstrap problem that one must accumulate experiences of suffering before the creative event. Second, the success of the creative act depends on an act of grace—Justice depends on Moira, a Goddess of Fate. Something is required to get one through the tough times. Third, one might not be a very creative person. Fourth, the scepter of death eventually prevails and as one’s creative capacity wanes, one could be disposed to become increasing bitter and cruel with age. Indeed, Nietzsche attempts to compel early resolution of this brute reality through his eternal recurrence doctrine, which helps avert subliminal gravitation toward poisonous discharges from the accumulated suffering destined to remain unredeemed.

27 The Birth of Tragedy, section 7, p. 60.
28 Ecce Homo, Thus Spoke Zarathustra, section 3.
29 The Birth of Tragedy, section 24; Ecce Homo, Thus Spoke Zarathustra, section 8.
30 The Birth of Tragedy, Preface section 4.
31 Joyous Science, section 382; Ecce Homo, Thus Spoke Zarathustra, section 2. Nietzsche is justifying his own excesses, particular in Joyous Science. See Preface to Joyous Science.
upon death and from subliminal fear of death itself. One’s struggle with death should become merely an issue as to the best timing and manner to advance one’s task.

In *The Birth of Tragedy* Nietzsche observes that a spectator of tragic art and the cycle of destruction and invention of appearance can gain faith that creative growth will eventually occur. The tragic spectator gains faith in the joy of existence and the fertility of the “eternally creative primordial mother.” Indeed, repeated experience of the tragic feeling provides “an assured premonition of the highest pleasure attained through destruction and negation....” The tragic spectator learns to feel joy in destruction, even his or her own. The tragic spectator learns to feel faith that Dionysian “magic” will eventually make use of suffering. Furthermore, given the holistic nature of causation where an immeasurable effect can become necessary, the tragic spectator understands that all prior pain was necessary. This is the premise of Nietzsche’s strongest statement of *amor fati*:

My formula for greatness in a human being is amor fati: that one wants nothing to be different, not forward, not backward, not in all eternity. Not merely bear what is necessary, still less conceal it—all idealism is mendaciousness in the face of what is necessary—but love it.

These are fine as philosophic assertions. Indeed, they are plausible cosmological assertions. The modern science of complex adaptive systems claims there is a *de facto*
teleological life force because those systems that continually promote their growth are the ones that persist. The variability of things and the brute fact of time have produced an escalating complexity in the capacity of systems to generate growth-promoting complexity. Eros has a physical presence simply as the leftover after other configurations of force have dissipated over time. For Nietzsche, all structures of forces in reality are either self-growth-promoting, or in decay. Sexual selection, for example, is an example of a highly successful growth-promoting strategy; the life forces that have chanced upon it have reproduced well and have refined it much further.

Despite cosmological plausibility, Nietzsche still had to find a psychological basis for this faith in life forces. It is one thing to have intellectual confidence that time will eventually make use of one’s deeds. Intellectually, Nietzsche argues that one should develop one’s critical capacity and powers to the limit of one’s aptitude and then perform deeds that will have an effect on the growth of one’s species. So long as one has exhausted one’s critical capacity, one can have faith that one’s deeds will promote growth whether in hindsight it was right or wrong. As with the common-law logic of growth, the system learns from good-faith errors and dissents. An appreciation of this system intelligence enables one to act blindly with resolute faith in one’s contribution to future growth.

But what psychological basis does Nietzsche have to presume that every person would care to contribute to the future well being of the species, much less cheerfully endure suffering and sacrifice his or her life to that purpose?

The early Nietzsche, writing *The Birth of Tragedy*, seems to have felt the competent spectator of tragic art would spontaneously generate such overwhelming feelings. However, after Nietzsche found that no one truly understood his book, he evidently became less optimistic and
realized one had to experience creative deeds to gain a psychologically grounded faith in creativity. Hence, Nietzsche called his first book flawed for being only for initiates. Nietzsche’s task became one of writing initiating works, so that interpreting Nietzsche induced the creative self-transformations required for understanding—“Have I been understood?” Nietzsche therefore attempted to write “dithyrambic” prose and verse to “educate” his readers.

The dithyrambic solution, however necessary for breeding persons of great order of rank, does not provide the psychological basis to care about the future of the species in the first place. Moreover, as noted above, not all people have the aptitude for creativity at a high order of rank. In addition, as Nietzsche acknowledged, even the great creative types need to sustain themselves in times of great suffering preceding their greatest creations.

Nietzsche’s solution to this was “this worldly comfort” of laughter. Laughter, like sexual orgasm, seems to have a temporary, discharging reversal effect. In The Birth of Tragedy, the comic becomes the artistic discharge of the “nausea of absurdity” through the “satyr” chorus of the dithyramb—the satyr being a symbol of the sexual omnipotence of nature. The Birth of Tragedy typically leans on “art” to solve its “metaphysical” problems, but even here, the seeds of Nietzsche’s psychology are spread throughout the book. As Nietzsche later conceals these seeds esoterically, their presence in The Birth of Tragedy is helpful for discerning Nietzsche’s mature psychology.

41 The Birth of Tragedy, “An Attempt at Self-Criticism” section 3.
42 Ecce Homo, “Why I am a Destiny”; see also “Is Hamlet understood?” Ecce Homo, “Why I Am So Clever,” section 4. This topic is discussed in the chapter “Para-Conceptual Rhetoric.”
44 The Birth of Tragedy, section 7.
JOY IN DUTY

The nature of comedy, for Nietzsche, is captured by the following formula: tragedy + time + Eros = comedy. Comedy, for Nietzsche, is a celebration of Eros as the life force that makes use of suffering for purposes of creative growth. Comedy breaks the grip of depressive paralysis and stimulates action by tickling one’s faith that the absurdities of tragic destruction will prove useful for Eros. Again, this begs the question of a psychologically grounded faith that is tickled. Nietzsche found that comedy works because it taps our reproductive instinct and that the purest form of comedy is sexual—Eros.

It is evident from the “Self-Criticism” that Nietzsche had not quite made this connection when he wrote The Birth of Tragedy, but he came extremely close with his confidence in Aristophanes. Nietzsche variously refers to “the profound instinct of Aristophanes” and “the unerring instinct of Aristophanes.” In section 223 of Beyond Good and Evil, Aristophanes is associated with the “laughter” of high spirits who can become parodists of world history. In section 294, this laughter called the “golden” and Nietzsche writes that “Gods enjoy mockery: it seems they cannot suppress laughter even during holy rites.” “Golden” is one of Nietzsche’s poetic image words and generally connotes sexuality. This reading is confirmed by Nietzsche’s esoteric reference to “Baubo” in the preface to Joyous Science: “Perhaps truth is a woman who has reasons for not letting us see her reasons? Perhaps her name is—to speak Greek—Baubo?”

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46 The Birth of Tragedy, section 13.
47 The Birth of Tragedy, section 17.
48 Beyond Good and Evil, section 223.
49 Beyond Good and Evil, section 294.
50 Joyous Science, Preface, section 4.
In Greek mythology, Baubo plays a significant role in helping Demeter break free of depressive paralysis after the loss of her daughter Persephone. Robert Graves summarizes the relevant portion of the myth as follows:  

On the tenth day, after a disagreeable encounter with Poseidon among the herds of Oncus, Demeter came in disguise to Eleusis, where King Celeus and his wife Metaneira entertained her hospitably; and she was invited to remain as a wet nurse to Demopaon, the newly-born prince. Their lame daughter Iambe tried to console Demeter with comically lascivious verses, and the dry-nurse, old Baubo, persuaded her to drink barley-water by a jest: she groaned as if in travail and, unexpectedly, produced from beneath her skirt Demeter's own son Iacchus, who leaped into his mother's arms and kissed her.

“Iacchus” is sometimes equated with Dionysus, who in other Greek myth is the son of Semele. However, in The Birth of Tragedy Nietzsche refers to Dionysus as the son of Demeter. Graves provides the following commentary on the Baubo incident:

Iambe and Baubo personify the obscene songs, in iambic metre, which were sung to relieve emotional tension at the Eleusinian Mysteries; but Iambe, Demeter, and Baubo form the familiar triad of maiden, nymph, and crone. Old nurses in Greek myth nearly always stand for the goddess as Crone.

The Eleusinian Mysteries must be the “holy rites” Nietzsche refers to in section 294 of Beyond Good and Evil. The mythologist Lotte Motz notes that the Homeric version of the story is unclear as to the nature of the jest, but Orphic tradition has Baubo exposing her vulva in the likeness of

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52 The Birth of Tragedy, section 10.
an infant's face. Motz notes the “magical” power of female sexuality to shatter the emotions of anger and grief and its incidents in numerous cultures all around the world.

The mythic logic that attracted Nietzsche is plain. Baubo is the terrifying aspect of the triple Goddess. She uses bawdy sexual humour to restore the will to life of Demeter, which eventually leads to Demeter making the earth fertile again. The ambiguous exposure of the vulva and Dionysus equates sexuality with Eros, the active force of creativity and, in the Orphic triad, Justice.

More can be inferred from the context of Nietzsche's use of Baubo in the preface to *Joyous Science*, where he speaks of the indecency of wanting to strip away all veils in furtherance of a will to truth. This, according to Nietzsche, was the neurosis of Hamlet. Baubo curses by satire the desire to see everything—the need for complete visual presentation of the source of Eros in the universe, which Baudrillard aptly calls obscene—by having her genitals become a mock-birth of Dionysus (Eros). The “magic” of creative-growth is in the realm of Moira (Fate) and cannot be seen as naked truth. Baubo is a crone, which shows that the mystery of creativity lies in the realm of chaos and eternity: time generates Eros out of chaos. For Nietzsche, this has become manifest in our psychology through sexuality and is activated by sexual humour. For Nietzsche, “golden” laughter enables a mocking, comedy of ideals by satirizing the completeness pathology and the fear of letting go of ideals in the absence of certainty. For Nietzsche, Hamlet’s tragedy, therefore, was his rejection of Ophelia (sexuality) to

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55 Ibid., 103, 131.
56 *The Birth of Tragedy*, section 7.
57 Gold is the colour of honey from the Orphic Bee-Eros-Dionysus.
demand logical certainty; however, wit is no substitute for comedy and the crone Baubo avenged the affront.\footnote{The Birth of Tragedy, section 7.}

Nietzsche’s reference to Baubo confirms the psychological reason for his high regard for Aristophanes. Aristophanes’ bawdy sexual humour activates one’s reproductive, species instincts in a way that discharges doubts about the futility of action and life.\footnote{Nietzsche makes a modest attempt at bawdy humour in section 69 of Joyous Science.} Aristophanes enables great persons to exhaust their lives performing great creative deeds assured that these events will later become necessary for creative growth. This insight is the key to understanding Nietzsche’s singular reading of Plato.

Nietzsche considered Greek culture to be in declining psychological health at the time of Socrates.\footnote{Twilight of the Idols, “The Problem of Socrates.”} For Nietzsche, the noble Greeks were no longer psychologically strong enough to experience tragedy as stimulant and Socrates provided them with faith in reason as a panacea—science as \textit{deus ex machina}. Nietzsche could understand decadence in the person of the plebian Socrates, but had difficulty attributing it to the poetically gifted nobleman Plato. Nietzsche also noted the great irony that Plato, one of the great mythic poets of all time, proclaimed through Socrates a philosophy with no use for poetry or myth.\footnote{The Birth of Tragedy, section 14.} Further, Plato makes reference to esoteric writing, which begs the reader to read Plato esoterically. The “smoking guns” to understanding Plato for Nietzsche are the dying words of Socrates (as reported by Plato) and the dying gesture of Plato. In section 340 of \textit{Joyous Science} Nietzsche refers to Socrates as a “pied” piper (that is, one who seduces with a disguised message) and then interprets his dying words “O Crito, I owe Asclepius a rooster.” Asclepius was a god of medicine, so Nietzsche writes that for those of us who have “ears” (that is, who listen for esoteric meaning), Socrates says that death is curing him.
of an illness—life as a disease. Plato, through Socrates, admits the degenerating condition of the Athenian, and so the incompleteness and falsity of the faith in science to redeem suffering though complete reason. Socrates’ reversal in his dying words suggests to Nietzsche that Plato intended the will to truth to exhaust itself and self-overcome, thereby reversing the degeneration of Greece. In *The Birth of Tragedy* Nietzsche refers to the “aim” of Socratic optimism as one of self-exhaustion at its limits. In the later-written preface to *The Birth of Tragedy* Nietzsche writes as follows:  

> And science itself, our science—indeed, what is the significance of all science, viewed as a symptom of life? For what—worse yet, *whence*—all science? How now? Is the resolve to be so scientific about everything perhaps a kind of fear of, an escape from, pessimism? A subtle last resort against—*truth*? And, morally speaking, a sort of cowardice and falseness? Amorally speaking, a ruse? O Socrates, Socrates, was that perhaps *your* secret? O enigmatic ironist, was that perhaps your—irony?

Ruse indeed. This means that Plato, as philosophical physician using the literary Socrates as his “pied” piper, seduced Greek youth into a neurotic will to truth as an inoculating virus. In section 345 of *Joyous Science*, Nietzsche goes on to describe morality as “that most famous of all medicines.” In section 28 of *Beyond Good and Evil* (also quoted in the previous chapter), Nietzsche infers from Plato’s secret reliance on Aristophanes that his will to truth was a noble ruse and his deeper alliance was with sexuality and open-ended creative growth:  

> And as for Aristophanes—that transfiguring, complementary spirit for whose sake one forgives everything Hellenic for having existed, provided one has understood

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63 *Beyond Good and Evil*, section 28.
in its full profundity all that needs to be forgiven and transfigured here—there is nothing that has caused me to meditate more on Plato’s secrecy and sphinx nature than the happily preserved petit fait that under the pillow of his deathbed there was found no “Bible,” nor anything Egyptian, Pythagorean, or Platonic—but a volume of Aristophanes. How could even Plato have endured life—a Greek life he repudiated—without an Aristophanes?

With Aristophanes’ humour in sexuality as the psychological foundation, Plato could not only endure the suffering of life, but use his life to create a deed so grand that it would take over two millennia to self-overcome. Aristophanes was Plato’s esoteric hint that sexuality gave him faith that his magnanimous intent would eventually be discovered and history would make use of his deed for purposes of growth. Nietzsche plainly puts himself in the same category of philosophers who remain philosophers by remaining silent.

For Nietzsche, then, the great spirit achieves “great health” by overcoming suffering through three means: illusion, creativity, and faith in the eventual omnipotence of Eros. The good life is an active and critical science for the purpose of life, namely, Justice. One develops one’s task in relation to one’s aptitudes and situation, which gives all suffering meaning as a source of exuberant joy. The highest happiness implies creative deeds that serve future collective reproductive interests.

Conversely, Justice for Nietzsche is the dynamic that produces great deeds in furtherance of future growth. Justice is implicit in the creative deed, and so is not found in the mere execution of set procedures. Nietzsche rejects the Socratic paradigm of consciously devising a plan from the logical scheme and then executing it as an uncreative event. Justice entails poetic

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64 Joyous Science, section 382; On the Genealogy of Morality, II, 24.
creativity that the poet himself or herself cannot fully justify. That inability to justify one’s decision fully is the essence of Justice as dynamic creativity.

Nietzsche’s use of myth shows that he considers such ongoing creativity to be the essence of communal regulation and due process. The dependence of Justice and creativity on Moira implies ultimate dependence on sexuality to access life values, subject always to the uncertainty of chance. The Dionysian state entails dissolution of the boundaries of individuation between humans, and between humans and nature. Prometheus becomes an Atlas for all individuals. Justice, like the Red-Queen effect in evolution or the erosion of capital in capitalism, must continually create in order to maintain itself. Nietzsche notes that each culture is either degenerating or growing—Justice is dynamic by definition.

In sum, for Nietzsche a person of great health is a person who builds strength and critical understanding to perform the greatest deeds for life—one’s children and one’s children’s community. The good life is one of struggle as romance; the decadent life seeks comfort. Nietzsche’s image of great health is the chivalrous knight: “Unconcerned, mocking, violent—thus wisdom wants us: she is a woman and always loves only a warrior.” Nietzsche explains this aphorism as describing “great health” in the penultimate section of the second essay in On the Genealogy of Morality, and then goes on to demonstrate it in the third essay. “Unconcerned,” one is habituated to ice and mountains, able to gain comfort from nothing other than amor fati. “Mocking,” one has honed one’s powers of critique and acts as comedian of the ideals with sublime wickedness—an ultimate, supremely self-confident mischievousness in knowledge. “Violent,” the spirit has been strengthened, for whom conquest, adventure, danger and even pain

65 “For only in the Dionysian mysteries, in the psychology of the Dionysian condition, does the fundamental fact of Hellenic instinct express itself—its “will to life.” ...true life as collective survival through reproduction, through the mysteries of sexuality.” Twilight of the Idols, “What I Owe the Ancients,” section 4.
66 The Birth of Tragedy, section 1.
have becomes needs, which results in an overflowing need for action, deed and event. Truth is a woman because the warrior acts for romantic honour.

Nietzsche's third essay is a toccata demonstrating his warrior nature to win the heart of Ariadne by mischievously causing the will to truth of the ascetic ideal to self-undermine. Nietzsche is indeed mocking and violent, with an unconcerned faith in the inevitable appearance of a successor.

The last book Nietzsche wrote, Ecce Homo, similarly presents the person Nietzsche as a demonstration of what it means to be a warrior. Here, and elsewhere, Nietzsche emphasizes the holistic nature of the problem of building strength and defining one's task. The development of critical powers is foremost, but even critical powers presume a healthy psychology. In addition to diet, climate and exercise, Nietzsche emphasizes the importance of taste. The breeding of the highest order of rank requires minimizing diversions from this preparatory task. Nietzsche therefore cautions against pity, lest the growth phase be overwhelmed by sympathy prematurely, before reaching the height of one's powers. Given Nietzsche's mistrust of male instinct, Nietzsche's deference to Ariadne is a corollary to his requirement that one must define one's deed with the least reason to suspect exploitation to purposes other than the future. Nietzsche's underlying nature as a communal being is demonstrated by his making himself an archenemy of German culture. After having fought to assist the formation of a political state (The Republic), Nietzsche's role switched to apply his enormous critical talent to become archenemy to German culture—and thereby strengthen it. Finally, if as Claudia Crawford argues, Nietzsche staged his madness to turn his life into a fascinating event to catapult the influence of his writings, he

67 The Birth of Tragedy, section 9.
squared his life to become a catalyst for Justice on a scale comparable to Plato himself, on blind faith—The Soldier’s Faith.

4.3 The Soldier’s Faith

Holmes too, was exemplary as a warrior for Justice along the “The Path of the Law.” Indeed, what is perhaps most striking of Holmes is his lived life philosophy. Holmes was not merely a great judge. He was a great philosopher who, for the most part, thought through and applied his life philosophy. His canonical works, however, are merely three important speeches, and countless fragments in lesser speeches, letters and judgments. Holmes never provides a philosophical analysis of his philosophy. His principal canonical work was his life itself.

Holmes’s cheerful dedication to public service, his pithy writing and his graceful charm have made him into an exemplar of personal achievement that outshines his philosophical and substantive achievements. Holmes as warrior spent the first 40 years of life building his powers and refining his sense of taste, producing nothing of wider significance until the publication of The Common Law. As might be expected, Holmes has been described as ambitious, elitist and unsympathetic. For the first 40 years, Holmes struggled with the discovery of his task. For the next 50 years, he dutifully and cheerfully applied himself to public service as a judge with extraordinary intensity, usually taking on the greater workload among his judicial peers.

Holmes is perhaps most paradoxical in how he reconciles his extreme skepticism with his extreme patriotism. Skepticism is the hallmark of Holmes’s boldest risks as a member of the U.S. Supreme Court. For Holmes, his skepticism means that ends do not justify extreme and exclusive...
measures because faith in the end might be misplaced. His strong views on the standard of judicial review and free speech follow directly from his philosophy. Nonetheless, Holmes acts with resolve, even in dissent. The dissent is the paradigm of Holmes and Nietzsche's life philosophy. Indeed, Nietzsche's works and life can be seen as a dissent against German culture. Both Holmes and Nietzsche were great dissenters. By exercising one's critical capacity to its limit, one can usefully contribute to social development even if one turns out to be mistaken in dissent. In the dynamic systems view of Holmes and Nietzsche, growth is promoted by seeding the social memory with great creative events. If one has developed one's critical capacity and in good faith feels compelled to dissent, one can have faith that one's deed will be useful, regardless of whether the dissent will in hindsight be viewed as right or wrong. A judge has a duty to create an event, to write with impact.

Holmes's writings do not explore the psychological underpinning of his Soldier's Faith. Having made a judicial career in Massachusetts, without any realistic prospect for an appointment to the U.S. Supreme Court in mind, Holmes in 1900 simply asserted that joy is in dutiful action for life as an end in itself.69

... The joy of life is to put out one's powers in some natural and useful our harmless way. There is no other. And the real misery is not to do this. The hell of the old world's literature is to be taxed beyond one's powers. This country has expressed in story—I suppose because it has experienced it in life—a deeper abyss, of intellectual asphyxia or vital ennui, when powers conscious of themselves are denied their chance.

recognizable in his dissents, where he could write for himself. Holmes's judgments, even in dissent, tend to be more declaratory than analytic.

The rule of joy and the law of duty seem to me all one. I confess that altruistic and cynically selfish talk seem to me about equally unreal. With all humility, I think "whatsoever thy hand findeth to do, do it with thy might," infinitely more important than the vain attempt to love one's neighbor as one's self. If you want to hit a bird on the wing, you must have all your will in a focus, you must not be thinking about yourself, and, equally, you must not be thinking about your neighbor; you must be living in your eye on that bird. Every achievement is a bird on a wing.

The joy, the duty, and, I venture to add, the end of life. I do not seek to trench upon the province of spiritual guides. But from the point of view of the world the end of life is life. Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it is the one end that justifies itself. ... Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it.

Holmes's later speeches refer to an unknowable greater purpose and repeatedly express that greater purpose in reproductive images. On July 31, 1902, the summer Holmes first read Nietzsche, Holmes made a speech at the unveiling of a monument. For Holmes, the monument would become a lasting event as grist for the ongoing development of a single continuous, communal life as man's mysterious goal.70

We all, the most unbelieving, walk by faith. We do our work and live or lives not merely to vent and realize our inner force, but with a blind and trembling hope that somehow the world will be a little better for our striving. Our faith must not be limited to our personal task; to the present, or even to the future. It must include the past and bring all, past, present and future, into the unity of a single continuous life. We consecrate these memorials of what has been with the intent and expectation that centuries from now those who read the simple words will

find their lives richer, their purposes stronger, against the background of that different past.

... Modest as these are, the monuments now unveiled seem to me trumpets which two hundred years from now may blow the great battle calls of life, as two hundred years ago those whom they commemorate heard them in their hearts. And to many a gallant spirit, two hundred years from now as two hundred years ago, the white sands of Ipswich, terrible as engulfing graves, lovely as the opal flash of fairy walls, will gleam in the horizon, the image of man’s mysterious goal.

In 1904, Holmes praises Sarah Whitman in eulogy, because she kept society together and alive and her spirit echoes through our grandchildren—Eros.71

I think the first and also the last thing we should say of her is that she was generous of herself to all, and that in being so she made the greatest gift, the greatest contribution that she could make, that anyone can make—to keep society together and alive.

... The house which she built, an image of her hospitable soul, near the neighboring beach, is an empty shell which soon will lose the echo of its past. The great silence is descending but the hearts—the many hearts in which she truly lived—will whisper of her until they are no more; and even then and for cycles still to come, the impulse of her goodness will reverberate in souls that knew her not, and your grandchildren will be better because she aspired and loved and endured.

In 1912, Holmes gave a dinner speech to the Alpha Delta Phi fraternity he belonged to at Harvard over fifty years earlier. Now Holmes more generally grounds his faith in evolution and reproduction.72
... Perhaps by the self defeat of nature to which Hegel called attention civilization will cut its own throat, or as Flinder Petrie thinks there may be discoverable cycles of its rise, decline and fall. But even then we hope that some survivors will pass on the torch as the two men of '60 passed on the vital current of this Club. Whatever else we learn from nature we learn from it a mystic faith. I have been reading lately a golden book, or rather books, for there are ten volumes of it: Fabre's Souvenirs Entomologiques. It is a seed book. There I am very sure is the source of that echo from behind phenomena that for a moment we think we hear in Maeterlink’s Bees. I think it must have inspired one of the most beautiful traits in Bergson's Philosophy. It is simply the exquisitely told tale of a life long watch of beetles and wasps but from it we learn the faith I spoke of if we had it not before. I heard the doctrine years ago from Dr. Bartol. He spoke of the hen hatching her eggs in obedience to a destiny she did not understand. Fabre tells us of grubs born and having passed their whole lives in the heart of an oak tree when, after three years, the time for metamorphosis comes, build a chamber that as grubs they do not need with a broad passage for the beetle that is to be. They obey their destiny without any sight of the promised land. The law of the grub and the hen is the law also for man. We all have cosmic destinies of which we cannot divine the end, if the unknown has ends. Our business is to commit ourselves to life, to accept at once our functions and our ignorance and to offer our heart to fate.

The joyfully dutiful Holmes is a communal and historical being who faithfully creates monuments, as lawyer, judge or otherwise, for the subsequent growth of the community without knowing what the Promised Land will look like. In 1912, in what can be viewed as the germ of Holmes’s great free speech dissents, Holmes gave a speech to the Harvard Law School again using the image of man as a grub, with the skeptical judge being humble enough to allow extra
room for experimentation along the way to communal growth, with faith that tough but plausible judicial decisions and legislative experiments will be used well.\(^7\)

... When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law. Judges are apt to be naif, simple-minded men, and they need something of Mephistopheles. We too need an education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law. ...

... I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand.

Holmes ends this speech, his last published, with an unsettling image of the faith, one that suggests terror and cyclic renewal and bears the imprint of Nietzsche.

The other day my dream was pictured to my mind. It was evening. I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman’s Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall of Wagner’s opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the Götterdämmerung will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars.

Holmes’s poetic images, however, lack a psychological explanation of how this mystical faith could be made real. Nonetheless, Holmes’s life shows his own use of sexuality to underwrite his joyful duty as diligent patriot, and he left faint traces of this in his writing—such as in the following speech passage in which the “great end” converts dull detail into “romance.”

Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal. The stern experience of our youth [i.e., the Civil War] helped to accomplish the destiny of fate. It left us feeling through life that pleasures do not make happiness and that the root of joy as of duty is to put all one’s powers toward some great end. ... Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate significance is as parts of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves.

In terms of the role of sexuality in his psychological life, Holmes was an aristocrat of middle-class origin who was “made” into the mature Holmes by avidly participating in the parlor life headed by intellectual women, such as Sarah Whitman. Holmes continually rejuvenated his life force through intellectual flirtation with strong and intelligent women of society, preferring them to the company of men.

You may say what you like about American women—and I won’t be unpatriotic—but English women are brought up, it seems to me, to realize that it

is an object to be charming, that man is a dangerous animal—or ought to be—and that a sexless bonhomie is not the ideal relation.\textsuperscript{75}

My ladies for the most part are growing older (along with me).\textsuperscript{76}

Last night I went to a dinner of men (I hate men’s dinners) where I felt the pulse of the country with a vengeance.\textsuperscript{77}

Holmes comments about male company and his sentiments about President Roosevelt’s hunting betray a greater underlying affiliation to women and environment than for commerce. Holmes’s support for commerce was more of grudging acceptance of reality, much like his tolerance of socialist speech and legislation on principle.

Holmes maintained an intense letter romance with Lady Castletown during the years of his most demanding judicial workload while on circuit in Massachusetts. The romance seems to have been celibate, given the ocean between them, the infrequency of seeing each other and their reportedly having never spent more than five minutes alone (and on that occasion, in a garden). Rather Lady Castletown was a Muse or Ariadne to Holmes, to whom he served as chivalrous warrior—from a distance.\textsuperscript{78}

Oh my dear what a joy it is to feel the inner chambers of one’s soul open for the other to walk in and out at will.\textsuperscript{79}


\textsuperscript{76} \textit{Ibid.}, 286.

\textsuperscript{77} \textit{Ibid.}, 264.

\textsuperscript{78} \textit{Joyous Science}, section 60.

I might shoot or fish if I liked while here—but I prefer the role of Samson in the lap of Delilah so far as permitted.\(^{80}\)

Life is an art not a thing which one can work out successfully by abstract rules. It is like painting a picture. At every moment one has to use one’s tact and pigments in getting the right proportions between inconsistent desirables—between reading and writing—saving and spending—work and play etc. The trouble with many moralists as with many men of business is that they give too absolute a right of way to some one interest—to the principle of telling the truth—to the game of affairs—in law, to property—\(^{81}\)

While I write in this abstract way I am thinking of you until you almost seem present—and I can hardly go on.\(^{82}\)

Holmes similarly rejuvenated his life force by reading Casanova during his low periods.

Despite his flirtatious manner, his 57-year marriage was plainly an important factor in Holmes’s great health, and his wife’s death was evidently a severe blow to his constitution.

A man does but half live until he is married.\(^{83}\)

I sail for England without gaiety of heart. As I grow older the notion of leaving my wife weighs on me more, and I do not believe I ever shall do it again.\(^{84}\)

For sixty years she made life poetry for me and at 88 one must be ready for the end. I shall keep at work and interested while it lasts—though not caring very much for how long.\(^{85}\)

\(^{80}\) Ibid., 264.
\(^{81}\) Ibid., 217.
\(^{82}\) Ibid., 217.
\(^{83}\) Letter to William James, May 1, 1878, ibid., 133.
\(^{84}\) Ibid., 285.
I don’t lose my interest in my friends or affairs of the mind or in my job—although it may be, as I wrote to someone yesterday, like a man’s beard growing after he is dead. My wife’s death seems like the beginning of my own…

I think that my wife’s death, … keeps the thought of my own before me… It makes me think of the time when all life shall have perished from the earth…

With the death of his wife, Holmes struggled to bear the eternal recurrence doctrine more intellectually than bodily. On the celebration of Holmes’s ninetieth birthday in 1931 while he was still a Justice of the U.S. Supreme Court, in a brief national radio address he compared himself to a horse and rider cantering after having crossing the finish line—the death of his wife.

In this symposium my part is only to sit in silence. To express one’s feelings as the end draws near is too intimate a task. But I may mention one thought that comes to me as a listener in. The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a stand still. There is time to hear the kind voice of friends and to say to oneself: The work is done. But just as one says that, the answer comes: The race is over, but the work is never done while the power to work remains. The canter that brings you to a stand still need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living. And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago—“Death plucks my ear and says, ‘Live—I am coming.’”

Holmes thus became practiced at drawing on sexuality to make a psychological reality of his mystical faith in the creative genius of reproductive continuity. Holmes’s practice left only the slightest traces in his reflective writing as slim evidence of his implicit philosophy, but the psychology of his Soldier’s Faith is otherwise unexplained.

Holmes’s apparent final gesture was to set out his civil war uniform with a bullet that wounded him, all faithfully preserved for some seventy years. Through his will, Holmes repaid the government all the salary he received as a judge. Plainly, Holmes was telling us that among his works, *The Soldier’s Faith* remained pre-eminent. To understand Holmes is to understand *The Soldier’s Faith*. In this speech, however, Holmes only tells us what the Soldier’s Faith is and that it is a sublime phenomenon. Holmes never did say explicitly how to achieve it. For this reason most of this thesis has focussed on Nietzsche, who analyzes the “how” at length, but is much less sublime on describing the “what.” Having explored Nietzsche, we can now make sense of Holmes’s “what.” The remainder of this chapter analyzes *The Soldier’s Faith* from the Nietzschean perspective as a “festival of recognition.”

The most important inference from Holmes’s life and later writing, and from Nietzsche, is that the Soldier’s Faith is a residual faith after critical analysis, seasonally adjusted for the state of one’s community and tempered by the humility of skepticism. As Nietzsche observes, not everyone is the creative-critical type—or, more realistically, everyone varies widely in the attainment of such capacity, or “order of rank” as Nietzsche calls it. *The Soldier’s Faith* is Holmes’s paean to an everyman’s faith, in a context where the occasion and means of critique have been exhausted.

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89 *Joyous Science*, section 353.
90 *The Birth of Tragedy*, section 19.
Holmes’s first image is a blind piper, playing amidst a crowd that generally fails to notice his music.

Any day in Wellington Street, when the throng is greatest and busiest, you may see a blind man playing a flute. I suppose that some one hears him. Perhaps also my pipe may reach the heart of some passer in the crowd.

The “blind” flautist is plainly the skeptical Holmes, who cannot fathom Eros. He faithfully plays the music in various conceptual keys throughout the speech—“mysteries still real,” “honor,” “the unspeakable somewhat,” “The Gleam,” “Merlin’s magic,” “glory,” “soul,” and lastly, “the soldier’s faith.” Music similarly connotes Eros for Nietzsche: “Without music, life would be an error.”91 In this speech Holmes the flautist simply plays and does not teach music. Holmes is like Nietzsche in The Birth of Tragedy, writing for those who can already recognize the music. Unlike Nietzsche or Plato, Holmes never attempts to become a “pied” piper who writes esoterically, but Holmes does attempt to seduce law students toward music in “The Path of the Law.”

The Soldier’s Faith begins by observing the lack of “music” in commerce, partisan idealism and science. The heart of a woman is no longer the soldier’s prize for faithful struggle. The cult of comfort and pity leads inexorably to self-seeking individualism and a degenerating, divisive community. It begets material envy, whereas the respect of a general derives from his power to inspire and command, not the opulence of his tent. Justice should be holistic and demands a primordial, Dionysian unity with the entire community—patriotism. A life of scientific comfort without patriotic music wanes pale.

...[W]ar is out of fashion, and the man who commands the attention of his fellows is the man of wealth. Commerce is the great power. The aspirations of the world are those of commerce. Moralists and philosophers, following its lead, declare that war is wicked, foolish, and soon to disappear.

The society for which many philanthropists, labor reformers and men of fashion unite in longing is one in which they may be comfortable and may shine without much trouble or any danger. The unfortunately growing hatred of the poor for the rich seems to me to rest on the belief that money is the main thing (a belief in which the poor have been encouraged by the rich), more than on any grievance. Most of hearers would rather that their daughters or their sisters should marry a son of one of the great rich families than a regular army officer, were he as beautiful, brave, and gifted as Sir William Napier. I have heard the question whether our war was worth fighting after all. There are many, poor and rich, who think that love of country is an old wife's tale, to be replaced by interest in a labor union, or, under the name of cosmopolitanism, by a rootless self-seeking search for a place where the most enjoyment may be had at the least cost.

Meantime we have learned the doctrine that evil means pain, and the revolt against pain in all its forms has grown more and more marked. From societies for the prevention of cruelty to animals up to socialism, we express in numberless ways the notion that suffering is a wrong which can and ought to be prevented, and a whole literature of sympathy has sprung into being which points out in story and verse how hard it is to be wounded in the battle of life, how terrible, how unjust it is that anyone should fail.

Even science has had its part in the tendencies which we observe. It has shaken established religion in the minds of the very many. It has pursued analysis until at last this thrilling world of colors and sounds and passions has seemed fatally to resolve itself into one vast network of vibrations endlessly weaving an aimless web, and the rainbow flush of cathedral windows, which once to enraptured eyes appeared the very smile of God, fades slowly into the pale irony of the void.
Comfort, for Holmes, is not an end, merely a means to health and health a means to "music." Nonetheless, health is important and Holmes's de-emphasis of the ultimate importance of material comfort must be qualified by his bold resistance to using the Constitution to overturn socially progressive legislation.

Science, for Holmes the nominalist skeptic, is incomplete and there is a level of meaning outside its parameters. For those who listen, the palpable music of glowing mysteries—the felt need to struggle for life—still defies the bleak void of science.

And yet from vast orchestras still comes the music of mighty symphonies. Our painters even now are spreading along the walls of our Library glowing symbols of mysteries still real, and the hardly silenced cannon of the East proclaim once more that combat and pain still are the portion of man. For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine. ... Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war. If it is our business to fight, the book for the army is a war-song, not a hospital-sketch. It is not well for soldiers to think much about wounds. Sooner or later we shall fall: but meantime it is for us to fix our eyes upon the point to be stormed, and to get there if we can.

Holmes's celebration of suffering, like his de-emphasis of material concern, must be read as a post-critical faith that life will find meaning for suffering and even death, and that indeed we find joy only in such suffering and dying. Holmes's soldier, like Zarathustra's disciple, chooses a free and purposeful death. However, Holmes's unqualified praise of blind suffering comes across as a paradox—much as Emerson's post-Civil War address challenged his hearers by declaring that was is not good despite the killing, but because of the killing. As Holmes later wrote, "a
paradox takes the scum off your mind." Holmes’s speech builds up to a paradox of such absurdity as to resist any reductive explanation of the music he hears.

Who is there who would not like to be thought a gentleman? Yet what has that name been built on but the soldier’s choice of honor, rather than life? To be a soldier or descended from soldiers, in time of peace to be ready to give one’s life rather than to suffer disgrace, that is what the word has meant; and if we try to claim it at less cost than a splendid carelessness for life, we are trying to steal the good will without the responsibilities of the place. We will not dispute about tastes. The man of the future may want something different. But who of us could endure a world, although cut up into five-acre lots and having no man upon it who was not well fed and well housed, without the divine folly of honor, without the senseless passion for knowledge out-reaching the flaming bounds of the possible, without the ideals the essence of which is that they never can be achieved? I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.

Emerson, with his established reputation and authority as a secular minister, stuns his hearers with an unqualified paradox in a poetically dense aphorism. Holmes achieves a different, uncanny effect with his meandering and doubtful prose of skeptical introduction. Holmes cannot know anything for certain, except that an absurdly irrational soldier’s faith is the most beautiful truth.

Holmes does not argue the paradox. For those “who know battle” Holmes paints its primordial strength to overcome the most palpable sensory affronts to rational self-preservation: “felt the burst of the spherical case-shot as it came toward you,” “heard and seen the shrieking fragments go tearing through your company,” “seen where ... rifle bullets are striking,” “walk toward the blue line of fire,” “dead and dying lay piled,” “bullets splashing,” “heard the spat of bullets upon the trees,” “felt your foot slip upon a dead man’s body.”

You know your own weakness and are modest; but you know that man has in him that unspeakable somewhat which makes him capable of a miracle, able to lift himself by the might of his own soul, unaided, able to face annihilation for a blind belief.

Nevertheless, most of Holmes’s hearers would not have known battle. Holmes must appeal to ancient visions from battle that we live and die for Eros.

“The end of worldly life awaits us all. Let him who may, gain honor ere death. That is best for a warrior when he is dead.” So spoke Beowolf a thousand years ago. “... O young Mariner, ... Follow the Gleam.” So sang Tennyson in the voice of the dying Merlin.

Holmes later notes that battle veterans “have shared the incommunicable experience of war,” and so Holmes realizes he cannot convince with concepts and reason, but can only play his music.

You who called this assemblage together, not we, would be the soldiers of another war, if we should have one, and we speak to you as the dying Merlin did in the verse I just quoted. Would that the blind man’s pipe might be transfigured by Merlin’s magic, to make you hear the bugles as once we heard them beneath the morning star! For you it is that now is sung the Song of the Sword:
“... 
Making death beautiful. 
Life but a coin 
To be staked in the pastime 
Whose playing is more 
Than the transfer of being; 
...

Holmes then makes his only overt concession to prudence. Indeed, Holmes tells us that war itself is not the ultimate point. Rather, the point is that living in joy means suffering and dying for communal Eros and that one learns to feel this through experience. As for Nietzsche, one understands creative deed by doing creative deeds. The pursuit of comfort as an end is individualist negation that undermines the felt wisdom of Eros, which grows only from deeds that entail suffering as common law grows only from hard cases that entail decision. A great judge forsakes the comfort of concurrence for the pain of dissent—"the proof comes later and may even never come."

War, when you are at it, is horrible and dull. It is only when time has passed that you see that its message was divine. I hope it may be long before we are called again to sit at that master's feet. But some teacher of the kind we all need. ... We need it in this time of individualist negations, with its literature of French and American humor, revolting at discipline, loving flesh-pots, and denying that anything is worthy of reverence,—in order that we may remember all that buffoons forget. We need it everywhere and at all times. For high and dangerous action teaches us to believe as right beyond dispute things for which our doubting minds are slow to find words of proof. Out of heroism grows faith in the worth of heroism. The proof comes later and even may never come. Therefore, I rejoice at every dangerous sport which I see pursued. ... If once in a while in our rough
riding a neck is broken, I regard it, not as a waste, but as a price well paid for the breeding of a race fit for leadership and command.

Holmes’s non-genetic “breeding” accords with Nietzsche’s.

Holmes comes to the nub of the speech. The Soldier’s Faith is a constitutional principle of our communal existence. The joy of life entails love of country, not in the sense of nationalistic pride, but love for the greater community that administers itself as the means of Eros. When a community’s critical powers are exhausted and the “evil day” has arrived setting part against part, they act as “noble enemies” whose battle becomes an unforgettable event, a monumental dissent-plagued judgment in the development of Justice in the community. The psychology of Eros is joy in the struggle for Justice as the dynamic of building a stronger community. These constitutional truths Holmes takes to be self-evident.

That the joy of life is living, is to put out all one’s powers as far as they will go: that the measure of power is obstacles overcome, to ride boldly at what is in front of you, be it fence or enemy; to pray, not for comfort, but for combat; to keep the soldier’s faith against the doubts of civil life, more besetting and harder to overcome than all the misgivings of the battlefield, and to remember that duty is not to be proved in the evil day, but then to be obeyed unquestioning: to love glory more than the temptations of wallowing ease, but to know that one’s final judge and only rival is oneself: with all our failures in act and thought, these things we learned from our noble enemies in Virginia or Georgia or on the Mississippi, thirty years ago; these things we believe to be true.

"Life is not lost," said she, "for which is bought
Endless renown."

We learned also, and we still believe, that love of country is not yet an idle name.

"Deare countrey!...
How brutish is it not to understand
How much to her we owe, that all us gave;
That gave unto us all, whatever good we have!”

Once Holmes’s patriotism is recognized as Eros, his accordance with Nietzsche becomes clear. Nietzsche, despite his mask as arch-critic, remained a patriot of the German community as its noble enemy. Moreover, Nietzsche’s Eros expanded his sense of community to make him a “good European” for whom the distinctions and purity of cultural races (as opposed to genetic races) were desirable as the “breeding” of noble enemies of contrasting types.

Holmes ends his speech in a personal register. Holmes notes the encouraging effect of his regiment’s colonel, giving “soul” to the regimen—a personification of Eros in action.

Three years ago died the old colonel of my regiment, the Twentieth Massachusetts. He gave our regiment its soul. No man could falter who heard his “Forward, Twentieth.” I went to his funeral. From a side door of the church a body of little choir-boys came in like a flight of careless doves. At the same time the doors opened at the front, and up the main aisle advanced his coffin followed by the few gray heads who stood for the men of the Twentieth, the rank and file whom he had loved, and whom he led for the last time. The church was empty. No one remembered the old man whom we were burying, no one save those next to him, and us. And I said to myself, The Twentieth has shrunk to a skeleton, a ghost, a memory, a forgotten name which we other old men alone keep in our hearts. And then I thought: It is right. It is as the colonel would have had it. This is also part of the Soldier’s faith: Having known great things, to be content to walk in silence.

This is the most profound aspect of the life philosophies of Holmes and Nietzsche. Joy is dutiful action for life, the dynamic of Justice. One contributes to ongoing communal life through
creative deeds, according to one’s self-developed task or role. One has faith that life will make use of the event to become more robust, but this means at some point life will “have done with it,” as Nietzsche says of how individuals make use of their own experiences. The Soldier’s Faith therefore desires that deeds will have effect but ultimately be forgotten, much as judicial decisions affect the development of law but ultimately fade into irrelevance. Holmes ends making his point with a little song, in which the Soldier’s Faith is to make a world for future lovers—sexuality personifying Eros. The Soldier’s Faith is faith in life as the inexhaustible, open-ended struggle of romance.

And when the wind in the tree-tops roared,
The soldier asked from the deep dark grave:
‘Did the banner flutter then?’
‘Not so, my hero,’ the wind replied,
‘The fight is done, but the banner won,
Thy comrades of old have borne it hence,
Have borne it in triumph hence.’
Then the soldier spake from the deep dark grave:
‘I am content.’

.................................
Then he heareth the lovers laughing pass,
And the soldier asks once more:
‘Are these not the voices of them that love,
That love—and remember me?’
‘Not so, my hero,’ the lovers say,
‘We are those that remember not;
For the spring has come and the earth has smiled,
And the dead must be forgot.’
Then the soldier spake from the deep dark grave:
‘I am content.’
CHAPTER 5

NIETZSCHE'S HORRIFIC THOUGHT

5.1 Ecce Homo

Having come to understand that the essence of a psychologically healthy person is to attune to the
dynamics of justice resolutely with total self-sacrifice, did Nietzsche set such a task for himself?
Nietzsche claims to have heard a calling, which he quotes in the preface to Human, All Too
Human.\(^1\) Nietzsche wrote this preface after having written Thus Spoke Zarathustra. The timing
and tone of the preface suggests Nietzsche wrote with the confidence of hindsight, telling us that
he heard his calling just before Human, All Too Human and that it inspired the new direction he
took beginning with that work. This chapter proposes that Nietzsche experienced this calling on
Sunday, April 2, 1876 while reading Malwida von Meysenbug's memoirs.

The calling indicates that Nietzsche would thenceforth do his philosophy as dynamics of
justice, but he breaks off his report just as it was about to reveal his task completely. Why would
Nietzsche refrain from telling us the full content of his task? How would Nietzsche have used his
life to advance justice as much as he could with his psychological roots, his personal history, his
talents and his situation?

Nietzsche had to create a monumental deed that induces others to pursue obsessively the
dynamics of justice—both to understand justice and to do it. After The Birth of Tragedy,
Nietzsche studied psychology, evolution, chemistry and mathematics to advance his
understanding of justice as moral scientist. This chapter argues that Nietzsche's self-training as
psychologist and his evolutionary focus inexorably lead him to what he alluded to as a horrific

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\(^1\) Friedrich Nietzsche, Human, All Too Human, tr. R.J. Hollingdale (Cambridge: Cambridge University Press, 1986)
thought. Nietzsche evidently became convinced that male uncertainty over the genetic parentage of their children and its implication within intra-species sexual selection has resulted in an unconscious male disposition to exploit windfall opportunities at the expense of the collective future. Nietzsche prepares us for the "horrific" conclusion—horrific for males—the male elite should defer to their female elite peers.

This radical conclusion would have challenged Nietzsche with an intractable problem in terms of fulfilling his life philosophy to do justice. Simply penning a scholarly work to explain his theory of justice, the psychology of his life philosophy, and his radical gender politics would have rendered his work an historical footnote. Nietzsche’s philosophical and psychological imperative to apply himself wholly to a just life would compel him to seek maximum effect. Nietzsche saw the work of J.J. Bachofen (a colleague of Nietzsche’s at the University of Basle who wrote about matriarchy) shunned and without significant influence. To overcome this fate, Nietzsche used as his exemplar Richard Wagner, who was masterful at staging events—deeds with effect.

Nietzsche’s philosophical rival in terms of justice was Plato and Nietzsche sought to emulate Plato in creating a monument of multi-millennial effect. After bouts of serious depression as he grappled with the task of how to create a monument, Nietzsche apparently settled upon Zarathustra as his counter-work to Plato’s Republic. Nietzsche evidently emulated Plato in two respects. The following chapter, Para-Conceptual Rhetoric, will argue that Nietzsche wrote both exoterically (for the public) and esoterically (for initiates only). This chapter argues that the thrust of the esoteric political agenda was matriarchy—the horrific thought. This chapter will also speculate that Nietzsche, as demanded by his philosophy, used his life and death as a rhetorical figure and catapulted his effect by staging a mental breakdown. By dying with an
undisclosed esoteric philosophy, Nietzsche demonstrated faith that the eternally creative forces of nature would make use of his monument to promote future growth.

Nietzsche's task, then, might be summarized as follows. Nietzsche produces an exoteric manual for his readers to self-train the creative and critical capacities his understanding of justice requires. He uses Wagnerian techniques to make his readers feel that the self-building project and some undisclosed destiny have utmost importance. He writes in layers that stage degrees of access to esoteric content so that advancing through stages of understanding both trains and tests his readers' philological skill at doing emotionally engaged inductive science and provides them experience in self-transforming creativity. Nietzsche conceals an esoteric treasure that will only become apparent to the readers once they have undergone enough self-transforming creative experiences that their psychology will have been altered to dispose them to be receptive to the prospect of matriarchy—to experience matriarchy seriously rather than as comic or horrific. Once it becomes evident that some of the intelligentsia are studying the exoteric writing seriously, Nietzsche choreographs a mental breakdown to hook them by inducing cult fascination and obsessive questioning about his sanity in producing his last works. Nietzsche concludes *Ecce Homo* with a fugue ("Have I Been Understood?") that repeatedly urges the reader to decipher Nietzsche's life as a rhetorical figure to understand his horrific thought. With the self-sacrificing breakdown, Nietzsche abdicates to the care of his mother and sister. Nietzsche fortifies the biographical pointers in "Ecce Homo" to a ritual self-crucifixion for matriarchy by explicitly naming his mother and sister as his abysmal thought. Nietzsche dies in silence to demonstrate faith in justice as the eternally creative force that makes use of all monuments.
This chapter attempts to read Nietzsche as Nietzsche directs us to read Hamlet—to find in his actions what is not said expressly in the text. The following chapter applies the principles of self-organizing criticality to show how Nietzsche could apply his genealogical method to attempt to design the textual strategies his task required.

5.2 Nietzsche’s Misogyny

The matriarchal reading of Nietzsche developed in this thesis is not only radical, it reverses the received wisdom that Nietzsche was misogynistic. There are roughly four ways to read Nietzsche on women: (1) Nietzsche was an irredeemable misogynist; (2) Nietzsche was an incidental misogynist whose misogyny was an embarrassing lapse that is inconsistent with, not integral to, and expungeable by the rest of his thinking; (3) Nietzsche’s remarks on women can be deconstructed so that the trope of woman has non-misogynistic philosophical significance; (4) Nietzsche advocated matriarchy and attacked the women of his era as being psychologically too weak to assume their role as legislators and for being misguided in seeking equality, particularly through a formal schooling that failed to educate the will-to-life.

The first reading—irredeemable misogyny—is emphatically advanced by Geoff Waite in *Nietzsche’s Corps/e.* For Waite, Nietzsche was unquestionably a misogynist who fantasized a slave state governed by a handful of *male* elites—a modern rendition of the ancient Greek prototype that fundamentally captivated the likely homosexual, classical philologist. Nietzsche thus sought to emulate and surpass Plato by promoting an exoteric philosophy that would

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subliminally incorporate the conditions for political elitism, exorcising the scepter of imminent Enlightenment communism, the only true threat to elitism.  

Waite's thesis is politically motivated and he reads Nietzsche as fundamentally a political philosopher. Waite forcefully argues that the root of Nietzsche's thinking is a tainted political philosophy that has eluded most of his readers, the fruit of which is an exoteric pulp that implants an esoteric seed. In particular, Waite claims that Nietzsche subliminally insinuates a perspectivism virus into the critical faculty of his readers thereby causing an auto-immune disorder that undermines their capacity to resist elitism politically. Waite's argument on the necessity for a conspiratorial reading of Nietzsche is compelling and, indeed, such a tactical reversal is consistent with methods advocated by Nietzsche's exoteric philosophy. However, Waite is less tenacious in examining the nature of the elitism Nietzsche foresaw.

Carol Diethe likewise sees the germ of Nietzsche's thinking—its misogyny, in particular—contained in his essays on the ancient Greek state in the early 1870s. Diethe, however, is puzzled by and seeks to explore why it is that so many feminists have regarded Nietzsche as a forgivable misogynist, even an ally. Similarly, Waite concludes that "the puzzle of a largely uncritical reception by women of a sometimes self-professed hater of women remains unsolved."

Diethe provisionally explains such feminists by placing them within the second category of Nietzsche's readers—Nietzsche is fallibly inconsistent but redeemable by applying the rest of his exoteric philosophy to emend his statements about women. Diethe surveys Nietzsche's

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4 In an early essay Nietzsche wrote that we should read Plato as "the wonderfully grand hieroglyph of a profound secret study of the connection between state and genius, eternally needing to be interpreted..." Friedrich Nietzsche, "The Greek State (1871/72)" in On the Genealogy of Morality, tr. Carol Diethe (Cambridge: Cambridge University Press, 1994) 176-186, at 186.

5 Carol Diethe, Nietzsche's Women: Beyond the Whip (Berlin and New York: Walter de Gruyter, 1996) at pages 22 and 41-42 [hereinafter, "Diethe"].
personal relationships with women and concludes that such feminists and later feminists must have found Nietzsche's misogyny to be accidental and overcome by the liberating aspects of his philosophy. "Liberating for whom?" Waite appropriately asks—which suggests that reading Nietzsche as redeemable misogynist is a tenuous position. As Waite counsels, one should deal with all of Nietzsche, especially his esoteric rhetorical practice, before eclectically incorporating any of his exoteric philosophy.

Neither Waite nor Diethe is satisfied with the deconstructive readings of Derrida, Irigaray and others. Waite claims that Irigaray is philologically and philosophically wrong to read Nietzsche as supporting her feminist philosophy.\(^7\) The deconstructive approach leaves one feeling unsure whether Nietzsche really has been appropriated; indeed, one wonders, with Waite, whether it is not still Nietzsche who has appropriated the postmodern reader. Who owns whom cannot be determined without directly confronting Nietzsche's subliminal rhetoric.

While there is much force to Diethe and Waite's dissatisfaction with revisionist and deconstructive readings of Nietzsche's literal misogyny, there are still many unresolved paradoxes that warrant reconsideration of any presumption that Nietzsche was a core misogynist. Diethe observes that many feminists have felt as though Zarathustra speaks to them—notwithstanding Nietzsche's manifest, literal misogyny. Diethe also observes that many feminist contemporaries of Nietzsche conceded that women of his era largely deserved his criticisms. Diethe would like to explain away such concessions as feminist self-loathing, but ultimately this explanation fails to satisfy Diethe as having done with the issue. Diethe notes that some of Nietzsche's readers have interpreted the notorious whip in Zarathustra as intended for use by the woman on man and that such a reading is supported by Nietzsche's arranging the May 1882

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\(^6\) Waite at page 144.

\(^7\) Waite at page 144, footnote 84.
photograph of Lou Salomé holding a whip while seated in a cart pulled by Nietzsche and Paul Rée, but Dieth leaves this spectacular paradox unexplored. For Waite, the ambiguity of the whip in Zarathustra does not even warrant mention; Waite has Nietzsche unequivocally instructing men to use the whip on women.

There is a deep paradox generated by Waite's explanation of how Nietzsche's esoteric style of rhetoric operates. Waite hypothesizes that one of Nietzsche's subliminal tricks was to emblazon elitism hyperbolically on the surface of his writing. This would allow Nietzsche to write simultaneously for two sets of readers: (1) Nietzsche spurs his thoughtful, non-elitist readers to "interpret" the text as irony and construct another meaning, but, abetted by perspectivism, a double irony subliminally programs these readers to become ineffective to resist elitism forcefully; (2) Nietzsche speaks directly to vulgar and elitist readers who read his hyperboles literally. But Waite's identification of Nietzsche's esoteric agenda as male political elitism creates a paradox: why could Nietzsche not bear to legibly write his terrifying, horrific thought in letters or private notes\(^8\) when it was blazoned in print as a subliminal ruse for the most sophisticated readers? Either Nietzsche was inanely inept or he had something much more radical in mind than an updated version of ancient Greek political economy.

None of the first three readings of Nietzsche's manifest misogyny has done with the issue. The fourth reading—Nietzsche sought matriarchy—is rarely recognized as a possibility. Smith and Ferstman in The Castration of Oedipus interpret Nietzsche's use of the myth of Dionysus and Ariadne as a prescription for matriarchy.\(^9\) However, The Castration of Oedipus does not directly address whether this is a philologically and philosophically sound reading of Nietzsche.

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\(^8\) Waite, at page 209.
5.3 Nietzsche’s Esoteric Rhetoric

This chapter argues that Nietzsche ultimately advocated matriarchy as a political philosophy and that this can account for both Nietzsche’s writings and his biography. Further, this chapter argues that Nietzsche’s views are coherent and find support among current theories of evolutionary psychology. Waite’s exposé of the subliminal aspect of Nietzsche’s praxis strongly supports a matriarchal reading of Nietzsche in the following way: Nietzsche must have realized that openly advocating matriarchy would have been silently ridiculed, then ignored, and that he had to resort to subversive means to weaken the misogynistic, male faith in will-to-truth as the first step toward ending patriarchy. Nietzsche had to be subliminally subversive for his philosophy to have any effect; his praxis was a situational application of his philosophy.

Esoteric writing presents an interpretive Gordian Knot, especially when tied by a formidable philologist such as Nietzsche. Any interpretive approach one brings to his texts might have been fully anticipated by Nietzsche and so the reader would remain within his subversive control. Indeed, a strong case has been made that Nietzsche even staged important biographical events, his madness in particular, in an effort to craft his posthumous influence. If so, then he would have surely been selective about what “notes” he kept around to be poured through by Nietzsche scholars, such as Waite who relies heavily on various “smoking guns” in Nietzsche’s notes that indicate the presence of an esoteric agenda. Nietzsche wanted us to look for an esoteric agenda! —there are no short cuts to eluding Nietzsche. The most promising counter-strategy would be to approach Nietzsche from an entirely new perspective external to those he could plausibly have fully anticipated as a philologist.

The first burden of this chapter, then, is to reconstruct Nietzsche's psychological model independently from his subliminal influence and to show how the need for a matriarchal esoteric praxis can be derived from that model. Recent developments in the science of self-organizing systems—complex adaptive systems\(^{11}\)—and evolutionary psychology suggest that Nietzsche had an uncanny intuition of where evolutionary theory would be one hundred years later. Writing in 1995, David Depew and Bruce Weber describe "new" models that represent the "future" of Darwinism, which are based on chaos, thermodynamics, self-organization and complex systems—i.e., will to power and genealogy.\(^{12}\) Nietzsche's exoteric writings seem to have applied this new systems approach to the brain (psychology) and anticipated numerous recent findings in neuroscience and evolutionary psychology. As no one has argued that recent thermodynamic and neurological theories are a mere byproduct of Nietzsche's influence, this chapter can use them as the external perspective from which to discern his esoteric agenda.

The next step is to confirm that Nietzsche personally believed this exoteric model and that it was not merely a subliminal ruse. To accomplish this, the chapter will establish a reliable beachhead into Nietzsche's core esoteric beliefs from which the psychological model can be logically reconstructed using recent science to bolster the plausibility of the inferences. References to Nietzsche's exoteric writing in this section—principally from *Joyous Science*, his most mature "positivist" work—will be used merely to show that at some level Nietzsche appreciated the inferences. Nietzsche's esoteric commitment to the model could then be inferred from a presumption that Nietzsche's personal beliefs were consistent. The argument will be left

with the alternatives that Nietzsche was either blatantly self-inconsistent or that he constructed a monumental life work of ingenious labyrinthine design.

The second part of the chapter will present biographical facts to justify the presumption that Nietzsche was indeed consistent in his core esoteric beliefs and praxis, particularly with respect to matriarchy. Again, his writings will be used cautiously, always factoring in his presumed intention to write seductively and esoterically. This inquiry will lead us to Nietzsche's "horrific thought".

5.4 Nietzsche's Evolutionary Psychology

The most reliable evidence of Nietzsche's esoteric thinking would be the most spontaneous, uninhibited declaration available of a core aspect of his mature thought. In about November 1888 Nietzsche read August Strindberg's play *The Father*. Nietzsche was profoundly affected and on November 27 wrote to Strindberg: "I read your tragedy twice over with deep emotion; it has astonished me beyond all measure to come to know a work in which my own conception of love—with war as its means and the deathly hate of the sexes as its fundamental law—is expressed in such a splendid fashion."\(^{13}\) What had Nietzsche so excited?

*The Father* dramatizes the dilemma that evolution poses for human males. While the female has the disadvantage of being economically dependent on surplus labour during pregnancy and early child rearing, both Nietzsche and Strindberg saw the male as ultimately much more seriously disadvantaged due to uncertainty of genetic parentage. The male must support a female mate to ensure offspring—Strindberg calls the male a "slave"—but the male


never knows for sure whether his labour will be in vain—it is the "cruelest slavery."\(^{14}\) The male is condemned to the hell of game theory and so has evolved unconscious, selfish and opportunistic strategies to increase his probability of real parentage, even if they have negative social consequences. With the onset of consciousness and language, the male pursues a new strategy of obsessively seeking certainty through science and social institutions. The male psyche also craves surrogate, personal immortality through the "fruits of [his] mind"\(^{15}\)—religious metaphysics or eternal influence over the history of science, art and morals—rather than directly raising children and cultivating favourable social conditions. Ultimately, the male fails to overcome his inferior position; he unconsciously senses his futile denial and resents women for it. Woman, certain of the evolutionary significance of her efforts, is psychologically free to use illusion to promote conditions for her children to thrive.

War of the sexes.\(^{16}\)—Nietzsche's apparently final position is scientifically plausible. Indeed, it is now a widely held view within the field of evolutionary psychology. Meredith Small sums up the situation as follows:

[A] war between men and women is exactly what evolution predicts. ... Our inescapable biological heritage, in which females produce infants and males do not, naturally pits females and males against each other. ... The battle of the sexes can be explained, at its deepest level, as a war of different mating strategies.

Some maintain that people are supposed to act cooperatively to make more of our own kind and that collaborating on parenting is "natural" for humans. But our species, Homo sapiens, like any other species, has no lofty purpose, no


\(^{15}\) *Ibid.*, at page 52.

unifying push to make sure that its lineage goes on forever. It's a nice idea but evolution simply doesn't work that way. Evolution by natural selection operates not at the level of the species but at the level of the individual. The evolutionary goal of each individual is to pass on genetic material to the next generation, regardless of the interests of others. Evolution thus calls for an ultimately selfish strategy of looking out for one's own genetic future. But how the two sexes pass on their genes differs so dramatically that males and females of every species end up fighting each other all the way into their reproductive fitness.

... Compelled by the urge to pass on genetic material to the next generation, the sexes must cooperate in mating and parenting, but each sex cooperates only under duress because females and males operate under different reproductive rules set down in opposing directions eons ago.\(^{17}\)

Community and individual.\(^{18}\)—Nietzsche's interest in *The Father* shows that he appreciated an irreducibility in the conflicting evolutionary dynamics of individual and community—cooperation is always under duress. However, in section 1 of *Joyous Science* Nietzsche says we are species-beings and, like Aristotle and Marx, grounds ethics in bodily instincts to act for the good of the species. Did Nietzsche misunderstand evolution? Quite the contrary. Recent evolutionary theory is discovering increasing support for claims that communal strategies are instinctive.\(^{19}\) Under kin selection, an individual can promote his or her own gene replication by promoting the genetic success of kin, the probabilistic effect of which geometrically decreases with each degree of removed consanguinity—a daughter or sister shares


\(^{18}\) *Joyous Science*, Preface 2, 1, 3-4, 21, 117, 318, 373. See also Chapter 3 of this thesis, “Cultivating Justice”.

1/2 the genes, an uncle 1/4, a cousin 1/8, and so on. With a high degree of probability one can achieve evolutionary success (replication of one's genes) by promoting social conditions that benefit one's kin. Furthermore, the success of one's own offspring presumes an effective, viable social environment, and sexual selection itself presumes a species context in which mate selection occurs. Moreover, in a technological world where unchecked individualism could extinguish the possibility of individual replication altogether, even purely individual goals now entail a fundamental concern with community. Both individual gene-replication strategies and communitarian strategies are primordial from an evolutionary perspective—each are necessary means to the other, but always interact under duress.

*Causal irreducibility.*—Nietzsche's evolutionary thinking requires a causal explanation of how two teleologies could be means to each other and yet ends in themselves, so that neither teleology could be fully explained in terms of its contribution—reduced—to the other. How could Freud claim that drives are not reducible to instincts? Modern evolutionary psychology is beginning to answer this by revealing the interdependence of both instinct and culture—nature and nurture—in human mating behavior, so that, for example, our sense of beauty is always both instinctive and cultural, each constraining the other. Likewise, exoteric Nietzsche appreciated the fact that the battle of the sexes could not be reduced either to transcendental cooperative goals or to individual goals. Nonetheless, in exoteric Nietzsche's nuance-generating metaphysics and psychology, sublime superstructures could be generated from base ultimate teleologies.

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21 Joyous Science, 7.

Diethe notes that some feminists have found Nietzsche's depiction of marriage to be so inspirational that they question his capacity for misogyny. Two nascent bodies of scientific inquiry—chaos theory and complexification—and the new conception of causality and fractal-structures they entail, purport to explain how two base teleologies could become means to each other yet remain ends in themselves and generate sublime superstructures as a product of their struggle, and so overcome evolutionary reductionism.

*Incomplete knowledge.*—Chaos theory implies that there are causal processes that exhibit sensitive dependence on initial conditions, which means that increasing the accuracy of measurement of initial conditions does not ensure any increase in the accuracy of predicting the outcome. This gap in scientific knowledge is a gap that exists in principle—science could never improve upon probabilistic and vague descriptions of such processes—science could never fully explain the effects in terms of measurable causes—reductionism is impossible. Such a physical system would incorporate more knowledge than science could ever verify about the system—the historical experience of the system embodies knowledge that could not be judged before the bar of scientific reason. This correlates to exoteric Nietzsche's greater respect for embodied wisdom (will-to-life) over science (will-to-truth). This entails some degree of elitism, since wisdom depends on the quality and nuance of the system's history of experiences, the precise state and legitimacy of which cannot be measured or verified by science. To make this connection, however, Nietzsche had to find the dynamical link among chaos, order and teleology—a science of becoming—genealogy.

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23 Diethe, chapter 3.
24 *Joyous Science*, Prelude 53, 9, 10, 46, 335, 373.
Emergence of order.\textsuperscript{26}—A plausible theory of reality is to view chaotic, entropic energy as a basic constitutional background state, and order—matter, form, structure—as exceptional states of self-reinforcing feedback. Just by random chance, then, order can emerge from underlying chaos and endure as those structures that happen to result from self-reinforcing patterns of forces.\textsuperscript{27} For example, in chemistry certain sets of reactions might produce their own catalysts—auto-catalytic structures—and recent scientific theories generally posit “Kauffman Nets” as self-reinforcing networks of forces (lock-ins) that create stable patterns of energy.\textsuperscript{28} The emergence of such structures is random and chaotic, a product of undirected entropy. Chaos theory implies that science could never provide a fully reductive explanation of such an emergence—science would always have to treat the emergence as an end in itself. From an early age, Nietzsche was attracted to theories that viewed atoms as pure energy and rejected matter as a fundamental unit of reality.\textsuperscript{29} Nietzsche remained an avid reader of chemistry and thermodynamic principles\textsuperscript{30} and exoteric Nietzsche seems to have anticipated recent theories of Kauffman Nets and “memes.”\textsuperscript{31} For exoteric Nietzsche, a basic constituent of all matter and form is a randomly emergent, self-promoting process that commandeers energy to its self-perpetuation—will to power.

\textsuperscript{26}Joyous Science 1, 109, 322.
\textsuperscript{30}Selected Letters, page 64, footnote 22; page 182, footnote 47.
Genealogy.\textsuperscript{32}—Chaos theory gains teleological significance when combined with the selective principle of evolutionary theory.\textsuperscript{33} For exoteric Nietzsche a dynamical application of will to power produces genealogy—a morphological explanation for the evolution of structures of ever-increasing complexity as time unfolds. At the most general level, there emerges an ambient teleology that those structures that in fact happen to self-perpetuate are the ones that persist and predominate over time, most failing, thereby creating a de facto teleology from selection, called teleonomic in biology.\textsuperscript{34} Elemental structures emerge by chance as chaotic forces randomly self-organize into self-reinforcing orders. These elemental structures become building blocks within other self-reinforcing orders. The higher-level self-reinforcing order implicitly includes forces to commandeer substructures, which creates new teleological influences to promote the formation and perpetuation of the pre-existing substructures. However, the formation of the substructures, and their subsequent integration into the superstructure, are chaotic emergences of order. In relation to the superstructure, the chaotically emergent substructures are ends in themselves—explaining the roles of the parts in the superstructure does not fully explain either the origin of the parts or how they become functionally organized to produce the superstructure. Moreover, as the continued existence of the substructures comes to depend more on the teleological influences of the superstructure, both superstructure and substructures become interdependent means to each other in a Hegelian master-slave dialectic. Exoteric Nietzsche explains in section 12 of the second essay of On the Genealogy of Morality that the teleological explanation for the substructure (its role in the superstructure) does not fully

\textsuperscript{32}Joyous Science, 109-111, 205, 277, 332, 345, 360.
\textsuperscript{34}Ernst Mayr, This is Biology: The Science of the Living World (Cambridge, MA: Harvard, 1997); Mark A. Bedan and Norman H. Packard, “Measurement of Evolutionary Activity, Teleology and Life” on Artificial Life II, eds.
account for the substructures’ existence, either in origin, in formation, in persistence or in how it contributes to or is shaped by the ends of the superstructure.\textsuperscript{35} The chaotic emergence of order at every level means that the will to power is not a complete causal explanation, which could explain why will to power as a cosmological hypothesis is a just methodological presumption for exoteric Nietzsche in section 36 of \textit{Beyond Good and Evil}.\textsuperscript{36}

\textit{Complexification}.—Exoteric Nietzsche’s theory of causality and complexification—genealogy—finds strong support in contemporary science. The theory of nonlinear dynamical systems has produced a major paradigm shift in causality, away from unidirectional teleology and functional reductionism, toward the evolutionary and self-organizing paradigm. Esther Thelan and Linda Smith provide a succinct and devastating critique of previous models of cognitive and motor development in children as question begging.\textsuperscript{37} This critique is anticipated by exoteric Nietzsche in almost every detail, including the realization that every development must be analyzed fully from three perspectives—nature, nurture and chance.\textsuperscript{38} Moreover, the model of the brain as a self-organizing, nonlinear dynamical system—self-organizing superstructures emerging from the chaotic play of understructures—is becoming a dominant paradigm in brain research\textsuperscript{39} for the simple reason that former models have little explanatory power—just as exoteric Nietzsche complained one hundred years earlier. The key paradigm shift is to see brain development (mind processes) as causally homomorphic to motor development (body processes),

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\begin{itemize}
  \item \textsuperscript{38} Joyous Science, 333 (laugh=chance; lament=nature; curse=nurture).
\end{itemize}
and to the more universal effect of chaos in the formation of evolutionary complexity (evolutionary processes in general).

Genealogy in social theory.—A similar view of causality has been developed in social theory. Waite considers “structural causality” as central to the thinking of Spinoza, Marx and Althusser. Structural causes are said to “indwell” in the effects and so cannot be unraveled into a single, transitive thread of causes and effects. Nietzsche may have been influenced or reinforced by Spinoza and Marx in this regard; the essential insight is that reductionism is impossible in a way that implies relative autonomy of forms from measurable antecedent causes. Modern social theory has also found purely functionalist and structuralist models to be analytically inadequate. However, none of these social theorists seems to have thoroughly applied their insight into causality at the level of psychology, though some have explored the formative link between psychological processes and social exchanges.

Greek origins.—This paradigm of order as a chaotic, irreducible emergence from the interplay of underlying substructures and a greater teleonomic context has precedence in Heraclitus and the classical Greek description of four types of causality: material, efficient, formal and final. A claim that the emergence of a particular form is chaotic amounts to a claim that in such a case the four causes cannot be reduced to a precise, deterministic, binary cause and effect. The process of the emergence of the form depends on nonlinear sensitivity to historical information contained in the teleological contexts, the material characteristics of the substructures, and the precise history of interactions. It is important to realize, however, that not

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40 Waite at pages 34-47.
all forms are chaotically emergent or that often the range of chaotic instability might not be significant—otherwise reductionist science would never have gotten a foothold, nor would language have evolved the grammatical forms of agency and linear causality.

Proportionality. —Nietzsche was a psychologist and some of his most valuable exoteric insights were applications of the principles of chaotic emergence and complexification to unravel the human psyche genealogically. Like the Greeks, exoteric Nietzsche viewed psychological and social structures as seamlessly connected, chaotically emergent forms—possession by Homeric gods was a personification of such psychological and social forms. A fundamental aspect of exoteric Nietzsche’s psychology was to view the brain as a collection of conflicting forms, each a self-organizing, self-promoting brain structure with its own local goal—a will to this or that. The process of psychological development, then, is largely one of negotiating viable compromises among the competing substructures. Proportionality is a name for this process, though it means much more than simply finding a mean between extremes—the mean is "golden." Exoteric Nietzsche looks disdainfully upon simple averaging out of conflict, something he associates with liberal mediocrity.

Unity in diversity. —Two examples will help illustrate this crucial point. First, consider juggling. The juggler does not simply hold balls steady at an average height. That would restrict the juggler to just two balls—much potential capacity would be wasted by failing to take the risk of juggling. By keeping balls moving, a competent juggler can maintain several balls in the air at once. Juggling works by a system of coordinating opposing demands on the juggler’s attention—a better juggler can maintain more opposing demands within the same system. The juggling

43 Joyous Science 39, 50, 143.
45 Joyous Science 32.
algorithm is like a code that governs when to switch priority of attention from one ball to another. The more nuanced and strategic the code is at managing the need for priority reversals, the more balls the juggler can maintain. Unity emerges from diversity.

*Managing chaos.*—Second, consider the social form of trust. If I continually break promises, people will at some point suddenly lose faith in me and stop relying on me. Like a juggler, I have dropped a ball. However, I do not have to keep all promises to maintain trust—other goals can take precedence in the right context. Nonetheless, randomly keeping promises a certain percentage of the time or simple “moderation” will not do—the mean must be golden. I might break a lunch engagement to take my ill-stricken mother to the hospital emergency ward. Over time, my friends develop a sense of how important other things are for me—they infer my code of behavior with its implicit ranking of values, or I simply tell them—and they can adjust their reliance on me insofar as they trust me to contribute to their own juggling demands. We become like a pair of jugglers tossing balls to each other. A savvy juggler will not expect me to drop all other balls merely because I am being relied upon, but she will expect me to evaluate my effect on her when meting out priority. The primordial instinct for justice seeks cohesion while maintaining diversity—Nietzsche’s notes show that he planned to demonstrate: “The reward of justice, as the mother of the true truth drive.”\(^{46}\) Justice is the emergence of unity at the social level.

*Consciousness.*—Nietzsche understood consciousness primarily as a means of promoting psychic coherence. Exoteric Nietzsche understood dreams as confabulations to make sense of randomly triggered, emotional brain events and explained consciousness in these

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terms. Exoteric Nietzsche came to view the brain as a parliament of conflicting processes with clashing goals and demands. Richard Restak in *The Modular Brain* presents evidence that each functional module of the brain, such as vision, forms its own goal-driven, perceptual/meaning hierarchy, shaped primarily by its functional requirements but amenable to having its perceptual/meaning structures negotiated to harmonize with other modules, insofar as the negotiated compromises do not jeopardize the emergences of forms necessary to its local task. Psychic coherence can then be seen as a continual process of revising the shared meanings to enhance the degree of mutual accommodation among conflicting substructures. The Homeric consciousness, metaphorically yielding to possession by one god or another, can be interpreted as having failed to evolve a sufficiently nuanced conscious narrative to commensurate modular requirements adequately—modules assert control and the rationalizing capacity of consciousness must invent divine agents or madness to confabulate successfully a narrative to account for brain events. A child’s tantrum can be viewed as a standoff between competing modules—"please parent to preserve source of nurturing" versus "assert independence"—resulting in temporary loss of psychic order. Through a series of formative experiences that the child implicitly presumes to be representative, the child evolves a more nuanced, situational complexification between the competing teleologies, rather than simply reversing priority for the conflict next in sequence or adopting a simple mean that endangers the requirements for emergent orders necessary to both

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51 Knox, at pages 38-61, especially 42-45.
teleologies. The child must learn to juggle; in each major phase of emotional growth, the child learns to add a new ball.

Truth as treaty. This complexification of modular processes generates a personal truth not as primarily grounded in a representation of reality or the functional requirements of any one substructure, but rather, a situational, historically dependent treaty code whose efficacy derives from its evolved negotiation in the experiences of conflicting substructures. For exoteric Nietzsche, then, a strong will in the psychological sense is the result of a greater degree of successful negotiation of conflicting substructures. A personal code is forged—one adopts “brief habits” to discipline oneself, until one has gathered enough experience to undergo prudently a plausible transformation to a more complex version of the code. Perspectivism should be understood in this sense—because of chaotic emergence at various levels, no precise, fixed universal code is possible, but the functional reality of the modules still constrains the range of viable codes. The code has a coherence criteria of truth, like at treaty hammered out according to the relative importance and power of each module, but the code is ultimately constrained by the functional requirements of the various modules and can only ever achieve a relative autonomy from that reality check. Perspectivism is not relativism.

Emergent complexification. Creativity, for exoteric Nietzsche, was the process of the complexification of this code. Nietzsche’s most important psychological insight was that this codifying complexification process could itself become a chaotically emergent process—a "fifth cause" not specifically identified as such by the Greeks. The fifth cause arises from the evolving

commensuration of several formal causes that have to live together but “only cooperate under duress”—they are means to each other but ends in themselves—none is reducible to another. The process of codification that adaptively seeks commonalties, efficiencies and compromises so as to avoid the context-insensitive, bi-polar psychosis of absolute control simply toggling from one teleology to another, is itself a process whose success can be emergently chaotic, and has its own material, efficient, formal and teleological aspects. Jean Baudrillard focuses on this emergent codification process and correlates the chaotic emergence to a system of distributed, concurrent exchange transactions. This is the “invisible hand” that an economic market achieves with a pricing code that realizes a quantum increase of utility over reductionist, top-down, command-and-control economics by dynamically commensurating innumerable conflicting teleologies of scarcity and demand through highly distributed and concurrent exchange adjustments. Recent developments in the theory of complexification show similar effects in processes such as computer simulations of the flocking behavior of birds. Top-down algorithms are incapable of achieving the power of having distributed agents concurrently reacting to each other in what amounts to a decentralized system of exchanges. With only simple local rules to adjust to the position of nearby birds, birds can collectively maintain flocking in response to various obstacles that would render any top-down, complete code unmanageable. Similarly, jugglers do not attempt to monitor and calculate the trajectory and position of each ball—a juggler relies on a set of dynamic rules for frequent observation and subtle adjustment. Indeed, Thelan and Smith show
that even basic motor processes such as walking work by dynamic on-the-fly adjustment rather than command and control from a transcendental master plan. The enduring power of exoteric Nietzsche—and Marx—has been an ability to integrate this fifth cause effect into evolutionary logic and Greek conceptions of causation. Indeed, Greek tragedy itself may be viewed as a mythic projection of the logic of psychic and social complexification. Instead of studying the economy and the effect of exchange transactions, Nietzsche focused on psychic complexification and creativity.

*Emotions and complexification.* Exoteric Nietzsche realized the fundamental importance of emotions in regulating the process of psychic complexification and organizing experiential memory into processes that transform meaning structures in the brain. Again, Nietzsche finds strong support in recent theories that regard psychic development and creativity as emotionally regulated processes of complexification. Csikszentmihalyi identifies "flow" as a release of positive psychic energy that occurs from meaning or regulative transformations that make representations of the world or skills for acting in the world more effective or efficient. Antonio Damasio has shown how emotions are integral to social learning, which must introduce proportional degrees of sense of danger and response to deal with degrees of risks entailed by the chaotic collapse of socially emergent forms such as trust. Thus the brain is a self-organizing system that has evolved emotional processes to make the complexification process more effective by achieving a "fifth cause" emergence using a coherent, dynamic code subject to

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61 See elsewhere in this thesis at Chapter 4, section 4.2 and Chapter 6.
62 *Joyous Science*, 14, 42.
innumerable ongoing, adjusting transactions distributed among the brain’s relatively autonomous sub-modules. The conscious “subject” emerges like the invisible hand in the dogma of *laisser-faire* economics. Though Nietzsche left no clear biographical trail as a serious scholar of Marx other than as a research assistant for Wagner, Nietzsche may have been influenced by Marx more than has been recognized. Nietzsche did have an abiding interest in political economy and his notes compare science to the dogma of *laisser-faire* economics.65

*Morphology of complexification.*66—Complexity theory locates potential for undirected system learning in systems with self-organizing criticality. Avalanches and earthquakes are paradigm systems where self-organizing structures are transformed by a continual input stream of small stresses that result in erratic sequences of transforming adjustments. Self-organizing criticality is said to exist where the frequencies of transformations of various sizes form an inverse power-law distribution of size and frequency.67 For example, across the range of criticality there would be one-tenth as many earthquakes of ten times the size. Similarly, if one were to drop a steady stream of sand onto a tabletop, the pile would eventually undergo a series of unpredictable avalanches as the tabletop overflowed. Nevertheless, the avalanches would vary in size so that there would predictably be numerous tiny slides, many medium slides and infrequent major slides. Anticipating Kuhn on the morphology of scientific revolutions68 and applying it to the psychology of creativity, exoteric Nietzsche identifies the same process in the transformation of meaning, both as a subconscious process of psychic coherence and as a social

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65 See *Philosophy and Truth* at page 160.
66 *Joyous Science*, Preface 4, Prelude 8, 1, 4, 9, 19, 23-4, 26, 87, 125, 149, 283, 285-6, 288-9, 301, 343, 356, 358, 370-1, 376.
process. Exoteric Nietzsche sees knowledge and learning accumulating in "small doses," culminating in eruptions that result in the formation of new brief habits. Exoteric Nietzsche discerns distinct phases in the development of a code: poetic, classical, decadent and nihilistic—a tragic logic of seasonal growth and renewal. Again, exoteric Nietzsche finds support in current theories of development cycles in ecosystems, business and patterns of history. Exoteric Nietzsche focuses on the psychological. Creativity is a transformation of the subject's code, precipitated by a series of emotional, recalcitrant experiences. As recalcitrant experience builds due to the inadequacy of the code (decadent phase), it will ideally form a pattern that will spur the annihilation of the code (nihilistic phase) and guide transformation to a new code (poetic phase). Thus, Dionysus experiences loss of boundary and allows himself to be reconstituted by embodied experiential knowledge. Anticipating Gödel's incompleteness theorem—Nietzsche studied Cantor—Nietzsche saw the transformed code as always necessarily incomplete. In tragic terms, after reaping the harvest of a classical phase, the hero's character will eventually bring about its own downfall. As the body subconsciously gathers recalcitrant experience, it becomes like "a bee that has gathered too much honey" and is ripe to be seduced into abandoning the code for another that better reflects the intuition shaped by experience. In Jean Baudrillard's logic of seduction and reversal, the recalcitrant experiences form a pattern of experiences caused by failure to meet the needs of a conflicting but necessary teleology, and so the transformation process can be viewed as seduction and reversal of priorities.

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72 *Selected Letters*, page 64, footnote 22. Discussed more fully in the following chapter of this thesis, "Para-Conceptual Rhetoric."
Memory as stored affect.—Exoteric Nietzsche understood the crucial role of emotions in this process. Creative transformation happens through a series of emotional experiences. An experiential memory can be viewed as storing affect to be released later. The meaning structures are contained in a set of action strategies for dealing with situations in the world. The failure of this code to resolve satisfactorily an experiential encounter, such as a social transaction, results in an emotional association. The code can be viewed as a hierarchical tree or pyramid of meanings. A particular branch, or cluster of branches, can suppress immediate and full response and store a certain amount of associated recalcitrant emotional experience, the capacity of which is commensurate with the size and complexity of the meaning structure, which increases with maturity. The branches fill with recalcitrant experiences like apples on a tree branch. The size of each apple reflects the intensity and duration of the emotional experience. Repetition of similar experiences adds apples to the same branch. Meaning and language thus serve to induce the system to endure suffering on the credit of the existing code to deliver net utility in the long run. Humans are the promise-keeping animal.

Self-organizing criticality of emotional discharge.—But if a branch gets too heavy—overloaded with recalcitrant experiences—there must be a release—either as strategic action, emotional display (probably anger), cruelty to others, or self-immolation. An adaptive form of the latter could be annihilation and transformation of the code according to the logic of tragedy or seduction and reversal. The important feature is that the saturation of a branch causes a release of its apples. Moreover, the release can cause over-saturation of neighbouring branches, and so on.

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74 Joyous Science, 243.
75 This theme has been developed by social theorists who focus on action and attitude revision such as Dewey, Mead, Garfinkel and Giddens. See Ira Cohen, “Theories of Action and Praxis”, in The Blackwell Companion to Social Theory, ed. Bryan S. Turner (Oxford: Blackwell, 1996) 111-142.
There could be an avalanche or eruption all out of proportion to the immediate cause—a feature of self-organizing criticality. However, these are “magic” apples and branches.\textsuperscript{78} The apples store psychic energy in a form that facilitates generalization from the experiences that formed the apples and transforms the branching structure of the tree. This is similar to computer programming techniques—such as genetic programming—where memory is ambiguously stored as both data and procedure to be used for evolutionary system learning.\textsuperscript{79} When the “apples” are released there is a burst of psychic energy that is either positive (flow, eureka) because of a successful creative transformation or negative because of frustration (anger). Due to the avalanche effect, a saturated branch can trigger a larger-scale transformation of more than one branch. Indeed, a massive-scale transformation might reorganize the branching pattern of the entire tree—a Dionysian surrender that risks breakdown of psychic order—a release of power that constructs a decisive and separating moment—a crisis.\textsuperscript{80} The maturation or complexification of the brain’s behavioral “code” can be seen as a series of differentiating and integrating transformations—expansions, revisions and contractions\textsuperscript{81}—that increases the power of the “tree” and supports a more nuanced code of strategic responses to interactions in the environment.

\textit{Growth requires stress}.\textsuperscript{82}—For exoteric Nietzsche, all creative learning is driven by suffering and the stored procedural-affect-associations created thereby. Put another way, all creative learning is driven by error, a position now being forcefully advanced in philosophy of

\textsuperscript{77} Joyous Science, 305, 371.
\textsuperscript{78} Regarding “magic,” see the discussion on Dworkin in section 2.2 of chapter 2 of this thesis, “Legal Reasoning.”
science. For exoteric Nietzsche, all creative learning entails mourning. A child’s individuation can be seen as a series of losses—in terms of the reliability of the parents to provide for all needs—that induce mournful crying as the child unconsciously searches for creative transformations to cope in her new environment. The “Other Dancing Song” (*Zarathustra*, Book III, section 3) is Nietzsche’s ritual prayer to stimulate the work of mourning. Exoteric Nietzsche’s doctrine of the eternal recurrence is ingeniously crafted to stimulate the work of mourning, to gather and present incorporated negative emotional experiences for creative learning. The prospect of eternally repeating the same life in every detail spurs a desire for creative transformation. The eternal recurrence doctrine induces present suffering because imagining endless repetition of one’s life in every detail magnifies unredeemed negative experience, thereby forcing one to do the work of mourning for every experience. The eternal recurrence doctrine also exploits fear of death by creating a sense of urgency in completing redemption, so as not to leave unfinished business, and spurs one to create meaning for the death-event itself, thereby promoting self-sacrifice for social purposes. The onerous challenge of the eternal recurrence doctrine is ultimately social—one must receive one’s evolved social instincts from the body.

*Buffering stress.* Exoteric Nietzsche viewed the whole body-emotion-intellect system as growing in response to waves of stress and recovery—a paradigm gaining acceptance in sports psychology and training. The structure of the brain itself helps manage modal shifts between stress-producing action and stress-processing recovery. The buffering of experience is necessary to get on with the business of living. James Loehr draws a distinction between the “Performer

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Self’ and the “Actual Self.” The Performer Self must consciously and ritualistically suppress negative affect in order to marshal resources required for the task at hand. Negative experience goes into a buffer for later processing by the Actual Self—hence the need for a medium-term memory buffer. Once in a recovery mode, buffered experience is “digested.” For exoteric Nietzsche, digestion of negative experience—having “done with it”—entails either immediate use for strategic action, or filing into long-term memory as procedural-affect-associations. Psychic hygiene entails flushing out the buffer—clearing work-space that is undistracted by lingering resentment or other undigested experience—to focus on the task at hand. Exoteric Nietzsche further distinguishes between medium-term and long-term modes of recovery. Short-term recovery techniques such as relaxation, meditation and dreaming have longer-term correlates in convalescence and depression. The latter are more exclusively directed toward profound creative transformations of the code, bringing up long-term memory of recalcitrant emotional experiences. As with any other active task, undigested resentment would taint the task of creativity, perhaps interfering with the use of buffers for pattern-recognition by skewing the sample of experiential data or simply by using up buffer space and leaving less “bandwidth” of working data in which to discern a pattern.

Two bandwidths of relevancy.86—The distinction between types of recovery reveals a distinction between types of relevancy. The use of the code to generate action, which includes deductive learning that merely helps complete the code according to its internal logic, entails a selective screening of perceptual data about the world. The code is incomplete, so not every conceivable perceptual detail of the world is required—active forgetting is required. Conscious concealment of perceptions by the Performer Self—focus—may be required to buffer data

relevant to the code for later processing; but the brain also unconsciously shapes perceptions into
gestalt-forms that suit efficient code processing. The brain conceals as it reveals. However, in
order to gather emotional data for eventual transformation of the code, the brain must be able to
gather data that is not relevant according to a strict application of the code. The added perceptual
nuance allows a deeper spectrum of emotional experience to gather data to display patterns to
guide creative transformations. If emotional sensitivity has too little nuance, then important
patterns cannot be stored and will not guide subsequent transformations. If emotional sensitivity
is too nuanced, stored affect will overflow before collecting a broad enough sample of
experiences to capture patterns at a level of generality just beyond the current complexity of the
subject’s action code. “Active forgetting” entails rejection of experience outside the bandwidth of
emotional relevance, but also involves unconscious concealment of emotionally relevant data
from code-based consciousness. One must confidently act on a code of “brief habits” as though
they were absolutely true, even though one expects them to be later transformed. Maturation is a
continual series of transformations of varying scale that deepen the nuance of both types of
relevant data that one can usefully process. The more mature the system, the greater the amount
and intensity of emotional stress that can be incorporated and redeemed through the recovery
process of mourning, which makes the eventual pattern-recognition more reliable. A strong
warrior seeks greater challenge.

Pathologies.—Of course the system does not always go well. The coded strategies are
always maladaptive in some environmental context, due to the necessary incompleteness of the
code. An anger outburst could be misdirected because the precipitating experience was similar to
previous experiences and the outburst attacks the wrong agent (transference). Overt release of
affect might be suppressed and, failing discovery of an adaptive meaning transformation,
psychosomatic damage might result. Exoteric Nietzsche identifies a major way in which the integrity of the emotional system could be compromised—emotional trauma due to an experience of greater emotional stress than the meaning system is mature enough to buffer and absorb.

*Stress overloads.* Exoteric Nietzsche understood the profound influence of early childhood experience. Early trauma—overloads of emotional experience that are not representative of later social contexts—result in entrenched, subconscious, maladaptive strategies. Because these anomalies were forged from patterns of formative experience that were misrepresentative of later social contexts, the action strategies they entail generate recurring patterns of recalcitrant experience. A person is “haunted” by a ghost that challenges the subject’s code and terrorizes the sense of self-preservation—the poetics of gothic horror. The greater the original trauma, the more the strategic, coping meaning structure will protect itself from transformation, erroneously inferring that transformation would leave one vulnerable to the objects of primal fear associated with the original trauma. Exoteric Nietzsche claims that all great philosophers were haunted by such sicknesses of the soul and that one does not understand a philosophy until one infers what trauma haunted the philosopher, including Nietzsche himself—"Have I Been Understood."

*Diversions.* Exoteric Nietzsche identifies psychic techniques to pre-empt psychic saturation and avoid the uncertainty of transformation. Exoteric Nietzsche suggests that sexual orgasm has the effect of thinning saturated branches of emotional substructures and counsels the stimulation of creativity through sexual abstinence. Again, Nietzsche finds support in recent theories. Konrad Stettbacher recommends sexual abstinence in order to stimulate emotional

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87 *Joyous Science,* Prelude 2, Prelude 36, 120, 309, 326, 348.
89 *Joyous Science,* 84, 283, 286, 326, 370.
memories and transferences to enable access to non-conscious emotional structures for more effective trauma therapy.90 Jack Morin shows how fantasy and orgasm are profoundly shaped by the way in which the erotic-seduction instinctual template is co-opted by the need to reduce psychic pressure caused by early patterns of trauma.91 Baudrillard's discussion of fetish codes shows a psychic technology refined to relieve the tension induced by codes that fail to reflect important teleologies, so that fetishes defuse potential seduction to reversal—and so interfere with emotional creativity.92 René Girard observes how violence can preemptively release social frustration if it can be ritualized into a symbolic association that achieves a form of transference—the closer the match the more complete the release.93 Exoteric Nietzsche emphasizes the importance of festivals and romantic pessimism as cathartic releases to maintain psychic and social order. Ritual violence as social orgasm—the link between sex and violence is profound. If one defines ideology as opiates or fetishes that preemptively release the accumulation of political affect and, therefore, much potential energy for social reform, Marx—like Nietzsche—counseled abstinence in order to promote social creativity.

Patriarchal diversions.94—Maladaptive unconscious structures need not be explicitly traumatic in origin and can be implanted by a diffuse pattern implicit in a high frequency of less intense emotional experiences—a pattern that might reinforce decadent social structures, such as patriarchy. Men in power must adopt severe, streamlined codes of action in order to achieve the efficiency required to marshal effective social action. Moreover, their aggressive life force is propelled by the flood of testosterone that comes with being alpha-male, so that stress-producing

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92 Jean Baudrillard, Symbolic Exchange and Death, tr. by Iain Hamilton Grant (London, England: Sage, 1993) [In French, 1976].
action produces recalcitrant experiences at a faster rate. These men understandably rely heavily on heightened sexuality and fetish technology to maintain psychic order. The more elaborate the fetish narrative, the more branches are cleared in the release, and so the man derives greater pleasure—more accumulated affect is released and transformed—when the narrative of the sexual episode more closely conforms to the pattern of recalcitrant experiences. As evidence of the implicit patriarchy of liberal political structures, powerful men in liberal society seem more compelled to frequent dominatrices, notwithstanding the social risk. Patriarchy generates a recurring pattern of recalcitrant experience—its leaders are haunted by matriarchy. As Baudrillard notes, the man must stage an ersatz seduction to ensure immunity from a real seduction where the woman would induce a real creative transformation that would revise the patriarchal meaning structure. In terms of evolutionary psychology, this fetish technology might have evolved because, as Morin observes, there seems to be an instinctive seduction template, a human mating dance of increasing degrees of attraction and placing of obstacles as the female tests the commitment and economic capacity of the male. The male’s attraction—limerence—is heightened by the escalation of obstacles—as in Ravel’s *Bolero*—and the seduction is consummated by a transformation of the man’s emotional priorities according to the woman’s. A male who is seeking economic power to increase his standing in the mating market, must learn to sublimate or release mating urges—experiences recalcitrant to the goal of maximum growth of his economic capacity and social standing. As his standing increases, his testosterone level rises and he experiences more seduction offers and recalcitrant experiences that press the limits of his fetish capacity. Finally, the male is overripe for seduction and is transformed by a woman, whose

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94 *Joyous Science*, 3, 7, 14, 60, 68, 69, 75.
power to transform the male seductively is a power to kill. So exoteric Nietzsche portrays the 

seduction template in Joyous Science, his "most personal work." However, if the fetish 
technology is too effective, the man will never be truly seduced and will only take a "trophy 
wife" as a fetish object and adjunct to the continuing privileged goal of amassing economic 
wealth and social power—will to truth denies will to life.

**Rhetoric.**—Exoteric Nietzsche, in addition to anticipating post-Freudian therapy for 

psychic trauma, goes on to apply therapeutic techniques as a rhetorical tool. Exoteric Nietzsche 

used the metaphor of creating in his reader a cloud from which erupts a bolt of lightning.
Nietzsche’s metaphors suggest his writing should be seen as seeding a cloud with innumerable 

small doses of emotional experiences that fill according to patterns that he wants to guide the 

eruption of emotional transformations. His aphoristic style emotionally engages the reader and 

presents a series of small challenges to the reader’s personal code. Like an impressionist painter, 

Nietzsche dabs emotional colour here and there and constructs the topology of future eruptions.
As Waite emphasizes, the reader is unaware of the broad effect. However, the fact exoteric 

Nietzsche thought he could do this, and Waite claims he has, strongly supports his theory that 

creativity is experience-driven embodiment and not reducible to any code, whether the code is 
called science, morals or will-to-truth. In other words, the quality of one’s earliest education—
one's discipline and breeding—profoundly determines how much “sickness” (i.e., maladaptive 
unconscious associations) there is in one’s soul, how long one would have to work at self-
transformation before “cleanliness” could be achieved—one’s “rank”—and therefore how 

reliably creative one could be. Psychic "hygiene" is imperative for untainted creativity.

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95 Sam Janus, Barbara Bess and Carol Saltus, *A Sexual Profile of Men in Power* (Englewood Cliffs, N.J.: Prentice-

Hall, 1977).

96 *Joyous Science* Prelude 1, Prelude 7, Prelude 23, Prelude 54, 11, 38, 82, 153, 193-4, 197, 240, 301, 308, 373, 377, 

381, and see generally the discussion and references in the following chapter, “Para-Conceptual Rhetoric.”
Moreover, chaos theory implies that the nuances of such experiences and processes cannot be policed or duplicated by science—elite capacity is real but unverifiable other than probabilistically by classification of hygienic rank. And because continual creativity is essential to the evolutionary imperative of promoting the replication of one's genes and the social conditions required therefor—the so-called "Red Queen Effect" and the necessary incompleteness of any moral code—for exoteric Nietzsche elitism is ethically required.

Community and individual. —Thus linked to contemporary science, exoteric Nietzsche's science, psychology and ethics form a coherent and plausible system. How does this entail matriarchy? Read with Nietzsche's letters to Strindberg, exoteric Nietzsche asserts that the male dilemma as uncertain parent entails greater evolutionary success for males through opportunistic exploitation of low-risk windfalls, risking social welfare as a wager for greater potential individual reproductive interests. Women, as certain parents, have no fundamental interest in risking the viability of social context.

Demonic individualism. —This chapter speculates that esoteric Nietzsche wagered that by the time his concealed matriarchy was exposed there would be scientific support for his claim that the male psyche is flawed. If so, Nietzsche wagered correctly—evolutionary psychology now supports his position. In Demonic Males, Wrangham and Peterson argue that the males in the great ape species—orangutan, gorilla, chimpanzee and human—have evolved opportunistic and selfish strategies. How male opportunism manifests itself differs according to the political economy of each species, but the general pattern is the same, including opportunistic killing.

98 Joyous Science 349 and 363. See also, Beyond Good and Evil, sections 194 and 238; Dawn, section 237; The Case of Wagner, section 3; Ecce Homo: How One Becomes What One Is, "Why I Write Such Good Books", section 5.
99 Joyous Science 26, 33, 70, 73, 94, 266, 311, 313, 325, 370.
Citing Damasio’s work, and wholly consistent with exoteric Nietzsche's explanation of consciousness, the authors conclude that conscious reason merely rationalizes the feelings generated by the non-conscious patterns that shape emotions. It follows as an obvious inference from exoteric Nietzsche, that creativity in males will be tainted by opportunism.\footnote{101} Wrangham and Peterson conclude, therefore, that the rule of law must be vigorously enforced. However, the efficacy of the rule of law depends on the existence of a complete code, which cannot exist according to Gödel’s Incompleteness Theorem, chaos theory and exoteric Nietzsche. Any code must continually transform as a series of imperfect compromises. One of the most important results of critical legal theory in North America has been to expose the rule of law as an unattainable ideal of liberal political ideology that fails to stem opportunistic class and gender politics.\footnote{102} But even though the total adequacy of the rule of law is a fantasy, a complete moral code must still be in place and gaps in the rule of law will be filled by discretion—always leaving opportunity for male exploitation. Much of exoteric Nietzsche’s genealogical analysis reveals decadent individualism—male resentment—as the underpinning of nominally collective social institutions.

\textit{Containing individualism}.—The next part of this chapter argues that esoteric Nietzsche completed the obvious syllogism that Wrangham and Peterson, and true communists such as Waite, steadfastly resist—moral legislation and legal discretion must ultimately be policed by female creativity. Esoteric Nietzsche would be supported by recent scientific theory: Wrangham


\footnote{101} Wrangham and Peterson have overlooked the possibility that even if traits are strongly correlated with males, specific male brain and female brain features may be mixed within any single person. Indeed, Wrangham and Peterson report that sometimes female chimpanzees joined male raiding parties. This potential error has a history in brain research: see Marianne van den Wijngaard, \textit{Reinventing the Sexes: The Biomedical Construction of Femininity and Masculinity} (Bloomington: Indiana University Press, 1997).

\footnote{102} Joel C. Bakan, \textit{Just Words: Constitutional Rights and Social Wrongs} (Toronto: University of Toronto Press, 1997).
and Peterson observe that Bonobo chimpanzees have evolved prophylactic measures that contain the destructive effects of male opportunism—matriarchy.

5.5 Biographical Signs to Nietzsche’s Matriarchy

Accepting Waite’s thesis that Nietzsche wrote esoterically, one should not expect to find matriarchy blazoned across his writings. There is a good reason for this—Nietzsche would probably not be taken seriously or read at all if he openly argued for matriarchy. Nietzsche learned this from the negative reaction to the publication of the *Birth of Tragedy*, hardly a radical thesis in comparison. The thought of matriarchy must have been both horrific for him—having suffered abuse from his mother and sister—\(^{103}\)—and he knew it would be horrific for his readers. This is still the case. In *Harvest Home*,\(^ {104}\) a recent novel that resembles *The Father*, an urban family moves into a closed agrarian New England community and the husband and wife are unsuccessfully trying to conceive another child. The husband slowly discovers that the community is a matriarchy and resists its growing authority over his family. The husband learns through his doctor (science) that he is sterile; the widow-matriarch (wisdom) intuits as much. The husband’s desperate curiosity eventually draws him to overspy a secret ceremony of all the women whereby his wife accepts impregnation by the young Harvest Lord who then willingly bows his head for ritual sacrifice. The husband’s resistance threatens the social order of the community so he has to be blinded and muted—a decisive yet minimal response—and he spends the rest of his days in the loving care of powerful women. Reviewers described the book as “an

\(^{103}\) Clément Rosset notes that Nietzsche’s final amendment to *Ecce Homo* was to identify his mother and sister as the most abysmal experiences in the application of the eternal recurrence doctrine to his own life. Clément Rosset, *Joyful Cruelty: Toward a Philosophy of the Real*, ed. and tr. David F. Bell (New York and Oxford: Oxford University Press, 1993) at page 67.
unhinging experience,” “a dimension of unspeakable malice, virulence and malignity,” “primeval nightmare,” “horror”—a horrific and unspeakable thought—even though the plot it is no more violent than a typical television show. (In fact, it was made into a television movie starring Bette Davis as the widow-matriarch.) That the prospect of matriarchy remains “horrific” could account for why the highly successful psychoanalyst Eric Fromm’s essays written in the 1930s were only posthumously published in 1997. Despite his overwhelming success up to the end of his life, overtly publishing works disposed to matriarchy could have undermined his capacity to gain influence—the very dilemma Nietzsche would have encountered.

Nietzsche was raised in a matriarchal family setting and was continually attracted to motherly figures. Nietzsche understood the profound impact of mothering on early childhood development and how this early “discipline and breeding” almost determined one’s destiny in life. Nietzsche may have been steered to this insight and his ambivalent attitude towards women because of his own early discipline. Nietzsche both revered and hated his mother. He wrote in a letter “I hate my mother.” Yet, Nietzsche was masochistically drawn to her, which seems to be reflected in “The Other Dancing Song” in Zarathustra. Nietzsche’s tenacious attacks on German culture and Christianity can be interpreted as transferences whereby Nietzsche attacks the patriarchal institutions that distorted his mother from her inner will-to-life sensibility. In section 95 of Joyous Science Nietzsche speculated that Chamfort’s love for his mother sanctified “an instinct of revenge that went back to his boyhood and waited for the hour to revenge his mother”—a projection that says more about Nietzsche than Chamfort.

The ultimate problem of political praxis for Nietzsche was how to give women power without turning them into men. Meta von Salis, a feminist acquaintance of Nietzsche, posed the problem in her novel *Guardian Angels* through the character of Falconier (Nietzsche) in the following way: “I cannot give up the idea that femininity always ought to be that which is finer, sweeter, more unusual, and therefore cannot rid myself of the accompanying notion that it remains more in need of protection, and easier to distort, being more vulnerable. But how can I combine this with the concept of strength which I have when thinking about the woman of the future?”

For Nietzsche, women had to attain ultimate authority without becoming tainted to an over-commitment to will-to-truth. For this reason, Nietzsche considered formal education, which Nietzsche elsewhere criticized severely, as ultimately the wrong approach for women. Writing for the future, Nietzsche chided women for going in this direction. However, Nietzsche in deed was much more strategically accommodating. In Basle, Nietzsche voted *for* the admission of women. This is not something Nietzsche had to do to save face; this was radically progressive at the time and Nietzsche presumably could have voted no without censure.

A major biographical challenge to reading Nietzsche as a matriarch is a series of unpublished essays he wrote in the early 1870’s that extol ancient Greek society. Particularly troublesome is Nietzsche’s seemingly uncritical approval of the political economy in which slave labour provided leisure time for the elites and of the cloistered role of Greek mothers.

Nietzsche’s views on his role as a cultural physician betray a pre-established opinion on the need for a social teleology that uses hierarchy to forge unity within diversity; however, it may have been the case that this need for hierarchy was derived from even earlier insights Nietzsche had regarding the formation of creative genius. The young Nietzsche saw himself as an emerging

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genius and intensely examined the conditions conducive to creative genius.\(^{108}\) At just fourteen years of age, before his immersion into classical studies at Schulpforta, Nietzsche wrote an autobiography with the same title as Goethe’s, presumably in preparation for what Nietzsche saw as his own destiny as a creative genius.\(^{109}\) Having the opportunity to spend a lot of time with Richard Wagner at Tribschen shortly after Nietzsche began teaching at Basle was crucial in this respect. In any event, Nietzsche’s empirically tested psychology of creativity depended on post-chaotic causality and the morphology of development, which compellingly generalizes to describe social development, and thereby justified his cultural theory. Thus, even if his investigation into the psychology of creativity had only been \textit{motivated} by an \textit{a priori} political theory, the outcome supercedes the source and it would be a genetic fallacy to dismiss his psychology of creativity as merely an unscientific rationalization of an \textit{a priori} political theory.\(^{110}\) This is why the current scientific support for Nietzsche’s psychology of creativity is so significant to the thesis of this chapter.

Given Nietzsche’s abiding interest in creative genius, it makes good sense to view Nietzsche as a scientific investigator into the conditions that promote creative genius. Nietzsche was born into a family of pastors—his father and both grandfathers—which created expectations that limited his education options. By fate, and rare proficiency, he fell into classical philology as his only area of specialization in formal studies. From the time Nietzsche graduated he continually expressed regret about the narrowness of his schooling in classical philology.

Circumstance therefore required Nietzsche to look primarily to ancient Greek society—and later, Wagner, then himself—for empirical data on creativity and other aspects of his philosophy. It

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\(^{107}\) Diethe, at page 75.
\(^{109}\) Pletsch, at pages 43-44.
would be a misreading of Nietzsche's life to conclude that he celebrated Greekness or its particular social structure *per se*. Greek elites and Greek mothers were sources of empirical data as to what conditions cultivated creativity. It would be the creativity that was primordial and ethically fundamental according to Nietzsche's evolutionary ethics. Naturally, Nietzsche's notes and essays explored features of Greek society that promoted creativity and Nietzsche celebrated them as such. Many of Nietzsche's comments become credible in this context.

For instance, Nietzsche's hyperbolic rhetoric on slavery and the herd has to be read with creativity in mind. Nietzsche claims creators need the benefit of surplus labour. Howard Gardner in *Creating Minds* examines highly creative people and concludes that the necessary conditions include social support. The tenure system is obvious recognition of this insight, as is public funding of the arts. One would not think Nietzsche was being radical here. Strindberg, as noted, used the word "slavery" to describe the male situation in supporting female child rearing. For Nietzsche there is ultimately more evolutionary significance in creativity (legislators) than in reaping gains during a classical phase (the main activity of the herd). The Nietzschean "herd" of surplus producers includes doctors, lawyers and bankers, hardly fitting the image of the slave class of ancient Greece. Nevertheless, these professions have to be prepared by Nietzsche to accept ultimate rule by creative elites where will-to-truth cannot achieve a rule-of-law legitimation of legislative acts.

The ultimately secondary role of ancient Greece in Nietzsche's thinking is demonstrated by the first and third essays in *On the Genealogy of Morality*. While Nietzsche admires the noble, act-without-thinking willfulness of noble Greek character, his other published writings make it clear that this is far from a fully developed version of what Nietzsche had in mind. Similarly, in

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110 Chapter 3 of this thesis, "Cultivating Justice," argues that although Nietzsche admired Greece, he would not view it as just if recreated in the current context of social development.
the third essay Nietzsche admires the ascetic priests for their innovation of psychological
*technique,* but plainly rejects the result of applying the technique in that instance.

The hypothesis that Nietzsche used ancient Greece as both data and a means for
presentation is well argued by Daniel Breazeale.¹¹² It is during this period, and through a study of
pre-Platonic Greek philosophy and culture, that Nietzsche developed the distinction between
science (will to truth) and wisdom. Nietzsche's notes include the following title: "The Struggle
between Science and Wisdom, exhibited in the ancient Greek philosophers."¹¹³ Nietzsche wrote
in a March 22, 1873 letter to Erwin Rohde: "I hope to be far along enough to send you a large
section of my very slowly gestating book on Greek philosophy for a provisional examination.
Nothing is set concerning the title, but if it were to be called *The Philosopher as Cultural
Physician,* you would see thereby that I am concerned with a fine general problem and not merely
with an historical one."¹¹⁴ This lead Nietzsche to mathematics and thermodynamics, as he reports
in an April 5, 1873 letter to Carl von Gersdorff: "It was also necessary for me to pursue the most
peculiar studies for this end—I even touched fearlessly upon mathematics, then mechanics,
chemical atomic theory, etc."¹¹⁵ As the apparent fruit of this investigation, Nietzsche anticipated
Gödel's Incompleteness Theorem and chaos theory and concluded that science (will to truth)
dermines itself and cannot account for the use of illusion towards a greater teleology than the
will to truth. Illusion (as distinct from lying) is within the domain of creators: "Our salvation lies
not in *knowing,* but in *creating!*"¹¹⁶ Breazeale concludes that Nietzsche was drawn to the tragic
age of the Greeks because it was the great age of genius, having "drawn its driving energy from

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¹¹² "Introduction" in *Philosophy and Truth.*
¹¹³ *Philosophy and Truth,* at page 128.
¹¹⁴ "Introduction" in *Philosophy and Truth,* at page xix.
¹¹⁵ "Introduction" in *Philosophy and Truth,* at page xx and at page 217.
¹¹⁶ *Philosophy and Truth,* at page 33.
an unconscious and unexamined center of vitality and to have propagated itself largely by means of illusions.\footnote{117}

However, the “self-confident creator” must draw on some unifying teleology apart from will to truth to justify illusion.\footnote{118} Summarizing Nietzsche’s cultural theory in his Greek essays, Breazeale observes that “the achievements of ‘the genius’ of culture presupposes the labors of ‘the slaves.’ On the one hand, culture is always the possession of a socially privileged elite; but on the other, the function of the elite is to impose a saving unity upon (and so, in Nietzsche’s words, to ‘justify’) the society as a whole.”\footnote{119} Nietzsche had fledgling, evolutionary-inspired thoughts in this regard,\footnote{120} but the issue was still open during this period. In a lecture on pre-Platonic philosophers Nietzsche writes: “Another problem is the problem of purposiveness in nature. With this problem the opposition between spirit and body is brought into philosophy for the first time.”\footnote{121} Nietzsche had already linked science to mind and wisdom to body.

About 1873, Nietzsche saw that at least three tasks were required: (1) doing an “inside job” to undermine science, (2) exploring the formation of wisdom, and (3) developing a master social teleology from an evolutionary perspective. Nietzsche’s various draft plans in 1872 and 1873 included entries such as “The altered position of philosophy since Kant. Metaphysics impossible. Self-castration.” “Tragic resignation...” “Classification of the philosophers’ methods for arriving at what is ultimate.” “Life in illusion.” “Philosophy has to produce the need for tragedy.” “Culture as the antidote. In order to be susceptible to culture one must have recognized the insufficiency of science. Tragic resignation. God only knows what kind of culture this will

\footnote{117}{"Introduction" in *Philosophy and Truth*, at pages xxvi and xli.}
\footnote{118}{*Ibid.,* at page xl.}
\footnote{119}{*Ibid.,* at page xxiv.}
\footnote{120}{*Ibid.,* at page xxii.}
\footnote{121}{Quoted in “Introduction” in *Philosophy and Truth*, at page xlv.}
be!" 122 “Description of science’s laissez faire. What is missing is the dictator.” 123 The question became, what was the dictator and how did it structure the struggle between wisdom and science?

The unresolved issue for Breazeale is why Nietzsche abandoned his long developed effort to publish a companion piece for Birth of Tragedy. The answer must be that following the Wagners’ departure for Bayreuth in 1872, Nietzsche grew more independent and saw himself evolving into a creator and cultural physician in his own right. Much of Nietzsche’s psychology of creativity must have been already worked out, and so he interrupted his work on the philosopher as cultural physician to practise psychological hygiene on himself. In letters to Erwin Rohde, Malwida von Meysenbug and Hans von Bülow (19 March 1874, 25 October 1874, and 2 January 1875, respectively) Nietzsche referred to a five year project of writing “Untimely Meditations” to "sing assiduously the whole scale of my hostile feelings, up and down" for the purpose of "clearing my soul." 124 However, shortly after Nietzsche returned to work on his proposed book on pre-Platonic Greek philosophy at the end of 1875, Nietzsche lost interest in merely commenting on how cultural creativity works—Nietzsche wanted to do it. In an April 1, 1874 letter to Carl von Gersdorff Nietzsche wrote that he liked preparing for his summer lectures—on rhetoric. 125 Nietzsche must have applied his insights into creativity to fashion a new rhetoric that forces the reader to make connections in a manner that manipulates the process of creativity in the reader. Nietzsche tested his theory through rhetoric. The aim of Nietzsche’s aphoristic period, therefore, was to explore the psychology of creativity, wisdom, morals and

123 Ibid., at page 160.
125 Selected Letters, at page 126.
their relationship to evolution, while at the same time doing an “inside job” on science by exploiting his insights into creativity to slip past the will-to-truth sentries of his readers.

A major turn in Nietzsche’s thinking seems to have occurred before he wrote *Joyous Science* as a result of his deeper explorations into evolution and sexuality. Breazeale summarizes Nietzsche’s position in the early 1870’s as follows: “there is a manifest incompatibility between the desire to free oneself of all illusions, to settle for nothing less than ideal certainty in questions of truth, and the need for life-preserving fictions, which apparently must be believed to be true if they are to serve their intended function.” Nietzsche apparently made a connection between the fact that the only criterion science recognizes is certainty and that evolution drives human males to seek certainty of parentage neurotically, promoting repressive moral regimes and science. Nietzsche evidently linked the overcoming of male neurosis to mother love, mother love without the physical bond of mother and child—matriarchy.

Nietzsche had a high regard for mothers. Nietzsche relied on a series of matronly types to nurture his own creativity. Nietzsche looked to mothering as an exemplar of the conditions required for creativity and saw his own creativity as a form of mothering. In an April 11, 1869 letter to Carl von Gersdorff Nietzsche wrote that “If we must bring to birth all the life that is in us, let us try to use this life so that others will bless it, for its value, once we have been happily absolved from it.” In *Joyous Science*, he called “a continually creative person, a ‘mother’ type in the grand sense ...” (section 369) and “artists and people of ‘works’ ..., the motherly human type” (section 376). A spiritually pregnant contemplative type—a male mother—is “closely related” to the productive, motherly character, but not equal (*Joyous Science* section 72). From the standpoint of Nietzsche’s evolutionary ethics, mothers have primary significance for the

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127 *Selected Letters*, at page 44.
health of the species—they were evolved to be the productive sex, not the beautiful sex; woman should select mates and rule over men rather than being corrupted by men into becoming the beautiful sex (Joyous Science sections 72, 68 and 70). The male need for science makes him mistrustful and evil (Joyous Science section 33) and unreliable in his use of cruelty (Joyous Science section 73); it is women's kinder disposition from having the true productive nature that makes her vulnerable, but also wiser in her use of cruelty. On April 14, 1876 (Good Friday), Nietzsche wrote to Malwida von Meysenbug:

...[F]rom early until the moonlit evening... I read your book [Memoires of an Idealist] to the end and kept telling myself that I had never spent a more consecrated Sunday... You walked before me as a higher self, as a much higher self... How often I have wished to have you near me, in order to ask you a question which can only be answered by a higher morality and being than I am! ... What must a man do, with the image of your life before him, if he is to escape accusing himself of unmanliness? —this is what I often ask myself. He must do all that you did, and absolutely nothing more! But most probably he will not be able to do so; he lacks the safely guiding instinct of love that is always ready to help. One of the highest themes, of which you have first given me an inkling, is the theme of motherly love without the physical bond of mother and child; it is one of the most glorious revelations of caritas. Give me something of this love, meine hochverehrte Freundin, and look upon me as one who, as a son, needs such a mother, needs her so much!

It seems that reading Meysenbug’s book on April 2, 1876 triggered an emotional, eruptive reversal in Nietzsche. It certainly put him in heady spirit. On April 11, 1876, shortly after reading
Meysenbug’s book, Nietzsche sent a letter to Mathilde Trampedach proposing marriage.\textsuperscript{128} Such a heady release of positive affect is evidence of a successful, profound self-transformation.

How did Nietzsche make the leap to matriarchy so quickly? One of the married women with whom Nietzsche had become a close friend was Louise Elisabeth Bachofen, the wife of Johann Jakob Bachofen, who was a professor at Basle when Nietzsche arrived there. Nietzsche socialized with them the first few years at Basle, telling Frau Bachofen about each Sunday visit he made to see the Wagners. Frau Bachofen wrote that her husband liked Nietzsche very much and that she knew Nietzsche respected him very much—"he had often told me so."\textsuperscript{129} Pletsch reports that J.J. Bachofen's ideas interested Nietzsche very much. Pletsch notes that "The opposition of Apollinian and Dionysian that figures so prominently in \textit{The Birth of Tragedy} is something that Bachofen had used prominently in his works...Nietzsche seems to have learned more from Bachofen's concentration upon the myths of the ancients, and from his absolutely innovative treatment of Roman culture as a coherent system." Nietzsche must have studied Bachofen's writings closely. Bachofen's most famous work is \textit{The Mother Right} (1861), "which argued for a primitive matriarchy as the predecessor of all other human societies." Pletsch summarizes: "His argument that a universal matriarchy must have been the predecessor of all other human societies derived from vestigial mother-rights that he discovered in ancient Roman law. His contemporaries did not appreciate his work." A warning for Nietzsche. Nietzsche learned this firsthand from the reaction to \textit{Birth of Tragedy}, which he described in letters to Malwida von Meysenbug (7 November 1872)—"You see, my \textit{Birth of Tragedy} has made of me the most offensive philologist of the present day, to defend whom could be a true marvel of courage, for everyone is of a mind to condemn me." —and Richard Wagner (mid-November

\textsuperscript{128} \textit{Selected Letters}, at page 141.
1872 and 18 April 1873)—“I have suddenly acquired such a bad name in my field that our small university suffers from it!” and “[Overbeck’s coming book] is so aggressive against all parties, and, moreover, so incontrovertible and honest, that he too will be outlawed, once it is published, as a man who, to quote Professor Brockhaus, has ‘ruined his career.’ Basle is gradually becoming thoroughly offensive.”

Nietzsche probably did not accept the matriarchal aspects, at first. However, years of absorbing and creatively using what he first found useful in Bachofen probably planted seeds that sprouted later. In *Joyous Science* Nietzsche reports:

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*Good luck in fate.*—The greatest distinction that fate can bestow on us is to let us fight for a time on the side of our opponents. With that we are predestined for a great victory.

In section 334 Nietzsche says of "all things that we now love" were first tolerated in spite of their strangeness until finally we get used to it and then we become enchanted by it. In section 306 Nietzsche advocates an Epicurean selective focus if one has an irritable intellectual constitution and fate permits one to spin "a long thread" (emphasis Nietzsche’s). Elsewhere in *Joyous Science*:

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*Our eruptions.*—Countless things that humanity acquired in earlier stages, but so feebly and embryonically that nobody could perceive this acquisition, suddenly emerge into the light much later—perhaps after centuries; ...

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A kind of atavism.—I prefer to understand the rare human beings of an age as suddenly emerging late ghosts of our past cultures and their powers—as atavisms of a people and its mores ...

Consciousness.—... To this day the task of incorporating knowledge and making it instinctive is only beginning to dawn on the human eye ...

After stepping “Outside the lecture hall” in section 33 to say that the need for science has made man mistrustful and more evil, Nietzsche refers to a concealed or secret history, using a Latin caption:

Historia abscondita.—Every great human being exerts a retroactive force: for his sake all of history is placed in the balance again, and a thousand secrets of the past crawl out of their hiding places—into his sunshine. ...

In Joyous Science section 43—“What laws betray” (history’s secrets?)—Nietzsche demonstrates that he had assimilated Bachofen’s matriarchal argument, using as an example Roman Law’s severe repression of the “Dionysian” cult—a word that Nietzsche often used to describe himself—which “struck the Romans as a monstrous foreign invasion that overturned the basis of the European sensibility; it seemed treason against Rome, the incorporation of what was foreign.” Nietzsche wrote in section 54: “I have discovered for myself that the human and animal
past of all sentient being continues in me to invent, to love, to hate, and to infer.” The “monstrous” Medusa of matriarchy had been “incorporated” but atavistically reappears in Nietzsche, to haunt patriarchy and “overturn” it.

Nietzsche's later, uncensored insane ramblings suggest that he remembered Bachofen for his matriarchy. His mother copied down the following in February 1891:

Prof. Dr. Adolf Bastian lived till now in Siberia and is the best expert in ethnology. He stood in correspondence with Prof. Bachofen in Basle; as the former is for ethnology, so Bachofen is the greatest expert on matriarchy. Explanation of matriarchy described by an Englishman which sets special value on ancestral law.

As Bachofen was "not appreciated by his contemporaries," the label "greatest" must be Nietzsche's own, which suggests familiarity with other experts on matriarchy—Nietzsche had become "used to" matriarchy in his personal battle against it, until it erupted as a reversal after reading Meysenbug's *Memoires of an Idealist* in early April 1876.

This reversal was instructive for Nietzsche. He now had a vivid personal experience of the planting, gestation and eruption of a major, self-transforming insight. Nietzsche’s insights into creative psychology were handed to him with his matriarchal atavism, at a time he was quite interested in rhetoric. The implications of this reversal for Nietzsche’s personal ethic required deep thought and obviously troubled Nietzsche, resulting in a new round of illnesses, probably psychosomatic or at least aggravated by stress, that bought Nietzsche a leave of absence from Basle. Nietzsche arrived at Bayreuth to attend Wagner’s festival as an honoured guest, but left after attending a rehearsal. Nietzsche sent his tickets to his sister, writing (1 August 1876):

Things are not right with me, I can see that! ...  
I have had enough of it all!
I do not even want to be at the first performance—but somewhere else, anywhere but here, where it is nothing but torment for me.

Perhaps you could write a few words to Schmeitzner as well, and offer him my seat for the first performance—or someone else, whomever you like, Frau Bachofen, for example.

Frau Bachofen! A strange suggestion considering Frau Bachofen later wrote “My relations with Nietzsche are limited to only the first few years he was here [at Basle]...” Bachofen must have been on his mind. Nietzsche must have been self-diagnosing his eruption over the next year during his wanderings in which he wrote notes for *Human, All Too Human*. The intensity of Nietzsche’s emotional and psychosomatic responses—euphoric marriage proposal, psychosomatic illness to get time off, revulsion of Wagner, convalescent leave of absence—all attest to a profound emotional self-transformation. The planting, gestation and emotional eruption of Nietzsche’s matriarchy gave him the firsthand experience he needed to develop his insights into the psychology of creativity, and a new style of rhetoric—one that crafts similar emotional eruptions in the reader.

As Nietzsche honed in closer to evolution and matriarchy, the professional fate of Bachofen and the negative response to *Birth of Tragedy*, even from friends, loomed large. Nietzsche’s new rhetoric provided a neat solution—a writing that emotionally engages the reader in a series of battles, skirmishes, the larger pattern of which is concealed. The battles prepare the soil and plants the seed of matriarchy that will gestate slowly, until it erupts as an insight in the
reader that is anchored by emotional conviction. Now Nietzsche can get past the censors, using hyperbolic flair to hold the reader's attention.

Nietzsche’s subsequent shift to the style of Zarathustra has premonitions in Human, All Too Human, section 218 (Assorted Opinions and Sayings):

“When we speak about the Greeks, we involuntarily speak of today and yesterday: their universally known history is a polished mirror which always reflects something which is not in the mirror itself. We take advantage of the freedom to speak about them in order to be able to be silent about other things—so that these Greeks might themselves whisper something into the ear of the thoughtful reader. Thus for the modern man the Greeks facilitate communication of many things which are difficult or hazardous to communicate.”

Hazardous and difficult indeed, if Nietzsche is attempting to insinuate matriarchy. Nietzsche provides numerous signposts in Joyous Science that a concealed message was being whispered to those close enough to have ears for it. After referring to the secret histories (section 34), Nietzsche advises his readers:

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Limits of our hearing.—One hears only those questions for which one is able to find answers.

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130 There is a potential irony in this aphorism. The most famous use of a mirror in Greek mythology was by Perseus during his encounter with the Medusa. Thus matriarchy is reflected in Nietzsche’s reference to the mirror.
Better watch out!—There is nothing we like so much to communicate to others as the seal of secrecy—along with what lies under it.

234

A musician's comfort—... Let those who have ears hear!

In the second edition (section 377), Nietzsche referred to his "secret wisdom" and gaya scienza, then emphasized what had been his rhetorical strategy in Joyous Science, and other writings.

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On the question of being understandable.—One does not only wish to be understood when one writes; one wishes just as surely not to be understood. ... All the nobler spirits and tastes select their audience when they wish to communicate: and choosing that, one at the same time erects barriers against "the others." All the more subtle laws of any style have their origin at this point: they at the same time keep away, create a distance, forbid "entrance," understanding, as said above—while they open the ears of those whose ears are related to ours. ...

Zarathustra is replete with whisperings of Greek mythology and tragedy—"lame-foot," "riddles," "labyrinths," Dionysus and Ariadne. If one wants to ascertain Nietzsche's concealed, horrific thought, an analysis of the Greek mythology used in Zarathustra is essential.

However, before Nietzsche fully embarked on Zarathustra, he met an extraordinary woman—Lou Salomé. Nietzsche’s reaction to this woman indicates that Nietzsche had ambitions to accomplish directly in deed what he had hitherto only hoped to accomplish through the
influence of writing. The posing of the May 1882 photograph with Lou Salomé holding the whip was described by Salomé as follows:\textsuperscript{131}

At the same time Nietzsche also was busy having a picture made of us three, despite stiff resistance from Paul Rée... Nietzsche, in an exuberant mood, insisted not only on that, but also occupied himself personally and zealously with the arrangement of details—like the little ladder-wagon (which turned out to be too small) and even the kitsch of the lilac branch on the whip, etc.

The intended meaning of the photograph is manifest from the perspective of Nietzsche's matriarchy. The lilac indicates a fundamental difference when a woman uses a whip—man "lacks the safely guiding instinct of love" that instinctively regulates a woman's "productive" use of the whip. Nietzsche's exuberance—emotional engagement—indicated that he was looking ahead to \textit{Zarathustra} and had discovered a new rhetorical register—another mode—in which to whisper his esoteric message.

Nietzsche's emotional exuberance for his task again produced a marriage proposal. There is some suggestion it was made merely to allow Nietzsche to work closely with Salomé, so as not to be undermined by gossip, but this sounds like a rationalization, much as Nietzsche rationalized his rejection by Mathilde Trampedach in a letter to Gersdorff (26 May 1876): "I am not getting married. In the last analysis I hate limitation and being tied into the whole 'civilized' order of things so much that there can hardly be a woman who would be of generous enough mind to follow me."

\textsuperscript{131} \textit{Conversations}, at page 117.
Nietzsche's ambitions to work with Salomé as a philosopher of the future grew. In a June 1882 letter to Salomé Nietzsche wrote of living together to carry out a plan and wanted to "initiate only the necessary persons. ... I like to keep my plans secret..." In a letter to Peter Gast dated July 13, 1882, Nietzsche referred to Lou Salomé in this way: “[S]he is as shrewd as an eagle and brave as a lion...She is most amazingly well prepared for my way of thinking and my ideas.” Salomé sensed that Nietzsche's ambitions entailed the founding of something akin to a religion, writing to Paul Rée in August 1882: "At the very beginning of my acquaintanceship with Nietzsche I wrote to Malwida of him that he was of a religious nature, and aroused her strongest doubts. Today I would want to underscore this expression doubly." and "We will experience it yet that he will step forth as the proclaimer of a new religion, and then it will be such a one as recruits heroes to be its disciples." In a letter to Franz Overbeck in October 1882 Nietzsche wrote “Lou is uniquely ready for the till now almost undisclosed part of my philosophy” and spoke of his “whole new praxis and rebirth.” Nietzsche’s enthrallment with Lou Salomé provides a biographical pointer to the “almost” undisclosed portion of his philosophy—section 70 of Joyous Science:

*Women who master the masters.*—A deep and powerful alto voice of the kind one sometimes hears in the theater can suddenly raise the curtain upon possibilities in which we usually do not believe. All at once we believe that somewhere in the world there could be women with lofty, heroic, and royal souls, capable of and ready for rule over men because in them the best elements of man apart from his sex have become an incarnate ideal. The intention of the theater, to be sure, is not at all that such voices should create this notion of women; what they are supposed to represent is usually the ideal male lover such as Romeo. But to judge by my experience, the theater regularly miscalculates on this point, as
does the composer who expects that kind of effect from such a voice. Such lovers are unconvincing: such voices always retain some motherly and house-wifely coloration—most of all when they make one think of love.

Nietzsche still veils his conclusion that women must rule over men behind the curtain of musical theater. This passage gains meaning from its context. After laying evolutionary and ethical foundations in Book 1 of *Joyous Science*, in Book 2 Nietzsche turned to creators and their exclusive right to destroy. Male realists are disqualified because they resist passion, women and nature—*i.e.*, their animality; males mistrustfully turn to science, and therefore (section 70) must be mastered by strong, motherly women. Nietzsche’s “experience” is that strong women retain motherly, housewifely coloration, which makes him "think of love"—a peculiar observation. It is difficult to read section 60, which uses the pronoun “I”, without imagining Nietzsche being “enthralled” (section 69) by Cosima, his Ariadne who would destroy his former self and lead him from the labyrinth.

... Here I stand in the flaming surf whose white tongues are licking at my feet; from all sides I hear howling, threats, screaming, roaring coming at me, while the old earth-shaker sings his aria in the lowest depths, deep as a bellowing bull, while pounding such an earth-shaking beat that the hearts of even these weather-beaten rocky monsters are trembling in their bodies. Then, suddenly, as if born out of nothing, there appears before the gate of this hellish labyrinth, only a few fathoms away—a large sailboat, gliding along as silently as a ghost. Oh, what ghostly beauty! How magically it touches me! ...
However, Nietzsche counseled “distance” in order to stay within the midst of his own plans and projects. The next section—“In honor of friendship”—is followed by “Love”—”Love forgives the lover even his lust.”—then followed by a biographical pointer to identify Ariadne—”Woman in music.” In the Prelude of Rhymes, Nietzsche wrote of a man who has lost his head:

50

*Lost His Head*

Why is she clever now and so refined?
On her account a man’s out of his mind,
His head was good before he took this whirl:
He lost his wits—to the aforesaid girl.

Looking beyond the first line of this rhyme, a woman is “whispered” by way of riddle, a veil behind which Nietzsche could safely use the pronoun “I”:

25

*Request*

The minds of others I know well;
But who I am, I cannot tell:
My eye is much to close to me,
I am not what I saw and see.
It would be quite a benefit
If only I could sometimes sit
farther away; but my foes are
Too distant; close friends, still too far;
Between my friends and me, the middle
Surely Nietzsche wished Ariadne to guide him from the labyrinth, only a "small footbridge" separating them (Joyous Science, section 16). But Cosima was unavailable—beholden to a "composer" who "regularly miscalculates" "such a voice" (section 70)—so Nietzsche rationalized a need for distance in order to become "closely related to the feminine character" (section 72), even though he must ultimately submit to motherly rule (section 70). At the time Nietzsche wrote Joyous Science, strong, enthralling women (sections 60, 69 and 70) who were motherly creators (sections 58, 70, 72) capable of sacrificing others (sections 70 and 73) and not distorted into weak (section 119), beautiful fetish objects for males (sections 68, 72 and 75), remained just a possibility (section 70)—until Nietzsche met Lou Salomé, who held for Nietzsche the possibility of a whole new praxis.

By a letter to Erwin Rohde dated July 15, 1882, Nietzsche sent a copy of Joyous Science and said that it would be the last for many years, since he intended to become a university student again, having consecrated his life to a new plan—"Now I have my own study plan and behind it my own secret aim, to which the rest of my life is consecrated ... I stand above all [the bad experiences for which the post-1876 writings were a home-brewed remedy] with the joyousness of a victor and fraught with difficult new plans—and, knowing myself, with the prospect of new, more difficult, and even more inwardly profound sufferings and tragedies and with the courage to face them!" Lou Salomé later wrote that Nietzsche had planned to give up writing for ten years and study natural sciences, in order to give his philosophy a firm foundation—and write the first part of this chapter of the thesis. In a letter to Peter Gast sent soon after writing Joyous Science (20 March 1882), Nietzsche criticized Robert Mayer’s Mechanics of Heat, which Gast had sent to Nietzsche, affirming his earlier view that there is no “matter,” only energy, a position

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132 Selected Letters, footnote at page 193.
Nietzsche considered to be canonically proven by mathematics—i.e., chaos theory. The evolutionary aspects of *Joyous Science* are manifest. Later (21 January 1887) Nietzsche wrote to Gast that he planned a “full-scale attack on the whole idea of causality in philosophy”—i.e., complex adaptive systems theory.

Nietzsche and Salomé were of such like mind when together in August 1882 in Tautenburg that Salomé wrote that "How very alike we think and feel about this and we literally take the words and thoughts from one another's lips." Nietzsche ended a letter to Salomé at the end of August—"In fond devotion to your destiny—for in you I love also my hopes." Nietzsche was exuberant again; in a letter to Salomé two weeks later, Nietzsche refers to Rhyme 25 of *Joyous Science* (“Request”, quoted above) and cryptically asks, "Can you guess, my dear Lou, what I am asking for?"—a request for an Ariadne, if not marriage. In a September 1882 letter to Franz Overbeck Nietzsche notes his sister’s negative reaction to Lou Salomé: “My sister ... quotes ironically in this regard, ‘Thus began Zarathustra’s Fall.’ In fact, it is the beginning of the start.”

However, Salomé and Paul Rée left Nietzsche in the lurch in November 1882. Frantically awaiting their arrival, Nietzsche’s plans were suddenly dashed and he fell into a serious depression. Nietzsche had a huge emotional investment in Salomé. Now “free as a bird,” Nietzsche tried to purge his rancorous ambivalence toward Salomé in the “Song of a Theocritical Goatherd,” one of a series of poems Nietzsche later added as an Appendix to *Joyous Science*—Songs of Prince Vogelfrei (i.e., "free as a bird").

Here I lie with intestinal blight,  
Bedbugs advancing;

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133 *Selected Letters*, at pages 182 and 217.
Over there, still noise and light;
I hear them dancing.

She promised—she is late—
She would be mine;
But like a dog I wait,
and there’s no sign.

She swore again and again:
Was it by rote?
Does she run after all men,
Just like a goat?

You give yourself such airs:
Who gave you silk?
How do I know who shares
Your goatlike ilk?

We’re poisoned by love when we wait,
It makes us barbaric:
Thus damp nights generate
The fly agaric.

Love eats me like a blight,
It is the seventh hell.
I’ve lost my appetite:
Onions, farewell!

The moon set in the sea,
The stars fade in the sky,
The day is dawning gray:
I’d like to die.

Read as Nietzsche’s reactions to Salomé, the chosen sequence of the poems becomes significant. Immediately before “Song of a Theocritical Goatherd” is “Declaration of Love (In the course of which the poet fell into a pit),” which ends with the declaration “I love you, noble bird!” (In the July 13, 1882 letter to Peter Gast, Nietzsche refers to Lou Salomé as an eagle.) However, after having been dumped and crying all night (“damp nights”) waiting for Salomé, “poisoned” by love, Nietzsche ranted against “Souls that are unsure.” Later regretting slanderous letters and remarks to others made in anger over Salomé and Rée, Nietzsche was a “Fool in Despair” who eventually turned to rhyme for remedy: “Rimus remedium Or: How sick poets console themselves.” Nietzsche concluded that only a “fool bears her a grudge.” After bemoaning his poor luck—“Mein Glück!”—Nietzsche headed “Toward New Seas” and finally, recalling “Sils Maria” Zarathustra came back into view. In an early December 1882 letter to Heinrich von Stein, Nietzsche declares: "I would like to take away from human existence some of its heartbreaking and cruel character. Yet, to be able to continue here, I would have to reveal to you what I have never yet revealed to anyone—the task which confronts me, my life’s task. No, we may not speak of this." Nietzsche’s plan evidently reverted to implanting matriarchy esoterically to overcome male demonism, which he obviously could not reveal to anyone.

In a letter to Franz Overbeck postmarked December 25, 1882, Nietzsche wrote: “This last morsel of life was the hardest I have yet to chew, and it is still possible that I shall choke on it. I have suffered from the humiliating and tormenting memories of the summer as from a bout of madness ... Unless I discover the alchemical trick of turning this—muck into gold, I am lost. Here I have the most splendid chance to prove that for me ‘all experiences are useful, all days holy and all people divine’!!!” Part I of Zarathustra was written in January 1883. In “The
Adder’s Bite” Nietzsche claims he has applied his eternal recurrence doctrine to overcome a
“poison” bite, presumably from Salomé, associating snake and the eternal feminine. “The
Adder’s Bite” immediately follows the infamous passage “You are going to woman? Do not
forget the whip!”, a sequencing that indirectly points to the photograph of Salomé holding the
whip. Why indirect? Because the old woman told Zarathustra to “Wrap it up and hold your hand
over its mouth: else it will cry overloudly, this little truth.” Matriarchy must be only be heard by
those close enough to hear whispers, and section 70 of the Joyous Science was too loud. Later, in
1886 Nietzsche published a Preface for the second edition of Joyous Science that tries to
discredit unidentified indiscretions written during the "intoxication" of his convalescence. Later,
in Nietzsche’s strategically crafted "biography," Ecce Homo, he writes practically nothing about
Joyous Science and steers the reader directly to Zarathustra. It is odd that in a "biography"
Nietzsche would say nothing about his “most personal” book, unless he were attempting to shift
attention away an error in rhetorical judgment—an indiscretion of his intoxicated pathos. In
Joyous Science (section 91) Nietzsche cautions that even posthumous autobiographies might lie
and that he "would not believe a biography of Plato, written by himself…"

In the new preface to Joyous Science, Nietzsche preferred to whisper matriarchy through
the Greeks—"Perhaps truth is a woman who has reasons for not letting us see her reasons?
Perhaps her name is—to speak Greek—Baubo?"—a "redoubtable female" (section 345)—an
Amazon! Nietzsche had reasons to conceal matriarchy; so he whispered it through a Medusa.
Nietzsche whispered the Medusa in a September 1882 letter to Franz Overbeck, referring to "the
terrifying face of my more distant life task." ("Distant" because Nietzsche was then planning ten
years of science to put his philosophy on a firm foundation.) Waite points out that in notes made
regarding Part IV of Zarathustra, Nietzsche explicitly likened his doctrine of the eternal
recurrence to a Medusa. Waite notes that for Nietzsche this Medusa would have both illocutionary (literal, thematic) effect and perlocutionary (nonliteral, emotional) effect. Waite, however, has no ear for the mythic significance of Medusa. Smith and Ferstman explain that Medusa symbolizes the pure potency of the female, an Amazon who from the male perspective is a monster that represents the pure horror of castration. The male Hero must retaliate and slay the Amazon, to delegitimize her. To overcome Medusa, the male enlists the support of Athena, who bears the likeness of Medusa on her shield and thereby dons the veil of femininity. But ultimately the Medusa's petrifying effect comes from within the onlooker—the Medusa causes the viewer to sense that a pattern of recalcitrant experiences could trigger an avalanche that transforms emotional meaning structures. The veil of femininity serves as a fetish for the male to use to avoid psychic transformations away from patriarchy: man creates feminine women as a fetish object to discharge recalcitrant emotional experiences erotically and thereby castrate Medusa's potency. Nietzsche's notes on pedastry in ancient Greece and whorehouses take on a new meaning—men are to have substitute objects for fetishized sexual release so that women—mothers, in the narrow sense, and, more generally, social matriarchs like Malwida von Meysenbug and Cosima Wagner—do not have to become effeminized fetish objects. (Joyous Science, sections 68 and 75).

Nietzsche was disappointed with the lack of understanding response to Zarathustra and disillusioned by the fact even his friends failed to understand much of his message. This seems to have prompted a change in rhetorical strategy by Nietzsche, and after Zarathustra, Nietzsche's

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134 Waite, at page 325.  
136 Smith and Ferstman at pages 239-240.  
137 Ibid., at page 236.  
138 Waite, at page 361.
attack on will to truth became quite explicit. Indeed, in *Beyond Good and Evil* Nietzsche lays out his methodology and critique of will to truth with overwhelming clarity and economy of expression. Nietzsche wrote new prefaces for previous works and Book 5 of *Joyous Science* to make his position even clearer. The "inside job" on science in the first edition of *Joyous Science* was too subtle. In section 2 Nietzsche advocates an intellectual conscience that desires certainty, hoping it would undermine itself and make it clear in section 324 why "*life as a means to knowledge*" is emphasized in scare quotes—will to truth was not to ultimately prevail, as section 110 tries to make clear. Nietzsche acknowledges the difficult subtlety of distinction in Part II of *Zarathustra* ("The Dancing Song"), after "life" had used her "golden fishing rod" to pull him up from sinking:

> For thus matter stand among the three of us: Deeply I love only life—and verily, most of all when I hate life. But that I am well disposed toward wisdom, and often too well, that is because she reminds me so much of life. She has her eyes, her laugh, and even her little golden fishing rod: is it my fault that the two look so similar?

With additional hindsight, Book 5 of *Joyous Science* begins by noting how faith had undermined itself (section 343) and then (section 344) immediately attacks will to truth as a metaphysical shadow of faith in God that might be a concealed will to death. In the end, however, a residue of faith is required (section 377), subject to a love for the questionable character of things—a "slight tightening of the reins as our urge for certainty races ahead" (section 375). Philosophically, this means the “subject ontology” in the grammar of language can only be overcome by dynamics—a developing sequence of brief habits (section 295), each configuration retaining subject/object
distinctions—and in terms of political hierarchy, evolutionary psychology and the dynamics of creativity requires woman to be the subject—Baubo, an Amazon—and man the “beautiful sex,” the object.

Nietzsche’s main exoteric task at that stage became to advance the art of psychic hygiene. In *On the Genealogy of Morality* Nietzsche masterfully demonstrates his evolutionary methodology while at the same time making explicit much of his psychology of decadence and ascendancy—the task of hygiene and the determination of rank. Nietzsche openly carries on two of the main tasks of *Zarathustra*—soften patriarchy by attacking will to truth and purify unhygienic weakness, especially effeminization or masculinization of women. Noticeably absent in these works is any sustained presentation of Dionysus and Ariadne themes, other than to shift attention away from rhetorical indiscretions regarding matriarchy in *Joyous Science* with a reference to a Medusa (Baubo).

After *Zarathustra*, Nietzsche continually held conference with a parade of educated women in Switzerland, at a time he otherwise jealously guarded his privacy.\(^{139}\) Nietzsche’s association with women makes sense in light of what Nietzsche wrote in section 353 of *Joyous Science*: "To become the founder of a religion one must be psychologically infallible in one's knowledge of certain average types of souls who have not yet recognized that they belong together." Nietzsche tolerated being called a misogynist, but did get upset when Helene von Drukowitz criticized his philosophy.\(^{140}\) Attacking his philosophy threatened the effectiveness of his esoteric master plan and upset Nietzsche, but protests of misogyny were evidence of skirmishes through which the esoteric message was being *emotionally* absorbed—the seeds of "recognition" were being sown in his unlikely allies.

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\(^{139}\) Diethe, chapter 3.

\(^{140}\) Diethe, at page 5.
As in the early 1870's, after *Zarathustra* Nietzsche drafted numerous outlines for a planned large opus of grand scope. Nietzsche's book was to be a re-evaluation of values, including a study of cultural decadence; an all out assault on Christianity, a dominant patriarchal institution; a study of discipline and breeding as means to attain psychic hygiene and rank; and a celebration of a Dionysian ethic. Again, Nietzsche's master plan seems to have been continually evolving, though he did finish works on cultural decadence, *The Wagner Case*, and Christianity, *The Anti-Christ*. Nietzsche held back *The Anti-Christ*, anticipating a severe reaction—a crucifixion—and so he decided to write a preparatory work, *Ecce Homo*—behold the man—the words spoken by Pontius Pilate in presenting Christ for crucifixion.

Nietzsche was attempting to accomplish a lot with *Ecce Homo*. In *The Anti-Christ* Nietzsche had said that Christ was an idiot (an innocent) who was misused by his disciples. *Ecce Homo* was thus at least partially intended to prevent such "mischief," Nietzsche's earlier writings having been mischievously misused by anti-Semites. *Ecce Homo* was structured as a biography that was an application of the eternal recurrence doctrine to Nietzsche's own life. Nietzsche reinterpreted his life and works in terms of his destiny, but of course, the ultimate destiny remained concealed. The reinterpretation does some violence to historical fact; one ought to recall the "caution" in section 91 of *Joyous Science*: "I would also not believe a biography of Plato, written by himself..." Nonetheless, *Ecce Homo* provides valuable clues for identifying his destiny—the secret task Nietzsche alluded to in his letters. With Nietzsche's late emphasis on biographic prefaces and a biography, Nietzsche appears to have directed his readers to go outside his texts and view his life actions, as Nietzsche said we must do to interpret Shakespeare's *Hamlet*. An important clue in this respect is the resurrection of the Dionysian theme in *Ecce Homo*, which suggests one look for Dionysian madness.
As Nietzsche was completing *Ecce Homo*, having already sent it to the publisher, he read Strindberg’s play *The Father* and Nietzsche’s plans seem to have started evolving again midstream. Writing to Peter Gast on December 9, 1888, Nietzsche attempted to recall all private copies of the self-published Part IV of *Zarathustra* for publication after the fall-out from *The Anti-Christ* and, in retrospect, he found a new reason to congratulate his intuition in adding new prefaces and Book 5 of *Joyous Science*. *The Father* set something astir in Nietzsche.

Nietzsche made a final revision to *Ecce Homo* that named his mother and sister as the greatest objection to his application of the eternal recurrence to his life. This suggests Nietzsche sought to insert an additional biographical clue to his most horrific thought. This is consistent with Nietzsche's preoccupation with "last words," final gestures and writing for posthumous influence (for example, *Joyous Science* sections 36 "last words," 87 "farewells without confessions," 95 “last words of Chamfort,” 281 "knowing how to end", 315 “On the last hour,” 340 "the dying Socrates," and 365 "posthumous people," and "On Free Death" in *Zarathustra*).

Nietzsche’s sane life ended with a flurry of letters that are almost impossible to decipher. They include motifs from *The Anti-Christ*, *Ecce Homo*, and *Zarathustra*. Nietzsche signs some letters as The Crucified, which is peculiar because *Ecce Homo* ends with “Have I been Understood—Dionysus versus the Crucified.” Nietzsche signed off other final letters as "Dionysus" and generally identified himself with Dionysus. A letter to Strindberg says that he will have the young emperor shot and is signed “Caesar” Nietzsche. Shooting the young emperor may signify a Hero—Pentheus, Oedipus, Theseus?—and the Roman reference a play on “August” Strindberg’s name and his familiarity with Latin. Alternatively, perhaps Nietzsche saw himself as establishing a new secular social order—a showdown between the kingdoms of Caesar and God. Nietzsche wrote to Jakob Burckhardt identifying Cosima Wagner as Ariadne—"The
rest is for Frau Cosima ... Ariadne ... From time to time we practice magic ...”—suggesting a final preoccupation with the Dionysus and Ariadne myth; perhaps it is Theseus-Wagner (*Nietzsche contra Wagner*) who is being shot. The associations in Nietzsche’s final letters are too free and overloaded with meaning to draw definitive conclusions.

After Nietzsche’s apparent breakdown, he was still quite lucid in most respects, something that perplexed Franz Overbeck, who retrieved Nietzsche from Turin and took him to Basle.\(^1\) Some of Nietzsche’s last acts demonstrate his core philosophy. On January 3, 1889, thought to be the day before his “complete” breakdown, Nietzsche came out of his residence and saw a tired horse being beaten. Nietzsche was seized by compassion and sobbingly threw his arms around the horse to protect it. Nietzsche collapsed and his landlord, attracted by the disturbance, managed to get Nietzsche into the house with great difficulty. Though the sequence is uncertain, he seems to have then written several of his strange letters, including one to Cosima Wagner: “Ariadne, I love you. —Dionysus.” Describing Nietzsche in Turin, Overbeck wrote to Peter Gast (15 January 1889):

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\ldots\text{always lucid as regards me and other persons, but completely in the dark about himself. That is, growing inordinately excited at the piano, singing loudly and raving, he would utter bits and pieces from the world of ideas in which he has been living, and also in short sentences, in an indescribably muffled tone, sublime, wonderfully clairvoyant, and unspeakably horrible things would be audible, about himself as the successor of the dead God, the whole thing punctuated, as it were, on the piano, whereupon more convulsions and outbursts would follow, but, as I said, this happened at only a few fleeting moments while I was with him;}
\]
mainly it was utterances about the profession which he had allotted to himself, to be the clown of the new eternities, and he, the master of expression, was himself incapable of rendering the ecstasies of his gaiety except in the most trivial expressions or by frenzied dancing and capering.

The first physician who examined Nietzsche in Turin reported, "Asks continually for women."\textsuperscript{142}

Dionysus, dancing, women—given Nietzsche’s fascination with final gestures and his perplexing lucidity, one suspects Nietzsche was not entirely out of control. Indeed, Claudia Crawford makes a compelling case that Nietzsche staged his mental breakdown.\textsuperscript{143}

To help determine whether Nietzsche’s acts of insanity might be meaningful, it is useful to attempt to answer his recurring question "Have I been understood?" by asking what sickness of soul relentlessly drove Nietzsche's conscience of science. It is interesting to note that Diethe spontaneously formed the opinion that Lou Salomé sensed that Nietzsche was masochistic toward strong women—an opinion Diethe cannot relate to her views on Nietzsche's misogyny, thus giving it some credibility of independence.\textsuperscript{144} Alice Miller presents a case that Nietzsche was haunted by the effects of over-disciplining as a child,\textsuperscript{145} which is especially significant to the theme of this chapter because it would have been by women—possibly using a whip. A punishment motif resonates throughout Nietzsche’s writings but especially in the second essay of On the Genealogy of Morality (the superfluous comment "as parents still punish their children"), Dawn and Rhyme 36 in the Prelude to Joyous Science:

\textsuperscript{141} Franz Overbeck in Selected Letters, at pages 351-355.
\textsuperscript{142} Selected Letters, footnote 188, at page 316.
\textsuperscript{144} Diethe, at page 55.
Juvenalia
My youthful wisdom’s A and O
I heard again. What did I hear?
Words not of wisdom but of woe:
Only the endless Ah! and Oh!
Of youth lies heavy in my ear.146

This casts new light on the "Other Dancing Song" in Zarathustra; indeed, it looks like a first
draft. Twelve lashes are being counted as Nietzsche sings his mourning song. One can visualize
Nietzsche bringing the whip to his mother—"You are going to woman! Do not forget the
whip!"—lowering his pants in front of her, turning to receive twelve lashes on his bare bottom—
"Only the endless Ah! and Oh! / Of youth lies heavy in my ear."—and as she held his left hand
with her left and lashed him with her right, Nietzsche dancing around in a counterclockwise
circle—"I dance after you, I follow wherever you linger. Where are you? Give me your hand! Or
only one finger." Perhaps, just once, she hit him too hard and he somersaulted, landing on his
head. "... Alas, as I leaped I fell." Thus Nietzsche, a late talker, wrote in rhyme 28 of Gay
Science:

Consolation for Beginners
See the child lost among the swine,
Helpless, he can’t even talk.
He is always, always cryin’—
Don’t despair! Soon he will treat
You to dances. It is said,

145 Alice Miller, Banished Knowledge: Facing Childhood Injuries, tr. Leila Vennewitz (New York: Doubleday,
1990) [1988 in German].
146 Kaufmann inexplicably drops the exclamation marks after “Ah” and “Oh”, which I have reinstated. The
exclamation marks suggest yelps from being whipped.
Once he can stand on his feet,
He will soon stand on his head.

This disciplining would go a long way toward explaining Nietzsche’s entwined love-hate feelings for his mother and his apparent ambivalence between misogyny and masochistic female-worship. The "Other Dancing Song" expresses this ambivalence—"I am verily weary of always being your sheepish shepherd. You witch, if I so far have sung to you, now you shall cry. Keeping time with my whip, you shall dance and cry! Or have I forgotten my whip? Not I!" The sarcastic last remark emphasizes the reversal in which Nietzsche, who brought “his” whip to receive his discipline, unexpectedly threatens to use it himself. However, life (his mother—as he tells us through the riddle in the first section of *Ecce Homo*) immediately melts his rage. Something is whispered that "no one" is supposed to know. "Eternal recurrence"—yes, but surely this has additional emotional connotation: endless Ah's and Oh's, ambivalent woe and pleasure (in German, *Lust*). Resa von Schirnhofer, to whom Nietzsche personally presented the three parts of *Zarathustra* inscribed above "With warm affection" and below "In nova fert animus" (The spirit carries one to new things), recalls from April 1884:

Another time Nietzsche asked me to read aloud "The Other Dance Song," from Part III of *Zarathustra*.

I had probably not intoned the end of it sufficiently enough to suit him, for Nietzsche repeated with a solemnly altered voice the midnight tollings of the "old heavy booming-bell":

One!
Oh man, pay heed!
Two!
What says the deep midnight?
Three!
"I slept! I slept—
Four!
"Out of a deep dream I have awakened!—
Five!
"The world is deep,
Six!
"And deeper than the day 'tis thought,
Seven!
"Deep is its woe—,
Eight!
Pleasure [*Lust*]—deeper yet than heart's grief;
Nine!
"Woe speaks: Perish!
Ten!
"But all pleasure wants eternity—
Eleven!
"Wants deep, deep eternity!"
Twelve!

Then he got up to leave, and as we were standing by the door his features suddenly changed. With a stolid look on his face, casting shy looks around him as if a horrible danger threatened if a listener should hear his words, muting the sound with his hand over his mouth he announced to me in a whisper the "secret" which Zarathustra whispered into life's ear, to which life had answered:

"You *know* that Zarathustra? *No one* knows that."

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147 *Conversations*, at pages 157-157.
There was something bizarre, indeed eerie in what Nietzsche told me of the "eternal return of the same," and the tremendous scope of the idea. I was bewildered far more by the way it was told than by its content. A different Nietzsche was suddenly standing before me and had frightened me.

Did Nietzsche do this for effect, or was he deeply stirred, emotionally "unhinged"? As Nietzsche observed about Shakespeare and Brutus in *Joyous Science* (section 98): "Could it be that we confront some unknown dark event and adventure in the poet's own soul of which he wants to speak only in signs?" The "solemnly altered voice" of the "bell" is a clue; bells do not count—lashes are counted out, solemnly! The whispered secret must connote something so radical enough that when writing his personal notes his handwriting would become illegible scrawl.148

Women ruling over men?—he wrote that (*Joyous Science*, section 70); male self-sacrifice for females?—self-sacrifice in mating was natural to Nietzsche (*Joyous Science*, section 3); scientific exploration of new forms of ambivalent suffering and pleasure?—getting scary, but he wrote about this in the abstract (*Joyous Science*, sections 12 and 338); matriarchy entails experimentation in disciplining males toward masochistic eroticism ... by mothers! This psycho-technic solution could evoke the "horrific," "unhinging," "unspeakable," "primeval nightmare" effect that *Harvest Home* had on its reviewers.

"The Other Dancing Song," the penultimate section of Part III (the last being a coda), is the proper ending of *Zarathustra*. After writing Part II Nietzsche wrote to Peter Gast (August 1883): "The detail contains an incredible amount of personal experience and suffering which is intelligible only to me..." nonetheless, "... I... have the worst difficulties ahead of me." After finishing Part III, Nietzsche considered the work complete, writing to Erwin Rohde (22 February
1884): “My Zarathustra is finished, in its three acts…” Nietzsche wrote Part IV but only published it privately after having already publishing the first three parts. Later, he would describe the fourth part of Zarathustra to Carl Fuchs (29 July 1888) as: “an entr’acte between Zarathustra and what follows (I name no names…”). The more exact title, the more descriptive one, would be: The Temptation of Zarathustra, An Entr’acte.” After reading The Father, Nietzsche tried to recover the private copies of Part IV he sent to select friends. Reading The Father made Nietzsche realize again that Part III was the emotional climax of the book and the coda—the ring of recurrence—should immediately lead us back to the beginning—"da capo!" (Ecce Homo)—where "lame-foot" is unable to walk the tightrope over the abyss. Lame-foot?—Oedipus! Nietzsche whispers through the Greeks! Matriarchy requires male self-submission to be psychologically anchored by eroticized masochism, which requires a new science—a psychology—of ambivalent suffering and pleasure (in German, Lust) to be administered or supervised by mothers (they'll decide). This is territory that Nietzsche's conscience of science could not explore; this required an übermensch—a woman. Smith and Ferstman were correct in identifying Lou Salomé as the archetype for the übermensch. Zarathustra was Nietzsche’s response to losing his “eagle” and “lion”—noble bird—in flesh and blood.

Could Nietzsche's "disciplining" have had this effect? The answer must be biographically inferred. The erotic aspect of Nietzsche's "disciplining" is manifest. Consider Nietzsche's family situation at the time. Nietzsche's father, a pastor, fell ill in September of 1848, just after falling down and hitting his head. He had periods of recovery but died in July 1849 of "softening of the head," three months before Nietzsche's fifth birthday. This left the five-year-old Nietzsche the man of the house, presided over by his father's mother, and included his father's two sisters, his

148 Waite, at page 209.
mother, his younger sister and maids—a matriarchy. Nietzsche's mother was left in a difficult situation and was permitted few responsibilities other than the care of her children. She was presumably the one who administered the physical punishment, and perhaps from time to time a bit too vigorously, releasing frustration from her difficult, cloistered household circumstance. Perhaps, just once, she immediately regretted her transferred rage and, like any good mother, consoled with tender strokes her crying son—her bare-bottomed son!

To gauge the effect on Nietzsche, consider the event from his perspective. Nietzsche's father was twelve years older than Nietzsche's mother. At the time of his death she was only twenty-three and still considered "beautiful" and "very attractive." An 1845 photograph of Franziska clearly confirms this—she resembles Uma Thurman. As in Pulp Fiction, Nietzsche was the man-about-house to look after the wife of the absent boss. Her authority over him blocks escape from her sexual aura, which intensifies as she flaunts her unavailability—"Mrs. Mia Wallace" the dominatrix goads her slave as she forces him to dance. It seems unlikely that Nietzsche's religious mother actually did anything purposefully incestuous, but the cloistered young woman—formerly a "wild young plant"—may have subconsciously projected erotic longings without being aware of it. In any event, that seems to have been the effect on Nietzsche.

After leaving home, Nietzsche would instinctively re-stage the drama of his family romance, repeatedly. Diethe reports that Nietzsche was inordinately close to Sophie Ritschl, the wife of his philology professor whose recommendation got Nietzsche his professorship at Basle. Other mothers with whom Nietzsche became close friends included Louise Bachofen, whose husband was twenty years her senior and just two years younger than Nietzsche's father; Irene von Seydlitz; Ida Overbeck, whose husband was a colleague of Nietzsche at Basle; Marie

149 Diethe, at page 14 and photographic plate 6.
150 Pletsch, at page 22.
Baumgertner; Louise Ott; and Cosima Wagner. Diethe describes Nietzsche as “smitten” by Cosima.\textsuperscript{152} His situation with Cosima was likely the most intense because it most closely matched his formative experience. Wagner was clearly a father figure to Nietzsche—young Nietzsche had been attracted to his father’s intellectual and musical talent, qualities he later worshipped in Wagner. Wagner was the same age as Nietzsche’s father, and Cosima was much younger, just seven years older than Nietzsche. A dutiful disciple of the self-absorbed Wagner, Nietzsche had to entertain the absent boss’s wife. Cosima’s feelings for Nietzsche are unknown; she destroyed much material in order to protect Wagner’s public image.\textsuperscript{153} She certainly didn’t fear scandal, having abruptly dumped her husband for Wagner, taking her two children and getting pregnant by Wagner before getting divorced and legally remarried. We can hear Nietzsche’s strong, troubling, contradictory feelings, and consequent depression, echo through \textit{Joyous Science} and one of his last sane acts was to write to Cosima—”Ariadne, I love you.” Ariadne, of course, is a major theme throughout \textit{Zarathustra}, in which Nietzsche’s synthesizes his experiences with Cosima Wagner and Lou Salomé. Nietzsche’s eroticized discipline as a child would help explain Nietzsche’s paradoxical attraction to unavailable women, while maintaining a distance he rationalized as necessary to preserve his creativity.

Nietzsche’s feelings for his mother erupted more directly later in his life, which included conspicuous references to his mother’s eyes in youth. Meta von Salis-Marschlins reports the following about a walk with Nietzsche in August 1888, near the end of his sane life:

> On the way he was enthusiastic and full of memories of his childhood days in Naumberg \textit{[i.e., after the death of his father]} and

\textsuperscript{151} Diethe, at page 30.
\textsuperscript{152} \textit{Ibid.}, at page 32.
\textsuperscript{153} \textit{Ibid.}, at page 33.
of his mother. "She had very beautiful eyes," he remarked, and he was very grateful to the young widow, who had plenty of suitors, for not having given him a second father, who might have interfered with a rough hand in the education of the "strange child."

Better an "education" from a "smooth" hand. In *Joyous Science* Nietzsche had written that "In [prior ages], one educated those close to one to endure pain..." (section 48) and, to overcome male fetishizing of females (section 68), "Men need to be educated better,' said the sage and beckoned to the youth to follow him.—The youth, however, did not follow him."

After Nietzsche's insanity, his mother wrote down various "unguarded" ramblings that again refer to beautiful eyes. From October 13, 1895:

On October 13 he spoke.
To the question do you want the meal he said:

Do I have a mouth for it Should I eat that? my mouth I say, I want to eat, What is that? Nice milk I always liked. What do we want to eat now. Precisely the thing. Will that taste good? That is tasty. What else do we want to eat? Nice things. Who will eat this? eat it yourself. What does Frau Pastor have? beautiful eyes. What is that here? a spoon. What is his designation? Friedrich Nietzsche.

In "The Dancing Song", Zarathustra begins his song "Into your eyes I looked recently, O life! And into the unfathomable I then seemed to be sinking. But you pulled me out with a golden fishing rod..."—apparently she did not spare the rod. (The rod in the hands of a safely guiding mother instinct is golden, but in the "rough" hand of a male is mere punishment.) Wisdom's golden rod, the eternal recurrence doctrine, was similar but not the same. Zarathustra's song ends
"Ah, then you opened your eyes again, O beloved life. And again I seemed to myself to be sinking into the unfathomable." —the unspeakable. The same pattern recurs in “The Other Dancing Song”:

Into your eyes I looked recently, O life. I saw gold blinking in your night-eye; my heart stopped in delight: a golden boat I saw blinking on nocturnal waters, a golden rocking boat, sinking, drinking, and winking again. At my foot, frantic to dance, you cast a glance, a laughing, questioning, melting, rocking-glance: twice only you stirred your rattle with your small hands, and my foot was already rocking with dancing frenzy.

My heels twitched, then my toes hearkened to understand you, and rose: for the dancer has his ear in his toes.

... you stood there, ..., your eyes full of desire.

... what I would not gladly suffer for you?

...

Who would not hate you, you great binder, entwiner, temptress, seeker, and finder? Who would not love you, you innocent, impatient, wind-swift, child-eyed sinner?

...

An anonymous visitor to the sanatorium at Jena in 1889, where Nietzsche was kept before his mother assumed custody of him, wrote:

The professor must have also been a lively dancer in his younger years, for when Baron X. played on his zither, Herr Nietzsche could not get on his legs fast enough to begin a marathon dance until the head warden led him off to calm him down.
From 1893 Heinrich Lec writes:

Alwine tells me that when he is without me he mumbles continuously, "My mother, my mother!"

In 1896 his mother (Franziska Nietzsche, née Oehler) wrote:

On April 21 he spoke: "Food, for example good milk" "I love my mother very much, elegant very loved" "I don't like Napoleon Bonaparte". To the question where we were going now "to bed" Whom do you love "mother" ... "I never loved the bath-master" ... "The mother elegant I love very much" "Good eyes" ... On July 22, 1896 he said:

..."I love my mother because I love my mother very much"
"I loved my sister very much"
"I underestimated many things very much"
"Franziska Fränzchen née Oehler"
...

Nietzsche’s mother, of course, would have been biased toward recording love for mother, but she would not likely have purposely inserted incestuous overtones. Nietzsche—master psychologist—whose "toes hearkened to understand" his mother may have understood things about his mother she did not. Thus, he could whisper a secret that "no one" knew, including his mother—Zarathustra was subtitled “A book for all and no one.” Nietzsche elsewhere refers to

154 See chapter 3 of this thesis for a discussion of Nietzsche’s ambivalent respect for Napoleon.
secrets. In section 60 of *Joyous Science*, Nietzsche described erotic arousal as “the flaming surf whose white tongues are licking at my feet” in a “labyrinth” and later, in section 310:

310

*Will and wave.*—How greedily this wave approaches, as if it were after something! How it crawls with terrifying haste into the inmost nooks of this labyrinthine cliff? ... —But already another wave is approaching, still more greedily and savagely than the first, and its soul too, seems to be full of secrets and the lust to dig up treasures. Thus live waves—thus live we who will—more I will not say.

So? You mistrust me? You are angry with me, you beautiful monsters? Are you afraid that I might give away your whole secret? ... Carry on as you like, roaring with overweening pleasure [in German, *Lust*] and malice ... I am so well-disposed toward you for everything; how could I think of betraying you? For—mark my word!—I know you and your secret; I know your kind! You and I—are we not of one kind?—You and I—do we not have one secret?

311

*Refracted light.*—One is not always bold, and when one grows tired then one of us, too, is apt to moan like this: "It is so hard to hurt people—oh, why is it necessary! ..."

The segue shows that with Nietzsche there is much more to context than is apparent on first reading. Sections 309 and 312 use the pronoun "I" whereas 311, for no apparent reason uses "us"—other than following 310. Waves, of course, recur eternally—endless ah's and oh's—a whipping seems like eternity.
Book 3 of *Joyous Science* ends with the following sequence:

273

*Whom do you call bad?*—Those who always want to put to shame.

274

*What do you consider most humane?*—To spare someone shame.

275

*What is the seal of liberation?*—No longer being ashamed in front of oneself.

In section 281 of *Joyous Science* Nietzsche wrote "Masters of the first rank are revealed by the fact that in great as well as small matters they know how to end perfectly..." Nietzsche's preoccupation with final gestures has already been noted above. How did Nietzsche end?

Nietzsche's sister described his death as follows:

He moved and closed his lips again, and looked like someone who has something more to say and hesitates to say it. And to those who were watching him his face seemed to blush slightly. This lasted for a little while: but then, all at once he shook his head, closed his eyes voluntarily and died ... So it happened that Zarathustra perished.

It is hard not to think of section 340 of *Joyous Science* where Nietzsche had ears for Socrates' dying words "Crito, I owe Asclepius [the Greek god of medicine] a rooster." Socrates thus said he had been cured of life, life being a disease. Nietzsche's final blush whispered that he had not been liberated from shame—his silence told us that an important secret remained untold.
5.6 Epilogue

This chapter has attempted to show that major signposts Nietzsche left us point toward matriarchy as his veiled political philosophy, incestuous longings as his shameful secret, and experimentation in erotic disciplining of boys by their mothers as his most horrific thought. Reading Nietzsche as a psychologist of creative genius, his frightening statements regarding ancient Greece, slavery, women, sexuality and femininity lose their terrifying edge, provided one is no longer petrified by the Medusa. If Waite is right about the perlocutionary effect of the eternal recurrence doctrine, the eternal recurrence will have reinstated the potency of Medusa, so that perspectivism undermines the capacity of will-to-truth to resist will-to-life. Like Gödel’s incompleteness theorem, the eternal recurrence uses logic to undermine faith in logic—a supreme irony that Nietzsche surely savored. If Waite is right about the profoundness of Nietzsche’s influence on contemporary thinking, then Nietzsche was extremely successful in learning from Wagner how to stage his life as an event.

What is less evident is how successful Nietzsche was in transforming his readers to dispose them to matriarchy and make use of his esoteric monument. How Nietzsche sought to achieve this rhetorically is developed in the next chapter.

This chapter has been argued to make a case for Nietzsche’s esoteric matriarchal views without having to commit to a position on whether Nietzsche really went insane or merely staged it. In either case, the biographic and textual evidence of a secret matriarchal agenda is present. If Nietzsche did go insane, many of the late gestures and texts could be read as indicative of less consciously guarded eruptions of latent tendencies. Indeed, almost all of Nietzsche’s writings could be characterized as outbursts from one perspective within his mind in defiance of others. One might also hold the intermediary hypothesis that Nietzsche was aware he had syphilis and
would eventually become insane—Hollingdale notes that 11 years from breakdown to death is long for syphilis—and so Nietzsche staged a breakdown while he was still capable of controlling it.

Because of numerous clues contained in Nietzsche’s texts—particularly in *Dawn*, many of which will be noted in the following chapter—and Crawford’s argument, I now favour the hypothesis that Nietzsche staged both his breakdown and timed his death to have maximum effect to promote his philosophy. The verity of Nietzsche’s insanity is too difficult an issue to address within the scope of this thesis, other than as a plausible hypothesis. Nonetheless, bearing in mind the abundance of pagan mythic structure in Nietzsche’s texts (discussed in Chapters 3 and 6), Nietzsche makes an uncanny reference to the year 1901 in section 371 of *Joyous Science* as his prediction of when he would be born posthumously, if he were very modest, and uses images of the oak-tree sacrifice in matriarchal paganism.¹⁵⁵

*We incomprehensible ones.*—Have we ever complained because we are misunderstood, misjudged, misidentified, slandered, misheard, and not heard? Precisely this is our fate—oh, for a long time yet! let us say, to be modest, until 1901—... Like trees we grow—... we grow in height; and even if this should be our fatality—for we dwell ever closer to the lightening—well, we do

¹⁵⁵ Nietzsche died in 1900. Section 371 was added in the second edition of *Joyous Science*, which was completed in 1887, less than two years before his breakdown. See also *Dawn*, section 459 in which Nietzsche states that the great thinker must offer his life as a sacrifice and *Dawn*, section 460 in which Nietzsche states that superior men who are irresistibly drawn to throw off the yoke of morality and form new laws have no alternative but to make themselves pretend to be mad. Crawford did not refer to these passages, which bolster her claim that Nietzsche staged his madness.
not on that account honor it less; it remains that which we do not wish to share, to make public—the fatality of the heights, our fatality.
CHAPTER 6
PARA-CONCEPTUAL RHETORIC

My triumph is the opposite of Schopenhauer’s—I say ‘non legor, non legar.’

6.1 Introduction

This thesis has argued that Nietzsche and Holmes drew on an understanding of the principles of self-organizing criticality to develop a dynamics theory of justice that entails a life philosophy of doing justice. Holmes’s manner of living justice was to be great judge, producing just a few elliptic works to indicate the existence of a greater philosophical context. Nietzsche, on the other hand, lived justice by theorizing about it and producing a monumental work to overturn the Platonic foundations of society and convert society to his life philosophy of doing justice. As Lou Salomé observed, Nietzsche was fundamentally religious in nature—an atheist religion of guiding others in their management of spiritual growth to become more just. Nietzsche’s task was plainly more difficult to accomplish than Holmes’s task. The plausibility of a claim that Nietzsche attempted this rests on how much Nietzsche believed he could accomplish with rhetoric.

The previous chapter, “Nietzsche’s Horrific Thought,” argued that Nietzsche had a matriarchal political solution to the problem of policing what he understood to be unconscious male windfall opportunism. Nietzsche’s matriarchy cannot be avoided. He evidently considered matriarchy integral to addressing the problem of minimizing potential abuses of power by any college of cultural physicians that would oversee the institutional systole-and-diastole dynamics
discussed in chapter 3 of this thesis, “Cultivating Justice.” Because overt matriarchal advocacy would render his work pariah within patriarchy, Nietzsche had good reason to explore techniques for esoteric writing. A burden of this chapter is to show that such an ambition would have seemed plausible to Nietzsche to undertake.

In addition to concealing his matriarchal political philosophy, there would be other reasons for Nietzsche to employ esoteric techniques. Nietzsche could use esoteric techniques to structure a multi-stage education of his readers. Nietzsche could first emphasize individual self-empowerment and conceal the communitarian and institutional elements of his theory of justice until the “Anti-Christ” aspect of his programme had taken root.

Finally, Nietzsche’s programme would require faith in a rhetorical technique that could educate his readers to attain the interpretive skills and psychological disposition to discover his hidden monuments. In keeping with the point of his life-task, Nietzsche would not have wanted to rely upon or permit chance discovery of his esoteric content.

The main burden of this chapter is to show how Nietzsche could have such faith in rhetorical technique and that Nietzsche did in fact attempt to accomplish these rhetorical effects. The nub of the claim is, again, the application of the principles of dynamics in self-organizing criticality. The second chapter of this thesis, “Legal Reasoning,” presented as the foundation of the skill of inductive legal reasoning a psychology of rhetorical persuasion as the incorporation of numerous narratives that contain small doses of dramatized recalcitrant experience. This chapter presents evidence that as an application of this psychology Nietzsche sought to invert that process to devise rhetorical technique. This chapter reviews various of Nietzsche’s textual passages as attempts to induce inductive creative transformations in the reader and then make the

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reader, who has thereby gained an experiential understanding of inductive creativity, ironically aware of the event. This chapter presents evidence that Nietzsche's works are structured in levels, access to which requires inductive transformations through prior levels. Through a progression of transformations, Nietzsche could thereby hope to train his readers to become initiates to the most esoteric levels of his life work.

This thesis does not claim to have deciphered fully the rhetorical structure of Nietzsche's oeuvre. The burden of this chapter in relation to the rest of the thesis is to show that Nietzsche had such ambitions for rhetoric, how it derives from the dynamics principles of self-organizing criticality, and how rhetoric could train a reader to do inductive science.

The first section of the chapter discusses issues of esoteric writing and reviews passages of Nietzsche that betray a preoccupation with esoteric writing. Additional Nietzschean passages portray rhetoric in terms of musical form and principles of self-organizing criticality. The next section examines in detail samples of Nietzsche's styles of "music-writing" from *Dawn*, *Joyous Science* and *Zarathustra*.

The final section of the chapter applies the insights gained from reviewing Nietzsche's explicit theorization and practice of rhetoric to analyze Holmes's use of rhetoric in his most influential work, "The Path of the Law." It will be seen that Holmes implicitly used techniques that Nietzsche worked out explicitly. As with Nietzsche, Holmes's rhetorical structure functions to destabilize any reading of his work not based on dynamic principles of self-organizing criticality. It will therefore be seen that the inconsistent interpretations this essay has generated in the past one hundred years is the appropriate effect of a masterful work rather than a hurried product of an inconsistent thinker.
The claim that Nietzsche was an esoteric writer is not new. Laurence Lampert has developed this theme by doing a careful philological analysis of Francis Bacon and Rene Descartes as esoteric writers and linking Nietzsche to their heritage, with its ultimate source in their readings of Plato.\(^2\) Stanley Rosen and Geoff Waite have solidly built on this foundation, with a closer examination of Nietzsche’s esoteric techniques and its effect.\(^3\) This thesis will not labor to repeat the work of Lampert, Rosen and Waite in demonstrating from text and notes that Nietzsche wrote esoterically, although some indicators from Nietzsche’s texts will be reviewed. The main concern here is to explore how Nietzsche’s technique of esoteric writing and the hidden content relate to the theme of self-organizing criticality and Nietzsche’s task as an educator of empirical methodology.

Whereas Lampert sympathetically reads Nietzsche’s esoteric project as an inspired, new understanding of science through a new understanding of nature, Waite unsympathetically reads the esoteric project as cruelly elitist and Rosen reads it as self-inconsistently elitist. In essence, Rosen and Waite conclude that because Nietzsche is esoteric with deliberate authorial intent, one must conclude his deconstructive aspect, particularly of the self as autonomous, free-willing ego, are either a put on (Waite) or simply self-contradictory or self-destroying (Rosen).\(^4\) Rosen goes so far as to say Deleuze falsifies Nietzsche’s doctrine when he claims that the eternal return is not the return of a particular arrangement of things and rejects Deleuze’s emphasis on genealogy.\(^5\) This thesis, on the other hand, finds no contradiction between Nietzsche both writing as a philosophical legislator and maintaining his genealogical will-to-power metaphysics in which

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\(^4\) Nietzsche’s strategic use of deconstructing the “doer behind the deed” is discussed in Chapter 3 of this thesis.
"doctrines of structure and value are redefined as perspectives or arbitrary interpretations of perturbations of chaos, not by independent and coherent subjects but by an unstable and continuously dissolving differential of multiple body-egos..." Indeed, this thesis argues Nietzsche’s rhetoric can be derived from his principles of genealogy, will-to-power and genius, both generally and as manifest in his psychology. Nietzsche’s rhetoric demonstrates how to use the phenomenon of self-organized criticality as a social engineer, or cultural physician. Rather than engage Rosen and Waite’s serious charges against Nietzsche directly, this thesis uses the self-organized criticality paradigm to show that Nietzsche’s understanding of causality is coherent and consistent with his rhetoric and psychology. In particular, this thesis does not engage in an evaluation of Nietzsche’s philosophical project as the purpose of this thesis is not to evaluate Nietzsche philosophically but to explore his utility in forming a model of legal reasoning and theory of justice.

Lampert repeats a useful distinction made by Francis Bacon between esoteric writing that conceals a message to all but initiates and writing that initiates the reader to some skill. Regarding Bacon’s initiative aspect, Stanley Fish describes the “strenuous and disquieting experience” of reading his essays where one seems to compose one’s own essay while reading Bacon’s, but Bacon remains in control of both. However, whereas Bacon’s writings on rhetoric separate the “initiative” aspects of learning to do science from esoteric writing, this chapter argues that Nietzsche combines both tasks in the same text. This chapter claims Nietzsche’s texts attempt to do several things simultaneously: make the reader experience the causal phenomenon

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6 Ibid., pages 3-4.
7 Stanley Fish, Self-Consuming Artifacts: The Expression of Seventeenth-Century Literature (Berkeley: University of California Press, 1972) 147, 162.
8 Lampert, 22-24.
he wants the reader to understand; train the reader to do his new science (as Bacon initiates the reader into his scientific method); initiate the reader to understand his esoteric message; and present the esoteric message as a celebratory confirmation of the apprenticeship—all in the same text.

Furthermore, this chapter argues that with Nietzsche the rhetoric is not merely a means of transmission, but also a means of inquiry. This chapter argues that Nietzsche finds the causal "genius" of self-organizing criticality to be an invariant feature of numerous planes of reality: psychology, epistemology, justice, physiological development, evolution, and thermodynamics. Not having adequate concepts to isolate the "genius" aspect of each, this chapter argues that Nietzsche applied a method of comparative analysis that seeks structural invariants across various topical planes. This methodology is not unlike evolutionary biology, which switches between physiological and evolutionary modes of analysis while doing comparative analysis within and across species in order to isolate what is physiologically and evolutionarily invariant. This is how Nietzsche could have attempted to undertake the philosophical task of discerning what is unalterable.9

The power of this "multi-planar" approach is that in developing the overall model, aspects of the invariant—i.e., principles of self-organizing criticality—might become more evident within one plane than another. Nietzsche could move freely from one plane to another, using insights from other planes to attack the least-fit aspect of his developing understanding at yet another plane. This investigative strategy, not coincidentally, follows the principle of self-organizing criticality—developed in Chapter 2 of this thesis regarding legal reasoning—that

9 "To me, on the other hand, the most vital of questions for philosophy appears to be to what extent the character of the world is unalterable: so as, once this question has been answered, to set about improving that part of it recognized as alterable with the most ruthless courage." Friedrich Nietzsche, "Richard Wagner in Bayreuth," in
mutation and coherence-seeking avalanches should be triggered at the least-fit point to achieve creative adaptation. The hyperactive, manic movement among and within topical planes—Nietzsche dancing on light feet—effaces any complete, linear narrative of the journey. An interesting effect of this manner of development is that Nietzsche’s thinking could improve holistically, like a hologram that increases in detail and resolution, so that each subsequent book says more or less the same thing, but with greater subtlety for nuance as he progresses.  

Nietzsche makes a similar point in section 4 of the Preface to *On the Genealogy of Morality*, criticizing specific passages in *Human, All Too Human* and *Dawn* for lacking nuance. Similarly Nietzsche’s “Attempt at a Self-Criticism,” added as a preface to *Birth of Tragedy*, is harsh only with respect to its rhetorical approach, the substance is only mildly qualified as lacking nuance. Indeed, one might say Nietzsche’s chief developments after *Birth of Tragedy* were rhetorical, or even more strongly, that apart from rediscovering causal insights already implicit in Pagan myths, Nietzsche’s originality was predominantly rhetorical. Nietzsche sought to be an “educator” to reverse modernism through rhetoric of text and deed.  

Not having adequate concepts at his disposal, Nietzsche had to create metaphors for the dynamics within each of the topical planes—like algebraic fields. Nietzsche’s method was to adjust continually the metaphoric fields toward homomorphic alignment with the empirically more solid aspects of other fields, and thereby telescopically develop toward a hierarchy of homomorphisms where more complex levels contain lower levels.  

Nietzsche could thereby work extended metaphors and mix metaphoric fields within the same sections of texts without...

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10 Or as a tree grows simultaneously in the roots, trunk, stems and branches. Nietzsche describes himself with this metaphor in section 371 of *Joyous Science*.  

11 A homomorphism is weaker than an isomorphism. Aspects of the more complex field will be lost in mapping invariant structure to the less complex.
losing a sense of metaphoric coherency, even though conceptual coherency is rarely maintained—indeed, it will be argued that Nietzsche's texts confound conceptual coherency as an integral aspect of how the rhetoric works. In reading Nietzsche, one almost senses a magnetic field at work under the page, over which concepts, like iron filings, appear haphazard within the sequential narrative but display a discernible pattern at another level of focus. To strengthen the magnetic pull to an almost gestalt effect, it will be argued that Nietzsche repeatedly drew on a pre-eminent mythic field he develops using the consort and Goddess mythic structure—Dionysus and Ariadne.\textsuperscript{12}

One of the most important topical planes Nietzsche used was his own Promethean biography to illustrate macro-level features of the dynamics of development. Nietzsche did this openly in \textit{Ecce Homo} and in the prefaces written after \textit{Zarathustra}. Nietzsche also openly instructed us that “Schopenhauer as Educator,” “Richard Wagner in Bayreuth,” \textit{Joyous Science} and \textit{Zarathustra} should be read as Promethean biographical accounts as well. Indeed, \textit{Zarathustra} can be read as Nietzsche’s Dantian journey into the underworld of self-transformation. \textit{Joyous Science} begins with a celebration of the Provençal poets who inspired Dante and ends with the section “incipit tragoedia” which quotes the opening lines of \textit{Zarathustra} and ends with the announcement “Thus Zarathustra began to go under.” Ted Hughes argues that Shakespeare similarly announced a Dantian journey into the underworld of human character through the character of Jacques in \textit{As You Like It}.\textsuperscript{13} However, Nietzsche’s Dantian journey is qualitatively different from either predecessor. Indeed, there is arguably a progression

\textsuperscript{12} Ted Hughes argues that Shakespeare used a mythic pattern for similar effect. Depending upon context, Nietzsche shifts among four paradigm mythic patterns: Moira and Prometheus, Demeter and Poseidon, the Queen and two consorts, and Ariadne and Dionysis. However, Ariadne and Dionysis is the ground-myth for self-organizing criticality in terms of personal development. Nietzsche’s mythic field correlates self-organizing criticality, the four causes, and the model of development implicit in the pagan calendar.
from Dante through Shakespeare to Nietzsche. Dante takes us through the levels of a gallery describing portraits, whereas Shakespeare takes us through a cinema complex and dramatizes the portraits. Shakespeare demonstrates the dynamics in actions—dramatized deeds. Nietzsche evidently believed he went further than Shakespeare to become a dithyrambic dramatist—the reader becomes a participant and experiences the dramatic trajectories by ritualistically engaging with the text. In this regard, Nietzsche considered *Zarathustra* to stand supreme among his works. This chapter will explore some of the means by which Nietzsche hoped to accomplish this and how it develops naturally out of his understanding of causal genius, psychology and genealogy.

This chapter argues that as Nietzsche’s style matured, he improved his ability to implode the metaphoric fields and movements within the fields into different and more compact units of language. *Zarathustra* perfects the use of the short aphorism. To help along his readers, Nietzsche exploded one imploded fragment—“Unconcerned, mocking, violent—thus wisdom wants us: she is a woman and always loves only a warrior.”—into one possible narrative dramatization of the meaning in the third essay, *On the Genealogy of Morality*. This chapter will undertake a controlled detonation of another stick of Nietzschean dynamite—“You are going to women? Do not forget the whip!”—in order to show how the reader’s developing engagement with the aphorism demonstrates within the reader the causal genius of self-organizing criticality Nietzsche sought to communicate outside the register of conceptual thinking. Other aspects of Nietzsche’s style will be briefly examined in this light and a trend will be noted as Nietzsche

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moves from a ‘Wagnerian’ romanticism in his early books *Human, All Too Human* and *Dawn*, to a high classical style in *Twilight of the Idols*.

Nietzsche tells us all this within his texts and so rhetoric itself was another topical plane with its own metaphoric field, usually cast in musical terms. This chapter argues that Nietzsche thereby sought to at once give us initiation instructions, initiate, have us learn to do science, and receive confirmation through his passages on rhetoric. Nietzsche’s text is cryptobiotic—like a spore encoding itself into an inert form to await a more favorable environment before initiating a reactivation sequence.

My time has not yet come, some are born posthumously.

### 6.2 Nietzsche’s Esoteric “Music-Writing”

Lampert observes that esoteric writing is antithetical to the Enlightenment spirit of modernism. Nietzsche makes the same point in section 30 of *Beyond Good and Evil*:

> Our highest insights must—and should—sound like follies and sometimes like crimes when they are heard without permission by those who are not predisposed and predestined for them. The difference between the exoteric and the esoteric—formerly known to philosophers...  

In *Joyous Science*, Nietzsche reminds us that to understand him we must recover forgotten means of reading these esoteric writings:

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the virtues of the right reader—what forgotten and unknown virtues they are! —...

Nietzsche gives the right reader a little guidance in section 381 of *Joyous Science*:

*On the question of being understandable.*—One does not only wish to be understood when one writes; one wishes just as surely not to be understood. It is not by any means necessarily an objection to a book when anyone finds it impossible to understand: perhaps that was part of the author’s intention—he did not want to be understood by just “anybody.” All the nobler spirits and tastes select their audience when they wish to communicate; and choosing that, one at the same time erects barriers against “the others.” All the more subtle laws of any style have their origin at this point: they at the same time keep away, create a distance, forbid “entrance,” understanding, as said above—while they open the ears of those whose ears are related to ours. And let me say this among ourselves and about my own case...

Plainly Nietzsche was aware of the esoteric tradition in philosophy and appears to be saying his readers should treat him as part of this tradition. Why would a philosopher partake of such a tradition? Nietzsche gives us the answer: philosophers are moral legislators and not just thinkers or investigators.

*Genuine philosophers, however, are commanders and legislators:* they say, “thus it shall be!” They first determine the Whither and For What of man, and in so doing have at their disposal the

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preliminary labor of all philosophical laborers, all who have
overcome the past. With a creative hand they reach for the future,
and all that is and has been becomes a means for them, an
instrument, a hammer. Their “knowing” is creating, their creating
is a legislation, their will to truth is—will to power.20

New philosophical legislation, like a new tax, is evil from the perspective of the existing moral
economy. Therefore, philosophers must either bury their treasures for a later age, appear as a
madman or jester to the times, or become a Caesar—a decent criminal.

The decent criminal is a recurring motif in Nietzsche’s writings,21 but is perhaps most
developed in his late letters to August Strindberg and others.22 Nietzsche wrote to Strindberg:
“The latest great criminal case in Paris, that of Prado, presented the classic type: Prado was
superior to his judges, even to his lawyers, in self-control, wit, and exuberance of spirit.” On the
cusp of his “madness” Nietzsche wrote an “insane” letter to Jacob Burckhardt in which he
identifies himself with Prado, saying “I wanted to give my Parisians, whom I love, a new idea—
that of a decent criminal.” Referring to a draft letter to his sister written shortly before his
“madness,” Claudia Crawford claims Nietzsche “speaks as a criminal who will be judged, but
also as a decent criminal, who accuses humanity and sentences himself.”23 Nietzsche wrote these
letters during the period he was correcting proofs of Ecce Homo, in which he says of Francis

19 Joyous Science, page 343, section 381. Cf. Birth of Tragedy, section 21, in which Nietzsche writes that critics have
not made it into the “entrance halls” of Shakespeare’s “music.” Friedrich Nietzsche, The Birth of Tragedy, tr. by
20 Beyond Good And Evil, page 42, section 30.
21 See, for example, Friedrich Nietzsche, Human, All Too Human: A Book for Free Spirits, tr. R.J. Hollingdale
Daybreak: Thoughts on the Prejudices of Morality, tr. by R.J. Hollingdale (Cambridge: Cambridge University Press,
Clever,” section 4.
[hereinafter, “Crawford”].
23 Crawford, pages 148-149.
Bacon: “But the power for the mightiest reality of vision is not only compatible with the mightiest power for action, for the monstrous in action, for crime—*it even presupposes it...*”

However, the genuine philosopher is a “decent” criminal—a Caesar with the heart of a poet. Thus, as Lampert’s Nietzsche reads Bacon, Bacon was a philosophical legislator—a heretical legislator of scientific method as a humane alternative to religion. Nonetheless, a criminal is often “on the lam,” and in preparation for the great deed, encrypts communications to accomplices to elude the thought police.

Lampert claims that Nietzsche “takes seriously what Bacon expressed in his fable of Cassandra: a genuine philosopher is a Cassandra reformed, a prophet who knows where he is and who has learned how to speak to his times in a way that will be persuasive and make a difference.” Nietzsche’s early essay “Richard Wagner in Bayreuth” makes it plain that a great event requires both deed and receptivity and that the great person takes correct aim to master chance. Indeed, an “untimely” philosopher such as Nietzsche might set out to legislate posthumously.

The task of a genuine philosopher-legislator suggests some very pragmatic reasons to write esoterically, once one has legislative pragmatics vividly in mind. First, the heretical philosopher might have to work in secrecy in order to develop the philosophy unimpeded by the moral authorities of the day. Lampert discusses how Bacon and Descartes had to work esoterically. Nietzsche wrote in section 5 of his early essay “On the uses and disadvantages of history for life”:

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25 See Lampert, section 17, pages 20-21.
26 Lampert, section 4.
In an age which suffers from this universal education, to what an unnatural, artificial and in any case unworthy state must the most truthful of all sciences, the honest naked goddess philosophy, be reduced! In such a world of compelled external uniformity it must remain the learned monologue of the solitary walker, the individual’s chance capture, the hidden secret of the chamber, or the harmless chatter of academic old men and children.  

In section 25 of *Beyond Good and Evil* Nietzsche would refer to some free spirits as “the compulsory recluses, the Spinozas or Giordano Brunos.”

Second, even after the theory has been developed the legislative project might need to be protected. A premature birth into society might expose it to ridicule so as never to gain influence or initiates. Radical theory would have to be concealed from all but initiates who are ready for its heretical content. In section 4 of “On the uses and disadvantages of history for life,” Nietzsche wrote:

... he is racked by the knowledge that he has to speak as it were to a sect and is no longer needed in the body of his nation. Perhaps he now prefers to bury his treasure....

And in section 183 of *Human, All Too Human*:

*The key.*—A man of significance may set great store by an idea and all the insignificant laugh and mock at him for it: to him it is a key
to hidden treasure-chambers, while to them it is no more than a piece of old iron.\textsuperscript{30}

Third, the effectiveness of the legislation might require suppression of the background philosophy. Section 30 of \textit{Beyond Good and Evil} makes it plain that for Nietzsche, the genuine philosopher-legislator, in effect, works in two modes—first, the background papers, the committee hearings and the legislative debates; second, the enactment and its implementation. The genuine philosopher only openly reveals the second aspect (philosopher in deed), and encodes the first for initiates (philosopher in thought). As Nietzsche puts it in section 335 of \textit{The Wanderer and His Shadow}: "Moral for house-builders.—One must remove the scaffolding once the house has been built." Indeed, the "mask" a philosopher wears in section 40 of \textit{Beyond Good and Evil} may conceal himself even to "the hearts and heads of his friends." For example, one might read Marx's \textit{Communist Manifesto} as a piece of philosophical legislation for a particular political-economic context, which legislation would be undermined if the full philosophical thinking behind it were disclosed. As will be discussed below in relation to section 457 of \textit{Dawn}, Nietzsche may have read Marx's communism as a "noble lie" that could not be revealed as such even to Marxists, lest theory undermine praxis. How might this be so? Nietzsche answers the question in section 295 of \textit{Joyous Science}, entitled "Brief Habits," where one must have faith that one's habits will be eternal, even as they replace prior habits whose time has come. Knowledge of the greater cycle might undermine the faith required, particularly if this faith must underwrite a "criminal" uprising that entails self-sacrifice on the part of the initiates. Therefore, "in certain cases, as the saying has it, one \textit{remains} a philosopher only by—keeping silent."\textsuperscript{31}

\textsuperscript{30} \textit{Human, All Too Human}, page 92.

\textsuperscript{31} \textit{Human, All Too Human}, Preface, section 8. There are numerous passages where Nietzsche speaks of the need for silence, or praises the silence of a philosopher, or derides lack of silence.
Fourth, a philosopher might be esoteric to protect innocents. This sense Lampert attributes to Plato’s “noble lie” —so as “to harm no one, and to do good to those who are good.”

Nietzsche recognizes Plato’s necessary lie in section 10 of “On the uses and advantages of history for life,” and in section 381 of *Joyous Science*, Nietzsche indicates his own writings have employed noble lies to protect innocents:

> On the question of being understandable.— ...Finally, my brevity has yet another value: given such questions as concern me, I must say many things briefly in order that they may be heard still more briefly. For, being an immoralist, one has to take steps against corrupting innocents—I mean, asses and old maids of both sexes whom life offers nothing but their innocence.

This sense suggests Nietzsche does not want to disturb folk unnecessarily, such as his mother, with the full force of his heretical philosophy.

This can be extended to a fifth cause for esotericism: to protect innocents, or indeed, society, from misuse of the philosophy by the vulgar. Nietzsche issues the following caution in section 9 of “On the uses and disadvantages of history of life”:

> If, on the other hand, the doctrines of sovereign becoming, of the fluidity of all concepts, types and species, of the lack of any cardinal distinction between man and animal—doctrines which I consider true but deadly—are thrust upon the people for another generation with the rage for instruction that has now become normal, no one should be surprised if the people perishes of petty egoism, ossification and greed, falls apart and ceases to be a

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32 Lampert, section 8, page 23, citing Plato, *Republic* i.331e-336a and iii.414b-c.
34 *Joyous Science*, page 345, section 381.
people; in its place systems of individualist egoism, brotherhoods for the rapacious exploitation of the non-brothers, and similar creations of utilitarian vulgarity may perhaps appear in the arena of the future.  

Would that Nietzsche had been so prescient regarding misuse of his own “true but deadly” writings, better heeding his own stylistic caution in section 71 of *The Wanderer and his Shadow*:

> Stylistic caution. —A: But if *everyone* knew this *most* would be harmed by it. You yourself call these opinions dangerous for those exposed to danger and yet you express them in public? B: I write in such a way that neither the mob, not the *populi*, nor the parties of any kind want to read me. Consequently these opinions of mine will never become public. A But how do you write then? B: Neither usefully nor pleasantly—to the trio I have named.

Holmes made a similar point to Felix Frankfurter regarding ethics beyond good and evil:

> I think morals are the superior politeness that absorb the shock of force but I don’t think them the cosmic ultimate, or even the human. But this is between ourselves as such a proposition unexplained would be caviare to the general.

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36 *Human, All Too Human*, pages 327-328.  
Today one hears similar arguments being made against certain types of socio-biological research on grounds of "political incorrectness" and the dangerousness of misuse by vulgar racists, etc.38 The pre-Enlightenment solution was simple—esoteric publication.

There are reasons writing might be "esoteric" apart from concealing a literal message. It may be that the "message" to be transmitted is an understanding or a skill that cannot be adequately captured with concepts in language. Nietzsche distinguishes factual causality from logical causality, preferring deed to word.39 Drama is esoteric in communicating insight through a narrative trajectory—a story that surpasses any moral reduction, the bad man's view of a legal case—which insight could not be achieved by words alone. In this way, for Nietzsche, Beethoven changes music from ethos to pathos.40 The insight transmitted beyond mere concept is esoteric relative to conceptual communication. Having such an insight to communicate is a seventh cause for esoteric communication.41

One might go further than mere demonstration of para-conceptual truths. One might involve the reader in a performative exercise—gymnastics—that, in effect, transmits a skill through apprenticeship.42 To achieve this "demonic transmissibility" the philosopher must become a "dithyrambic dramatist."43 As in the Dionysian dithyrambic chorus, the participant undergoes a ritual-induced or gesture-induced transformation—a perlocutionary effect of engaging with the text—rather than being a mere spectator of a transformation staged by an actor.

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38 Cf. Section 3.6 in Chapter 3 of this thesis and Robin West's rejoinder to such arguments.
40 "Richard Wagner in Bayreuth," section 9, pages 240-243
41 This is a fundamental element of both Nietzsche and Holmes: conceptual language and logical relations are necessarily incomplete but emotionally engaged activity can lead to understanding beyond conceptual understanding and may indeed eventually expand conceptual knowledge.
43 Ibid., section 7, pages 222-223.
Again, one might go further and not be open about the fact that the writer is attempting to cause a performative transmission, a transformation within the reader. As a ninth cause for esoteric communication, the writer seeks to implant a transmission or to seduce the reader into thinking he or she has come to an insight on their own accord. The writer "implants a need" and with "art and religion, true ancillaries, will be able to implant a culture" and thereby "found a stylistic tradition inscribed, not in signs on paper, but in effects upon the souls of men." Indeed, an unsuspected, esoteric implantation—secret gymnastics—would be even more effective as initiate training, as Nietzsche observes in section 62 of Dawn:

> And other secret levers are at work within him, too: for example, one strengthens an opinion in one’s own estimation when one feels it to be a revelation, one therewith abolishes its hypothetical nature, one removes it from all criticism, indeed, from all doubt, one makes it holy.

It is not enough to prove something; one must seduce or elevate people to it, as Nietzsche points out in section 330 of Dawn.

Finally, a tenth cause for esoteric communication is that the writer must simply await an audience capable of understanding the transmission. In section 158 of Assorted Opinions and Maxims Nietzsche notes that "[e]very good book is written for a definite reader and those like him...” However, by the time Nietzsche wrote On the Genealogy of Morality, he seemed dismayed by the fact he had no living readers who had had the experience necessary to "understand” his writing:

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45 Ibid., section 5.
46 “Richard Wagner in Bayreuth,” section 8.
47 Dawn, section 62.
If this book is incomprehensible to anyone and jars on his ears, the fault, it seems to me, is not necessarily mine. ... Regarding my Zarathustra, for example, I do not allow that anyone knows that book who has not at some time been profoundly wounded and at some time profoundly delighted by every word in it; for only then may he enjoy the privilege of reverentially sharing in the halcyon element out of which that book was born and in its sunlight clarity, remoteness, breadth, and certainty.\(^\text{48}\)

Most of his would-be readers have probably not experienced enough of a dysfunctional depression to “understand” all registers of Nietzsche’s dithyrambic drama. By the time of *Ecce Homo*, Nietzsche no longer expected to have any readers who “understood” him during his lifetime.

My time has not yet come, some are born posthumously.\(^\text{49}\)

Nietzsche thus indicated numerous reasons for an esoteric element in the work of a philosopher. Did Nietzsche himself attempt esoteric, para-conceptual communication? When asking this question it must be remembered that there are two broad categories of esoteric transmission: a concealed message that could otherwise be stated openly or a transmission that exceeds what is possible by literal translation into established concepts. In *Ecce Homo*, Nietzsche emphatically claims no one had understood his writings, resulting in his prediction that his work would be born posthumously. On the other hand, Nietzsche may have just been claiming to be esoteric late in the day to drum up interest. However, a survey of Nietzsche’s biography and early writings makes it clear this was not the case, or at least that there was more to it than an isolated desperate gesture to gain attention.

\(^{48}\) *On the Genealogy of Morality*, Preface.
In dealing with all the unsettling elements of Nietzsche’s philosophy, it is easy to lose sight of his early ambitions as an educator. After completing Birth of Tragedy, Nietzsche went on to prepare a series of six lectures, “On the Future of Our Educational Institutions.” However, attendance dropped off after the first lecture in January 1872. Pletsch reports that each was more tedious than the last and Nietzsche never delivered the sixth.\(^{50}\) One might conclude that Nietzsche gave up on education as an ambition. Indeed, as time went on his classes were more sparsely attended and he eventually gave up his academic position. On the other hand, the six lectures are really about the education of “genius” and it is very clear Nietzsche never abandoned that project. In “On the uses and disadvantages of history for life” Nietzsche ends by identifying the task of culture as the “education” of youth to a hygiene of life. Nietzsche’s essay “Schopenhauer as Educator” shows that Nietzsche’s concept of education becomes less and less suited to institutions. Indeed section 6 of that essay provides a Marx-like critique of the forces that corrupt scholarship in an institutional setting and its capacity to “educate” in the cultural, genius-nurturing sense Nietzsche was developing.

Another apparent reaction to his failure as a public lecturer—Nietzsche was no Emerson or Holmes in this regard—was a keener interest in rhetoric. Nietzsche lectured on Greek and Latin rhetoric during the winter semester of late 1872 and in the summer of 1874.\(^ {51}\) This interest in rhetoric is evident in his essay “David Strauss, the confessor & writer.” In “On the uses and disadvantages of history for life” Nietzsche reduced the task of the educator to a rhetorical problem as follows:

He who wants, on the contrary, to shatter this education has to help youth to speak out, he has to light the path their unconscious resistance has hitherto taken with the radiance of concepts and transform it to a conscious and loudly vocal awareness. But how can he achieve so strange a goal?\(^{52}\)

As will be seen, Nietzsche would soon abandon the search for “concepts” as the goal of his rhetorical project. In “Schopenhauer as Educator” (1874) Nietzsche describes “Schopenhauer” as having seen a tremendous vision as a young man and could well believe he had already seen it as a child.\(^{53}\) This accords with Ted Hughes’s observation about an “imprinted image complex” on one’s psychology from youth:

> This imprinting of the creative subjectivity, which often seems accidental, is how mythic imaginations acquire their peculiar symbolic systems: as Yeats said of himself, “I have no speech / But the pagan speech I made, amid the dreams of youth’. In one sense, the imprinting is irreversible and final: it cannot be superceded or truly abandoned—it can only evolve. In Emily Dickinson’s words: ‘The soul selects her own society / Then shuts the door.’\(^{54}\)

At the time of “Schopenhauer as Educator” Nietzsche’s problem was still a rhetoric problem. After noting “Schopenhauer’s” youthful imprinting, Nietzsche characterizes the fundamental problem as rhetorical:

> Everything he subsequently appropriated to himself from life and books, from the whole wealth of the sciences, was to him hardly more than colouring and means of expression, he employed even

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\(^{52}\) “On the uses and disadvantages of history for life,” section 10, pages 117-118.


\(^{54}\) Hughes, 40.
the Kantian philosophy above all as an extra-ordinary rhetorical instrument through which he believed he could speak of that picture more clearly: just as he occasionally made use of Buddhist and Christian mythology to the same end. For him there was only one task and a hundred thousand means of encompassing it: one meaning and countless hieroglyphics with which to express it.\(^{55}\)

In Nietzsche’s “Attempt at a Self-Criticism” later added as a preface to *Birth of Tragedy*, Nietzsche makes no real substantive critique, the flaws are all rhetorical—the content was obscured by the use of Kantian, Hegelian and Schopenhauerian rhetorical instruments which conflicted with the main theme of a life-affirming critique of science and made the work an “impossible” book. It was only when Nietzsche could devise a rhetoric of his own that he could fully shed the concepts of Kant, Hegel and Schopenhauer, whose philosophies never did accord with Nietzsche’s seminal insights.

Up to the point of Nietzsche’s *de facto* break from Wagner in August 1876, Nietzsche may have harbored hope that Wagner might be the rhetorical-artistic instrument for Nietzsche’s culture-educator task. Nietzsche seems to suggest this in section 3 of the 1886 preface to volume two of *Human, All Too Human* in which he describes his farewell to Wagner as the “greatest” privation in relation to his “task”:

My task—where had it gone? What? Was it now not as if my task had withdrawn from me, as though I would for a long time to come cease to have any right to it? How was I going to be able to endure this greatest of privations?\(^{56}\)

\(^{55}\)“Schopenhauer as Educator,” section 7, page 182.

It is plain from notes in 1874 that Nietzsche was becoming increasingly uneasy with Wagner.\(^{57}\) Nietzsche had difficulty writing a eulogizing essay for Wagner intended to be published for the opening of Bayreuth in the summer of 1876. Only the first six sections (of 11) were written in one go.\(^{58}\) Then, as argued in the previous chapter, Nietzsche’s Horrific Thought, Nietzsche seems to have had a matriarchal revelation on April 2, 1876. Nietzsche was going to abandon the Wagner essay, but was convinced to complete it by his new musical friend Peter Gast. Sections 9, 10 and 11 of the essay were written June 17 and 18, 1876.\(^{59}\)

Even without Nietzsche’s later observation in *Ecce Homo* that “Richard Wagner in Bayreuth” was really about himself, the last sections of the essay transparently were a rhetorical “business plan” for Nietzsche. Nietzsche had much earlier settled on a philosophy of language that held conceptual knowledge to be necessarily incomplete. Although Nietzsche had already observed in section 17 of *Birth of Tragedy* that in tragedy characters such as Hamlet speak more superficially than they act, in “Richard Wagner in Bayreuth” Nietzsche expresses the full realization that this applied to his own task of educational rhetoric, a rhetoric of soul-writing outside the register of conceptual thinking. Nietzsche uses “music” as the organizing metaphor for this exploration into rhetoric. In lauding and explaining Wagner’s para-conceptual musical effect on the soul, Nietzsche sets out the foundation of his own form of rhetoric—music-writing. In section 7, the point in the essay where Nietzsche resumed writing in May 1876, he introduces the concept of the “demonic transmissibility” of the “dithyrambic dramatist,” who through benevolent use of “ecstatic gestures” shows what of nature is invisible to concepts and induces “an ecstatic going-under and cessation of will.” In hindsight, it is plain that “the greatest sorcerer


\(^{58}\) Ibid., at page xxvii.

and benefactors of mortals, the dithyrambic dramatist” to whom Nietzsche refers here is none other than Zarathustra, that is, Nietzsche as educator.

The rest of the essay makes it plain that Nietzsche intends to use mythic language and a style of soul painting to induce the understanding he believes cannot be communicated in concepts alone. The affect in the writing in sections 9, 10 and 11 betrays much more than a eulogy for Wagner. Section 9 opens with the passages quoted in Chapter 1 of this thesis that favor event over word, factual causality over logical. The essence of “music” is the composition of gestures to induce empathy for inner states of feeling inexpressible in conceptual words. Rather than depending on invoking neural “imaging” through processing of literal concepts, Nietzsche indicates a search for a style of gestural dance that would invoke and manipulate neural images outside or between the lines of the conceptual mechanisms of the brain. Nietzsche the poet would become a prose stylist who “treats the pitch, volume and tempo of passionate human speech as a natural model which it is his task to transform into art.” In section 10 Nietzsche announces:

...[H]e is all the more insistent in setting every talent the new task of discovering together with him the *stylistic laws of dramatic performance*. He feels a profound need to found for his art a *stylistic tradition* by means of which his work could live on unalloyed from one age to the next until it attains that *future* for which its creator has destined it.\(^\text{60}\)

Already in this passage the “pitch, volume and tempo” of passionate speech are becoming the model of Nietzsche’s rhetoric. Notice that while purportedly writing about Wagner, whose

\(^{60}\)“Richard Wagner in Bayreuth,” section 10.
compositional career was ending, Nietzsche has manipulated the text into the present tense. The next passage is an uncanny prophecy of Nietzsche’s future:

To make his work a sacred deposit and true fruit of his existence...; the property of mankind, to lay it down for posterity better able to judge it, has become to him a goal which takes precedence over all other goals and for the sake of which he wears the crown of thorns which shall one day blossom into a laurel wreath: his efforts are concentrated on the safeguarding of his work as decidedly as are those of the insect in its final stage on safeguarding its eggs and on caring for the brood whose existence it will never know. It deposits the eggs where it knows for sure they will one day find life and nourishment, and dies contented.

Claudia Crawford claims that in 1882 Nietzsche decided to fake madness in order to make his philosophy deed and event in order to catapult it into public consciousness. She notes that from 1870-1871 Nietzsche continually redrafted a play to be called Empedocles. In the fifth act of this play, the philosopher leaps into a volcano with a woman, a self-sacrifice for rebirth. Zarathustra has four acts and, on Crawford’s reading, Nietzsche lives the fifth act, staging madness as a self-sacrifice, a self-crucifixion that accuses mankind in the manner of the decent criminal. Therefore, argues Crawford, Nietzsche’s “insane” letter to Cosima Wagner “Ariadne, I love you - Dionysus” and others signed “the Crucified” deliberately catapult the deed into catastrophic event. The passage from “Richard Wagner in Bayreuth” suggests that Nietzsche’s theater verismo with its self-crucifixion as rhetorical play was already in the business plan in June 1876. Nietzsche’s cryptobiotic egg metaphor suggests he already expected to be “born posthumously.”

In the interim, Nietzsche tells us that with his “secret” he will become a decent criminal on the lam—Prince Vogelfrei.
He lives like a fugitive whose aim is to preserve, not himself, but a secret, like an unfortunate woman who wants to save the life of the child she carries in her womb, not her own: he lives like Sieglinde, ‘for the sake of love’.

Nietzsche needed to find a way to implant his secret in the souls of transmitters: “art wants performers as transmitters, not letters and notes.”

That it was in any way possible for an art to exist which was so bright and warm that it would both enlighten the poor and lowly and melt the arrogance of the learned was something that could not be divined before it had come about. ... How can we preserve this homeless art so that it shall survive into this future?

Of course on the surface, Nietzsche is writing about Bayreuth being the means of preserving Wagner’s art into the future. However, below the transparent shell of this serpent’s egg we see Nietzsche struggling to be born. This is Nietzsche’s thinly veiled first public announcement of his Zarathustran task, which will take precedence “over all other goals.”

Nietzsche’s “business plan” tells us Nietzsche will become an esoteric writer in the sense of attempting to transmit an understanding other than through the established conventions of conceptual communication.

The system of procedures that Wagner handles is applicable to a hundred other cases: let him who has ears hear. 62

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61 Claudia Crawford, To Nietzsche: Dionysus, I love you! Ariadne (Albany: SUNY Press, 1995). The argument is made over several chapters.
Nietzsche certainly seems to believe he had achieved this, as indicated in the following excerpt from a passage in *Ecce Homo* immediately before commenting on each of his published and to-be-published works.

To give an idea of me as a psychologist I take a curious piece of psychology which occurs in ‘Beyond Good and Evil’—I forbid, by the way, any conjecture as to whom I am describing in this passage: ‘The genius of the heart as it is possessed by that great hidden one, the temptor god and born pied piper of consciences whose voice knows how to descend into the underworld of every soul, who says no word and gives no glance in which there lies no touch of enticement, to whose mastery belongs knowing how to seem—not what he is but what to those who follow him is one constraint more to press ever closer to him, to follow him ever more inwardly and thoroughly...’

Before turning to Nietzsche’s writings about how he intended to do this and then examining how his writings purported to do it, the question of whether Nietzsche had a deliberately concealed esoteric message that could have been communicated in literal concepts will be considered briefly.

Nietzsche made frequent reference to a secret. If Crawford’s hypothesis that Nietzsche staged his madness is true, all references to secrets become potentially ambiguous. In other words, there could have been more than one secret. Nonetheless, it is plain from several passages that there is a literal message secret apart from staged madness. In the preface of *Dawn*, which was written after *Zarathustra*, Nietzsche refers to a secret shared with his better readers. If a plan to stage his madness were the only secret, he would not be making inclusive references to readers of *Dawn*:

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—Finally, however: why should we have to say what we are and what we want and do not want so loudly and with such fervour? Let us view it more coldly, more distantly, more prudently, from a greater height, let us say it, as it is fitting it should be said between ourselves, so secretly that no one hears it, that no one hears us!  

Similarly, section 310 of *Joyous Science* refers to a secret. Lampert notes that section 310 is the middle section of in Book Four of *Joyous Science* and by its position indicates particular emphasis. Read with other sections that will be discussed below, Nietzsche practically gives away his secret: a form of matriarchy. For this indiscretion, his maenads, the “beautiful monsters”, elsewhere “amiable maenads,” get angry with Nietzsche:

...Thus live waves—thus live we who will—more I will not say. So? You mistrust me? You are angry with me you beautiful monsters? Are you afraid that I might give away your whole secret? ... How could I think of betraying you? For—mark my word! —I know you and your secret, I know your kind! You and I—are we not of one kind?—You and I—do we not have one secret?

Given its position of pre-eminence this section would appear to be a first attempt at the “Other Dancing Song” that would appear later in Part III of *Zarathustra*. After whispering the secret, *Zarathustra* will take his whipping from Mother-Life, having sublimated the “Ah! and Oh!” of his youthful wisdom in the poem “Juvenilia” in the Prelude to *Joyous Science* into the “Other Dancing Song.” However, there’s more to Nietzsche’s secret than just the Eternal Recurrence Doctrine, or there is more to the Eternal Recurrence Doctrine than is normally thought. After all,  

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64 *Dawn, Preface.*  
65 Compare the structural analysis of *On the Genealogy of Morality* in Chapter 3 of this thesis.  
Nietzsche openly tells us the Eternal Recurrence Doctrine in the penultimate section of Book Four of *Joyous Science*—hardly a secret, if that is what the secret was.

*Joyous Science* contains numerous sections that refer to secrets and whispers in contexts that plainly indicate something beyond a secret plan to stage madness.⁶⁸ In section 377, for example, Nietzsche commends free spirits to his “secret wisdom and *gaya scienza*” which entails something broader than Nietzsche’s personal drama.

Neither is elitism the secret to which Nietzsche alludes. There is a telling passage in section 6 of the Preface to *Human, All To Human* where Nietzsche hears a call in the form of a series of “you shall” imperatives. After referring to the problem of order of rank—elitism—there follows another “you shall” that breaks off. Similarly, section 230 of *Beyond Good and Evil* abruptly breaks off mid-sentence as though there were more to be said. Elitism is never hidden in Nietzsche’s writings and, indeed, is presented as an unalterable, regrettable fact in section 4 of “Richard Wagner in Bayreuth”:

> The greatest causes of suffering there are for the individual—that men do not share all knowledge in common, that ultimate insight can never be certain, that abilities are divided unequally—...⁶⁹

The last “you shall” then is not simply elitism.⁷⁰

Nietzsche’s exoteric writings thus show both an awareness of the practice of esoteric writing and declare the presence of an embedded secret. Before examining textual passages for evidence of how Nietzsche used rhetoric, this section of the chapter will conclude by reviewing

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⁶⁷ *Joyous Science*, section 310.
⁶⁸ See, for example, *Joyous Science*, sections 82, 193, 194, 197, 240, 310, 377 and 381.
passages of Nietzsche’s exoteric writing that discuss the theoretical foundations of his rhetorical techniques. Passages from Nietzsche’s text, principally Dawn, make it clear that he crafted his rhetorical strategy using his philosophy of causal genius as self-organizing criticality. After Dawn Nietzsche is much less open about his rhetorical technique.

Earlier chapters of this thesis have examined Nietzsche’s understanding of self-organizing criticality in the relationship of conscious thought to the emotions and the body. This understanding of self-organizing criticality translates into a rhetorical strategy for Nietzsche. His goal, set out in his early essays, was to learn to induce a series of emotional experiences that did not quite fit the logical categorizations or concepts habitually available to consciousness. Nietzsche’s early works through Dawn emphasize how emotional or other para-conceptual effects are induced through patterns of gestures and images. In section 216 of Human, All Too Human, Nietzsche explores how mimicking gestures use body movements to induce similar feelings and thoughts and how this is fundamental to learning language. In the next section, 217, Nietzsche explains how as we become practised our musical ears grow more “intellectual” and learn to hear the reason behind the music. In a similar way painters make our eyes more intellectual. By section 142 of Dawn, Nietzsche describes empathy in general in this way, progressing from movement gestures to their reflections in word, picture or music, which, by the associative conditioning that makes “musical ears more intellectual,” can induce patterns of images and patterns that lead to empathetic feelings. Nietzsche goes on to illustrate the effect in music. This is our hint that Nietzsche treats music as the most abstract form of gestural-imaging and that all the art forms reproduce music’s effects in their own way. In section 255 of Dawn Nietzsche analyzes how music convinces—plainly a rhetorical effect.

70 In previous chapters, “Cultivating Justice” and “Nietzsche’s Horrific Thought,” this thesis argues that Nietzsche’s esoteric political theory is an elitist meritocracy, not so different from what we have in capitalism, but where society
May I say a few words about this music? And may I also show you a drama which you may not have noticed at first hearing? ... What we hear now is not yet what he wants to say to us: up to now he has only been promising that he will say something and, as by these gestures he intends to indicate, something unheard-of. ... And now he is convinced that he has convinced his hearers, he presents his ideas as though they were the most important things under the sun, he points shamelessly at his theme as though it were too good for this world. —ha, how mistrustful he is! He is afraid we might get tired! So now he showers his melodies with sugar—now he appeals even to our coarser senses so as to excite us and thus again get us into his power. Hear how he conjures up the elemental forces of stormy and thunderous rhythms! And now, when he has seen that these forces have seized hold of us, throttled and almost crushed us, he ventures to introduce his theme into this play of the elements and to convince us, half-stupefied and shattered as we are, that our stupefaction and convulsion are the effect of his miraculous theme. And henceforth his hearers believe it is so: as soon as they here the theme there arises within them a recollection of that shattering elemental effect—this recollection then benefits the theme, it has now become ‘demonic’! How well he understands the soul! He rules over us with the arts of a demagogue!71

Nietzsche posits a reversal of perspective whereby music is analyzed as rhetoric, suggesting that rhetoric be analyzed as music. This dual-reversal is also suggested by the introductory comments of the interlocutor in this section (not contained in the excerpt quoted above): “Very well! I have two ears, and more if need be. Come up close to me!” To listen with more than two ears is not literally possible, so more than the rhetoric of music is implied. Nietzsche often refers to having “ears” as an intellectual-perceptual faculty of esoteric initiates and so Dawn section 255 implies

educates its highest male elite to subordinate themselves masochistically to female peers.

71 Dawn, section 255.
that the initiate will perceive higher registers of rhetoric by successively adding more “ears.”

Indeed, the interlocutor asks for Nietzsche to “Come up close to me!” which implies he will hear a whispered secret—“by these gestures he intends to indicate, something unheard-of.” Thus, *Dawn* section 255 ironically uses the type of rhetorical gesture Nietzsche refers to in section 255 itself as musical.

Looking back to section 119 of *Assorted Opinions and Maxims*—“Origin for the taste for works of art”—the higher taste for art applies to listening to rhetoric and describes the growth of one’s capacity for understanding new things in general:

... [I]n the cult of symmetry we thus unconsciously honour regularity and proportion as the source of our happiness hitherto; pleasure is a kind of prayer of thanksgiving. Only when we have become to some extent satiated with this last-mentioned pleasure does there arise the even subtler feeling that enjoyment might also lie in breaking through the orderly and symmetrical; when, for example, it seems enticing to seek the rational in the apparently irrational: whereby this feeling is then, as a kind of reading of aesthetic riddles, revealed as a higher species of the pleasure in art referred to first of all.—Whoever continues on this train of thought will realize what *kind of hypotheses* for the explanation of aesthetic phenomena are here being avoided on principle.72

Here Nietzsche has already begun to seek to induce in his reader the sort of poetic transformation of the musical ear that finds patterns in the hitherto irrational—the initiation function that will be dealt with presently in this chapter. Nietzsche will further develop the metaphor of the poetic listener in section 301 of *Joyous Science*. Indeed, the distinction between listener and composer

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will eventually dissolve in section 303 of *Joyous Science* with the “improvisers of life” who can integrate “into their thematic order the most accidental tone.”

In the course of section 119 of *Assorted Opinions and Maxims* as a whole, the order of rank of artistic taste increases as one moves up from simply understanding intellectual concepts, through recollective understanding, through perlocutionary understanding, and finally attaining the transformative understanding in the passage quoted above. This highest echelon is attained by the ironic auditor who understands the gesture of transformation itself. Nietzsche will later use the word “Dionysus” to attempt neuro-associative conditioning of his readers so as to induce recollective understanding on command—and perhaps to conjure the “demonic” feeling referred to in section 225 of *Dawn*, quoted above. Nietzsche’s immediate task, though, was to explore all the art forms to see how they musically induce such transformative gestures by presenting small doses of the apparently irrational as aesthetic riddles such that when the listener discovers them a transformation alters the categories that constitute the intelligence of the ear. In section 205 of *Human, All Too Human* the “painter in writing” paints emotionally charged gestures into the soul so that the reader will learn to perceive the outline, as the listener of Beethoven learns to “divine” the arc of the pathos.\(^73\)

*Painting in writing.*—An object of significance will be best represented if like a chemist, one takes the colours for the painting from the object itself, and then employs them like a painter: so that the outline is allowed to grow out of the boundaries and shadings of the colours. Thus the painting will acquire something of the ravishing element of nature which makes the object itself significant.\(^74\)

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\(^73\) “Richard Wagner in Bayreuth,” section 10.

\(^74\) *Human, All Too Human*, section 205.
This, then, is the task of rhetoric. Nietzsche will paint in concepts—dabs of the irrational from which the higher taste is to discern the outline of the object itself. The phrase “object itself” in this new context would mean an understanding of the transformative process of discovering the rational pattern in the irrational, which marks the highest order of rank in Nietzsche’s classification of degrees of artistic taste. Nietzsche continues the thought in *Dawn* 462:

If only we possessed the eye of this actor and this painter for the domain of human souls!  

As an educator of the transformative taste using rhetoric, Nietzsche must apply small doses of the irrational, as he indicates in *Dawn* section 534:

*Small doses.*—If a change is to be as profound as it can be, the means to it must be given in the smallest doses but unremittingly over long periods of time! Can what is great be created in a single stroke? So let us take care not to exchange the state of morality to which we are accustomed for a new evaluation of things head over heels and amid acts of violence—no, let us continue to live in it for a long, long time yet—until, probably a long while hence, we become aware that the new evaluation has acquired predominance within us and that the little doses of it to which we must from now on accustom ourselves have laid down a new nature in us.  

Similarly, Nietzsche emphasizes the need for small doses in *Dawn* section 462:

*Slow cures.*—Like those of the body, the chronic sicknesses of the soul arise very rarely from a single gross offence against the rationality of body and soul but

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75 *Dawn*, section 462.
76 *Dawn*, section 534.
usually from countless little unheeded instances of neglect... [I]n such a case the only cure is to take countless little exercises in the opposite direction.77

In Joyous Science section 82, Nietzsche again argues for small doses of the irrational as the means to growth of knowledge.

In good society one must never wish to be solely and entirely right, which is what all pure logic aims at; hence the small doses of unreason in all French esprit.78

Earlier, in section 11 of Joyous Science, Nietzsche indicates that his task was to use rhetoric as a means to “incorporate” knowledge—his “secret wisdom and gaya scienza.”

This ridiculous overestimation and misunderstanding of consciousness has the very useful consequence that it prevents an all too fast development of consciousness. Believing that they possess consciousness, men have not exerted themselves very much to acquire it; and things haven’t changed much in this respect. To this day the task of incorporating knowledge and making it instinctive is only beginning to dawn on the human eye and it is not yet clearly discernible...79

Through such incorporation of innumerable small doses, the reader becomes “pregnant” and, with luck, an infant idea or deed will be born into consciousness. Nietzsche introduces the pregnancy metaphor in Dawn section 552, which becomes an important image in later works, as will be seen below.80

77 Dawn, section 462.
78 Joyous Science, section 82.
79 Joyous Science, section 11.
80 See also Chapter 3 of this thesis on the pregnancy images in the second essay of On the Genealogy of Morality.
Ideal selfishness.—Is there any more holy condition than that of pregnancy? ...

'What is growing here is something greater than we are' is our most secret hope:... And if what is expected is an idea, a deed—toward every bringing forth we have essentially no other relationship than that of pregnancy and ought to blow to the winds all presumptuous talk of 'willing' and 'creating'...." 

The presumptuous talk of willing and creating (as a deliberate act of will) arises because of a confusion over two types of cause, as Nietzsche clarifies in section 360 of Joyous Science. The efficient cause—the accumulation of stresses that contain a pattern and their release—is mistakenly subsumed by the final cause—the resulting pattern as the goal of the self-reorganization. Thus conflated, pregnancy as a gradual process of accumulation and an act of grace becomes a simple act of will, reductively linked to the occasioning cause. Nietzsche elsewhere cautions against equating doer and deed.⁸²

This induced transformation takes place outside consciousness and entails "losing oneself," as Nietzsche tells us in section 305 of Joyous Science:

For one must be able to lose oneself occasionally if one wants to learn something from things different from oneself.⁸³

In section 307 of Joyous Science, Nietzsche describes the transformative effect of gaining new knowledge this way as shedding a skin:

When we criticize something, this is no arbitrary and impersonal event; it is, at least very often, evidence of energies in us that are growing and shedding a skin.⁸⁴

⁸¹ Dawn, section 552.
⁸² On the Genealogy of Morality, Essay One, section 12. See Chapter 3 of this thesis for a discussion of this section.
⁸³ Joyous Science, section 305.
⁸⁴ Joyous Science, section 307.
Nietzsche had already used the analogy of a snake shedding its skin in sections 455 and 537 of *Dawn*. The snake symbol becomes pre-eminent in *Zarathustra* and recurs in most of the later works and prefaces. In the prefaces, Nietzsche refers to his own transformations. In *Dawn* and *Joyous Science*, however, Nietzsche tells us he is seeking to induce his reader-disciples to shed their skins. This will become more apparent as examples of the Nietzschean initiation process are examined presently in some detail, section 447 of *Dawn* in particular. For present purposes, it should be clear Nietzsche explored the means to achieve this effect in his readers through the use of rhetorical gestures and that the techniques he describes reflect his understanding of self-organized criticality in the psychology of pre-conscious creativity.

### 6.3 The Nietzschean Initiation—Music-Writing Techniques

Nietzsche’s business plan indicates he intended to do some form of implantation or soul-writing outside the register of concepts and theoretical man. Nietzsche’s early works indicate he explored means of gestural communication to achieve this effect through rhetoric as an application of his psychological theory. As a result, Nietzsche’s writings are like musical compositions. The dramatic element occurs within the reader as the genealogical development of the reader’s interpretation of each aphorism and how they all relate. Each aphoristic form takes on new meanings as the interpreter undergoes the inventive, creative transformations Nietzsche’s psychology entails. With each transformation, the interpreter acquires additional “ears” for new levels of esoteric meaning that were previously embedded in a frequency outside of hearing.

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range. This section will examine examples from Nietzsche’s texts that show some ways by which he might induce this effect in his readers.

**Music-Writing—Subliminal Chords**

The first example combines direct instruction, implantation, announcement of an esoteric message, and confirmation. On a conceptual reading of section 43 of *Joyous Science*, Nietzsche is making a point about how laws reflect over-reactions to moral and political threats. As is typical, Nietzsche starts with a challenge to ordinary sensibility:

> *What laws betray.*—It is a serious mistake to study the penal code of a people as if it gave expression to the national character.\(^{86}\)

This jolts common sense; moreover, Nietzsche tells us common sense is a “serious” mistake. Nietzsche here is provoking an emotional reaction by calling it a serious mistake. Nietzsche had already told us in section 45 of *Assorted Opinions and Maxims* to expect this sort of manipulation.

> *Value of honest books.*—Honest books make the reader honest, at least to the extent that they lure out his antipathy and hatred, which cunning prudence knows best how to conceal. Against a book, however, we may let ourselves go, however much we may restrain ourselves when it comes to men.\(^{87}\)

Resuming section 43 of *Joyous Science*, Nietzsche has launched theoretical reader into hermeneutic action, inducing a state of conceptual limerence and opening the emotional and

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\(^{86}\) *Joyous Science*, page 109, section 43. For brevity, for the rest of this section of the chapter, footnotes will be omitted for quotes from the Kaufmann translation if the section number is identified in the text.

\(^{87}\) *Human, All Too Human*, page 246.
subliminal registers. Nietzsche immediately addresses the conceptual breach, partially, to keep the concept reader engaged but off balance:

The laws do not betray what a people are but rather what seems to them foreign, strange, uncanny, outlandish. The laws refer to the exceptions to the morality of *mores*, and the severest penalties are provided for what accords with the *mores* of a neighboring people.

Conceptually, however, one is left wondering just how much of this is Nietzschean overstatement—surely the laws do betray the local *mores*, subject perhaps to the distortions Nietzsche mentions. Perhaps the two examples that complete the section will resolve this conceptual issue. The examples illustrate the distortion but fail to clarify the conceptual issue and the section ends—Nietzsche does not close the conceptual register. Instead, in section 44 he makes an opposing, conflicting conceptual point in the psychological plane—fictitious motives are primary and real motives are of second-order interest. Conceptually, Nietzsche is no easy read.

The examples in section 43 seem to have no point other than to illustrate the true motives for disproportionate legal penalties for certain crimes, in the latter case, wine on the breath of women. However, the second example uses gripping concrete images of mythic significance and concepts that reinforce other images that Nietzsche continually insinuates in his texts:

Thus the old Romans had the notion that a woman could incur only two mortal sins: adultery and drinking wine. ... What the Romans feared above all was the orgiastic and Dionysian cult that afflicted the women of Southern Europe from time to time when wine was still new in Europe: this struck the Romans as a
monstrous foreign invasion that overturned the basis of the European sensibility; it seemed treason against Rome, the incorporation of what was foreign.

Nietzsche here aims to have the reader incorporate what is foreign:—“wine,” “women,” “orgiastic,” “Dionysian cult,” “monstrous,” “overturned” and “incorporation” are all charged concepts in Nietzsche’s metaphoric fields. Nietzsche’s intent is corroborated in the Preface to the second edition, which provides “a hint for philosophers!”—truth has hidden behind “riddles and iridescent uncertainties” and “is a woman who has reasons for not letting us see her reasons” whose name is “Baubo”—a Medusa figure, a monstrous female invader. Incorporation and overturning are core aspects of seduction. Thus, in section 43 Nietzsche is saying that laws betray resistance to seduction. To the non-initiate, the passage communicates strong images in the subliminal emotional register—an incorporation of a monstrous foreign invasion—while the conceptual thinker is consciously engaged with the issue of whether Nietzsche has overstated his point. To the initiate, this passage leaps off the page, particularly when section 43 is read with section 34—Historica abscondita—which bears a Latin title and calls for retroactive forces to re-animate a secret history—that is, to seek and reanimate what the Roman laws betray. The more dedicated Nietzschean might even feel reinforcement of the following passage from Dawn, section 457:

Ultimate silence.—Some act like treasure seekers: they light by accident upon things which the soul of another has kept hidden and acquire a knowledge of it which is often hard to bear! There are circumstances under which one can know and understand the living and the dead to such a degree that it is painful to speak
about them to others: one is constantly afraid of being indiscreet. —I can imagine the wisest historian suddenly falling silent.\(^{88}\)

Nietzsche, here the wise historian, can only discreetly communicate a hidden history to readers who have endured the trial of initiation. Upon transformation, prior references take on a new aspect—the same landscape looks different. Again, Nietzsche has already told us to expect this. Indeed, *Joyous Science* begins with the following poem:

*Invitation*

Take a chance and try my fair:
It will grow on you I swear;
Soon it will taste good to you.
If by then you should want more,
All the things I’ve done before
Will inspire things quite new.

Section 43, therefore, rhetorically functions to both initiate and confirm all planes of the Dionysian consort and Goddess mythic field, including the shamanic call to establish matriarchal elitism. If the small dose in section 43 does not trigger a para-conceptual transformation, no matter, Nietzsche provides countless more opportunities.

*Music-Writing—Endless Melody*

Picking up the thread leading back to *Dawn* section 457, one can see how in the sections from 447 to 460 Nietzsche deceptively appears to break up conceptual flow through the use of discrete sections that on the surface appear scattered. However, as the melody shifts from topical plane to

\(^{88}\) *Dawn*, pages 191-192, section 457. For brevity, for the rest of this section of the chapter, footnotes will be omitted for quotes from the Hollingdale translation if the section number is identified in the text.
topical plane there is a constant bass pattern—the homomorphic correspondence across
metaphoric fields. Nietzsche also inserts interludes—fillers—to allow the soul-painting effect
time to sink in and perhaps trigger a transformation.

Section 447—“Master and pupil”—briefly advises the reader that “[I]t is part of the
humanity of the master to warn his pupil about himself.” Reader take heed!

Section 448—“Honouring reality”—shifts topic and opens with an example of how
understanding only comes from having had similar experiences. Experience is something to be
feared:

... To what then, then, may our experiences not impel us! What really are our
opinions! If we are not to lose ourselves, if we are not to lose our reason, we have
to flee from experiences! Thus did Plato fall from reality and desire to see things
only in pallid mental pictures; he was full of sensibility and knew how easily the
waves of his sensibility could close over his reason.

Nietzsche makes the point that Plato failed to warn his readers that it was out of fear of reality, of
losing control to the effects of experience that Plato sought refuge in reason and pallid mental
pictures. Sections 447 and 448 are thus quite related. However, more is going on here. Nietzsche
has introduced ominous undertones: understanding comes only from experience and experience
will cause us “to lose ourselves,” “to lose our reason,” and the “waves of [our] sensibility could
easily close over [our] reason.” This “perhaps” causes profound fear in the wise. As Nietzsche
said earlier in Dawn section 130:
To get out of this perhaps one would have to have been already a guest in the underworld and beyond all surfaces, sat at Persephone’s table and played dice with the goddess herself.\(^{89}\)

Again, the thread in the labyrinth leads to a redoubtable female, of whom Nietzsche will later say in *Ecce Homo*:

\[
\ldots\text{the complete woman tears to pieces when she loves}\ldots\text{I know these amiable maenads}\ldots\text{Ah, what a dangerous creeping, subterranean beast of prey it is! And so pleasant with it!}\]^{90}

Reality, through experience, tears the veil of reason to pieces, something Plato apparently feared. Moreover, Nietzsche sees sexuality in this. Earlier in *Dawn* section 193, Nietzsche quoted “the ancient misogynist Aeschylus.” Nietzsche here whispers through the Greeks.\(^{91}\) As Froma Zeitlin has observed, Aeschylus’s *Orestes* is a mythic chronicle of gender politics.\(^{92}\) Orestes is placed in a dilemma between honoring mother and honoring father. In his trial for matricide (the mother represented by the furies—redoubtable women), Orestes (represented by Apollo—reason) is acquitted by Athena’s casting vote. Other versions of Greek myth have Athena assisting the hero in slaying Medusa.\(^{93}\) In calling Aeschylus a misogynist, Nietzsche has already cast his vote in favor of the Medusa and, indeed, would later liken his *Zarathustra* work to a Medusa.\(^{94}\)

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\(^{91}\) *Assorted Opinions and Maxims* in *Human, All Too Human*, section 218, page 264.


After sections 447 and 448, Nietzsche in section 449—"Where are the needy in spirit?"—seems to introduce another topic—the fulfilling life of a spiritual healer—but can easily be read as continuing the thought of masters warning pupils. Nietzsche, master, warns his readers:

Ah! How reluctant I am to force my own ideas upon another! How I rejoice in any mood and secret transformation within myself which means that the ideas of another have prevailed over my own! Now and then, however, I enjoy an even higher festival: when one is for once permitted to give away one's spiritual house and possessions, ... as it were a poor-doctor of the spirit aiding those whose head is confused by opinions without their being really aware who has aided them! Not desiring to maintain his own opinion or celebrate a victory over them, but to address them in such a way that, after the slightest of imperceptible hints or contradictions, they themselves arrive at the truth and go away proud of the fact!

Nietzsche assists the undertone here by emphasizing numerous keywords. The master will not "force" his ideas—they will be insinuated in a way such that a reader feels the ideas of another, the master, to be his or her own. The master is "permitted" to induce a "secret transformation" through the "slightest of imperceptible hints or contradictions." This is consistent with Nietzsche's earlier observations in section 144 of Assorted Opinions and Maxims, where he sets out to employ the "rhetorical and dramatic" to catch his readers "unawares" in order to be "understood," a term Nietzsche emphasizes. The word "opinion" in section 449 of Dawn relates back to the reason of Plato in section 448, which resists the terrifying transformative effects of experience—experience, of course, being required for understanding. Nietzsche cannot "force" the transformation—he can only provide small doses of emotional experiences through his text and hope the reader eventually approaches Persephone's table and comes away lucky.
In section 449, the idea is “given away” by the master, a gift from a gift-giving virtue.

Earlier in section 62 of *Dawn*, Nietzsche wrote on the origin of religions in the disciple:

> And other secret levers are at work within him, too: for example, one *strengthens* an opinion in one’s own estimation when one feels it to be a revelation, one therewith abolishes its hypothetical nature, one removes it from all criticism, indeed, from all doubt, one makes it holy.

Nietzsche, the master, suggests he is founding a religion and doing this through his rhetoric. Moreover, he is attempting accomplish the seduction in the same section.

Section 450—“The allurement of knowledge”—appears to switch topic to science. However, plainly science as the “the magic of all magic” is put forward as an alluring Platonic alternative to being transformed by experiences from another and playing dice with Persephone. Through science, one hopes to end “woe.”

Section 451—“To whom a court jester is a necessity”—superficially switches to courtiers and court jesters, but by seeking the underlying metaphoric fields, the continuity becomes more evident. The courtier needs a court jester to speak plainly wearing the mask of madness because all reasonable ministers adapt the truth to please the courtier. For example, in section 448 Plato approaches reality backwards “as African tribes do in the presence of their princes…” On another level of *Dawn* section 451, is Nietzsche the master telling us he will act as “madman” to Platonic modernity?

Section 452—“Impatience”—appears to change topic, but is really a prelude to section 453, the key undertones being people who “wander, reckless and adventurous.” There is a “school of genius” in their openness to dangerous experience.
Section 453—“Moral interregnum”—again appears to change topic, this time to morality—the main theme of *Dawn*. Here, Nietzsche speaks as one sure that the foundation of morality is defective and the superstructure beyond repair. Nietzsche says that to “construct anew the laws of life and action” one must build on the foundations of the sciences of physiology, medicine, sociology and solitude; however, these sciences are not yet sure enough of themselves. This creates a “moral interregnum” (a Latin word for this era between Caesars), and “the best we can do in this interregnum is to be as far as possible our own reges and found little experimental states. We are experiments: let us also want to be them!”

Nietzsche implodes several metaphoric fields in this section into a critical mass that is designed to trigger a transformation. The “knot” has been drawn so tight only a god could untie it—Persephone.96 This intent is evident from the two sections that immediately follow.

454

Digression.—A book such as this is not for reading straight through or reading aloud but for dipping into, especially when out walking or on a journey; you must be able to stick your head into it and out of it again and again and discover nothing familiar around you.

Nietzsche used a similar technique, and flagged it as such, in sections 120-122 of *Assorted Opinions and Maxims*, which followed section 119 on the progression of echelons of artistic taste, discussed above in the previous section of this chapter.97

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95 As noted in the previous chapter, “Nietzsche’s Horrific Thought,” Lou Salomé reported to Malwida von Meysenbug that Nietzsche was fundamentally religious in nature.
96 *Joyous Science* 153; *The Case of Wagner*, section 9.
97 See also *The Case of Wagner*, section 1.
120

*Not too close.*—It is a disadvantage for good ideas if they follow upon one another too quickly; they get in another’s way.—That is why the greatest artists have always made abundant use of the mediocre. ⁹⁸

Sections 121 (Coarseness and weakness) and 122 (Good memory) go on to describe artistic techniques and the need to confound over-precise conceptual thinking—in effect, to allow the dream-work of the unconscious to take place.

Nietzsche’s digressions, however, are never just mediocre filler without purpose—they are “*shrewd stupidities.*”⁹⁹ In *Dawn* 454 he practically tells you to put the book down to experience a transformation such that nothing around you (this segment of *Dawn*, yourself) remains familiar. To reinforce the point, section 455 is a checkpoint for initiates—have you sloughed your skins?

455

*First nature.*—The way in which we are educated nowadays means that we acquire a second nature: and we have it when the world calls us mature, of age, employable. A few of us are sufficiently snakes one day to throw off this skin, and to do so when beneath its covering their first nature has grown mature. With most of us, its germ has dried up.

“Snake” is a charged term in Nietzsche’s metaphoric fields. The sloughed “skin” of the second nature is the rationality into which Plato’s flees, and still underwrites modern education. The reckless adventurer who wanders among the sciences must slough logos-based science and allow a rediscovered first nature to emerge spontaneously from within, a nature formed by experience

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⁹⁸ *Human, All Too Human*, page 241.
⁹⁹ *The Case of Wagner*, section 9 (emphasis in original).
and that would to those of the second nature appear as madness. However, the first nature is now mature, the *interregnum* experiments in constructing laws of life and action are grounded in the sciences. Nonetheless, section 453 presents a fundamental contradiction, a knot—is science to provide life’s laws of life and action or not? Are we experimenters merely because the sciences are “not yet sufficiently sure of themselves”? Laws of life and action require illusion, as Nietzsche says often, sometimes invoking images of Othello and Hamlet, as in section 519 of *Dawn*:

> *Being deceived.*—If you want to act you have to close the door on doubt—said a man of action.—And aren’t you afraid of being *deceived*?—replied a man of contemplation.

Section 453 of *Dawn* presents the fundamental conundrum energizing Nietzsche’s work. How can science serve life under the paradox that reason is incomplete and understanding only advances through the experience gained through daring and painful experiments?

One solution, to avoid paralysis of action among the non-philosophical, would be to shield oneself from this paradox. Section 456—“A virtue in the process of becoming”—notes how “honesty” is a young virtue. Prior philosopher-legislators wrote esoterically to protect the viability of social action.

... Many worthy people still stand at this *level of truthfulness*: when they *feel* themselves selfless they think they are permitted to *trouble themselves less* about truth. Notice, however, that *honesty* is neither among the Socratic nor the Christian virtues: it is the youngest virtue, still very immature, still often misjudged and taken for something else, still hardly aware of itself—something in the process of becoming which we can advance or obstruct as we think fit.
Note that the philosopher-legislators ultimately rely on how they “feel” when constructing laws of life and action—feeling being the product of understanding based on experience (section 448), a renewed first nature (section 455) that comes from internal maturation and transformation (sections 449 and 455). As well, Nietzsche the master is warning us (section 447) that his personal experimentation (section 453) might require him to appear as a madman (section 451) or to reveal the full implications only to esoteric initiates (section 456).

In the following section, Nietzsche follows up the esoteric theme, this time as a reader of prior esoteric writers.

457

_Ultimate silence._—Some act like treasure-seekers: they light by accident upon things which the soul of another has kept hidden and acquire a knowledge of it which is often hard to bear! There are circumstances under which one can know and understand the living and the dead to such a degree that it is painful to speak about them to others: one is constantly afraid of being indiscreet.—I can imagine the wisest historian suddenly falling silent.

We have seen already how perilously close Nietzsche came to being an indiscreet historian in sections 34 and 43 of _Joyous Science_. “Treasures” are what esoteric writers bury, so the implication in section 457 of _Dawn_ is that Plato, having a copy of Aristophanes under his pillow, honored the reality of experience-based understanding and of having to confront Persephone at the dice table, but turned his back _because_ he knew and feared it (section 448). Moreover, Plato’s legislative project would have been undermined had he openly disclosed this knowledge and fear. Therefore, Plato legislated with a noble lie what he “felt” was justified.
The identity of the living esoteric is less evident. Whom was Nietzsche discreetly protecting? The best guess I am able to offer is Marx. If Nietzsche read Marx's background thinking as closer to his own, Marx would presumably hide the true scaffolding with which he has erected the Communist house as a half-way house to economic justice—his moral interregnum. That Nietzsche was hostile more to the rationalist doctrines and not the communitarian spirit of socialism is evident in his criticism of Wagner losing touch with his earlier socialist leanings. Nietzsche remained discreet by never mentioning Marx by name in his published writings—a thunderous silence—though he frequently attacked socialism. For Nietzsche then, Marx lived his philosophy—no idle thinker.

Sections 458 and 459 of Dawn can now tie together experience, experiment and grand destiny as necessary aspects of Nietzsche, the master.

458

The grand destiny.—This is something very rare but a thing to take delight in: a man with a finely constituted intellect who has the character, the inclinations and also the experiences appropriate to such an intellect.

In section 459—"The magnanimity of the thinker"—Rousseau and Schopenhauer are criticized for failing to live their philosophies: "their life ran along beside their knowledge like a wayward bass which refuses to harmonise with the melody!" Moreover, the scope of their knowledge was limited by the accidents of their formative childhood experiences, and to build their philosophies

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100 Ronald Hayman, Nietzsche: A Critical Life (New York: Oxford University Press, 1980) 185. See also The Case of Wagner, section 4, and the discussion in section 3.6 of this thesis. One might ask why guess if one cannot be certain here. By guessing Marx the reader is lead to section 255 of Dawn to identify the beautiful woman and beautiful horse and to passages of Dawn that suggest Nietzsche's use of Marxist concepts within the moral and psycholigical realms. One is also lead to consider how Nietzsche's communitarian justice based on nominalism and causal emergence differs markedly from socialism's hubris of rational social control and equality. One is also lead to consider that the Second International was in Basle and to look at Marx's writing for hints of esoteric writing—tasks beyond the scope of this thesis.
on no greater foundation of experience was pure vanity. The true philosopher must open himself or herself to terrifying experiences:

459

*The magnanimity of the thinker.*—...The fairest virtue of the great thinker is the magnanimity with which, as a man of knowledge, he intrepidly, often with embarrassment, often with sublime mockery and smiling—offers himself and his life as a sacrifice.

Section 460—"Making use of hours of danger"—stresses the importance of engaged agency. One’s pursuit of truth must involve experiences that endanger something personally important so that the truths “cut into our flesh with knives.” Nietzsche all but uses the word masochism in this segment. This seeking of pain, however, is strictly within a magnanimous project of gaining formative experiences for improving knowledge to construct laws of life and action. The knowledge is grounded in the empirical warrant of experience accumulated in small doses, but comes as a secret transformation from within, the winnings from Persephone’s underworld table, if the experiment succeeds. With such winnings, however, Nietzsche the experimenter must return to society as either an esoteric or a madman (or in later works, a decent criminal, a Caesar with a poet’s heart), depending on which strategy will have influence in the context of the times. Indeed, the madness might even be a mask, as Nietzsche observed earlier in section 14 of *Dawn*:

*Significance of madness in the history of morality.*—... all superior men who were irresistibly drawn to throw off the yoke of any kind of morality and to frame new laws had, *if they were not actually mad*, no alternative but to make themselves or pretend to be mad.
As a master, he must warn initiates about himself and then seek to insinuate ideas through dramatic rhetoric—dithyrambic drama—rhetoric of action that may even include sacrificing oneself by wearing a mask of madness.

Whether or not Nietzsche actually has the soul-writing effect of the dithyrambic dramatist at this stage of his style is not the point. The point here is that the style shows an effort to bring this about using rhetorical principles consistent with his understanding of causation. The foregoing segment sought to demonstrate that Nietzsche simultaneously wrote to initiate and to conceal an esoteric message. It should be emphasized that the sections chosen here for analysis (447-460) occur in the midst of Book Five of Dawn and are in no way indicated to form a distinct segment. The sections were selected for analysis here only because of the “Digression” in section 454 and sections were added in either direction until the inter-section underflow could be tolerably detached from the greater context. It should be emphasized again that on the conceptual level Nietzsche’s movement from section to section appears quite scattered. The analysis here has focused on the underlying continuity.

In his introductory essay to Hollingdale’s translation of Dawn, Michael Tanner observes how Nietzsche is continually “leaving the reader to make the vital connections”:—“I can think of few other books which require so active a reader. ... However one reacts, Nietzsche is almost certain to be several moves ahead, anticipating or contradicting one’s reactions.”\(^\text{101}\) Dawn represents what might be called the Wagnerian phase of Nietzsche’s music, his dithyrambic drama.

Indeed, this suggests a new reading of *The Case of Wagner*, using Nietzsche’s heuristic of replacing “Wagner” with “Nietzsche.” Nietzsche begins with the idiosyncratic preference for Bizet’s *Carmen* over the entire Wagnerian oeuvre. Completing the analogy, *Dawn*’s “infinite melody” is the “polyp” in Nietzsche’s music writing.\(^{102}\) Wagner is to be credited for being “an inventor and innovator of the first rank” of a theatrical rhetoric of “underscoring gestures” and “suggestion.”:— “he has increased music’s capacity for language to the point of making it immeasurable: he is the Victor Hugo of music as language.”\(^{103}\)

Regarding the matter of inducing intimations: this is the point of departure for our concept of “style.” Above all, no thought. Nothing is more compromising than a thought. Rather the state preceding thought, the throng of the yet unborn thoughts, the promise of future thoughts, the world as it was before God created it—a recrudescence of chaos.—Chaos induces intimations. … this really belongs partly to physiology.\(^{104}\)

Wagner created “a series of strong scenes, one stronger than the other—and in between much shrewd stupidity.”\(^{105}\) Nietzsche neglected to add, “like the shrewd stupidities in sections 454 and 455 of *Dawn*.” Concerned entirely with gestural effect, Wagner had become a “miniaturist.”\(^{106}\)

For the post-*Dawn* Nietzsche, then, gestural intimation had to become integrated into a style that “builds, organizes, finishes” and for this Nietzsche found the music of Bizet’s *Carmen* a useful metaphor.\(^{107}\) In Wagner (*Dawn*), the style of the larger architecture had been lost, as loss of totality, a decline in the power to organize: the scenes, the small units gained life at the

\(^{102}\) *The Case of Wagner*, section 1, page 157.
\(^{103}\) *The Case of Wagner*, section 8, pages 172-173.
expense of the whole. Rather, good style has the units “develop” and grow out of each other in “organic form”—aesthetics is tied indissolubly to the biological. The rhythm of this development is a living whole, which is to be contrasted with the merely logical-functional arrangement of individual units according to the paralyzing syntax of equality in which “[t]he whole no longer lives at all: it is composite, calculated, artificial and artifact.” The “spice” of “chaos” in Wagnerian intimations must “develop” and organically unfold as creative growth. The style itself, in the greater architecture, must reinforce this. If the “music” linked these compositional rhythms to causality, becoming a better “listener” would make one a better observer of nature (scientist) and human being (joyful wisdom). Nietzsche loses himself and receives wisdom, such that everything looks different (“Where am I?”—compare Dawn section 454). Experiencing and so understanding this dynamics of development is the highest wisdom, with the fact of growth as its ultimate philosophical warrant. Nietzsche expresses this in parallel between music-listening and the dynamics of philosophical-scientific inquiry in the following “strong scene” in The Case of Wagner, which now, being in a late Nietzschean work, appears in the context of a stylistic whole:

Once more: I became a better human being when this Bizet speaks to me. Also a better musician, a better listener. Is it even possible to listen better?—I actually bury my ears under this music to hear its causes. It seems to me I experience it genesis—I tremble before dangers that accompany some strange risk; I am delighted by the strokes of good fortune of which Bizet is innocent.—And, oddly, deep down I don’t think of it, or don’t know how much I think about it. For entirely different thoughts are meanwhile running through my head. Has it been noticed that music liberates the spirit? Gives wings to thought? That one becomes

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108 Ibid., section 7, page 170; section 10, page 177; Second Postscript, page 187.
109 Ibid., Epilogue, section 1.
more of a philosopher the more one becomes a musician? — the gray sky of abstraction rent as if by lightening; the light strong enough for the filigree of things; the great problems near enough to grasp; the world surveyed as from a mountain. — I have just defined the pathos of philosophy. — And unexpectedly answers drop into my lap, a little hail of ice and wisdom, of solved problems. — Where am I? — Bizet makes me fertile. Whatever is good makes me fertile. I have no other gratitudes, nor do I have any other proof for what is good.  

The self-transforming event has not changed from *Dawn*, but Nietzsche sets out to find new stylistic elements to integrate this philosophical pathos into a grander architecture, thereby further applying the principles of self-organizing criticality to design his rhetorical techniques. With *Joyous Science*, one can sense him moving toward a more formalistic and rhythmic style. With *Zarathustra*, Nietzsche’s shift in style is palpably manifest.

*Music-Writing: A Genealogical Fugue of Aphorisms*

Again, the aim here is not to unpack Nietzsche’s rhetoric fully but to shed light on how he derives rhetorical means that exploit his psychology of creative genius based on self-organizing criticality and how he, at the same time, both initiates suitable readers and conceals his esoteric thinking from all but the initiates.  

In *Zarathustra* Nietzsche makes rhetorical progress toward his claim, quoted above, that “I will grow on you, then things I’ve done before will appear new to you.” A stylistic device Nietzsche introduces is to create a network of aphorisms that resonate off each other. The interesting aspect of the aphorisms for present purposes is that each one acts as a form that generates a genealogy of evolving interpretations by the reader—a dance of interpretations that

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110 Ibid., section 7, page 170.  
111 Ibid., section 1, pages 157-158.
has, in a sense, its own rhythm. A sampling of aphorisms includes the following, which Nietzsche generally highlights with textual emphasis:

“God is dead!” (Prologue, 2)

“I teach you the overman.” (Prologue, 3)

“Behold, I show you the last man.” (Prologue, 5)

“Unconcerned, mocking, violent—thus wisdom wants us: she is a woman and always loves only a warrior.” (I, “On Reading and Writing’)

“Everything about woman is a riddle, and everything about woman has one solution: pregnancy.” (I, “On Little Old and Young Women”)

“You are going to women? Do not forget the whip!” (I, “On Little Old and Young Women”)

The following part of this section of the chapter is a possible genealogy of one of the aphorisms—“You are going to women? Do not forget the whip!” By following the development of interpretation, this exegesis demonstrates how the reader is taken through a series of self-transformations that change the interpretation of the aphorism. Each transformation changes the resonance patterns among the aphorisms and creates a new set of interpretive irrationalities in the Nietzschean landscape, to which the reader must return as a “bee” to gather countless “small doses” of honey.\footnote{Nietzsche refers to himself as a bee who has gathered honey. See Zarathustra, Prologue; and On the Genealogy of Morality, Preface, section 1.}
Level One:—"You are going to women? Do not forget the whip!"—A man should use corporal punishment on his woman. Nietzsche’s sister provides the following biographical origin of the aphorism in April 1882:

... in the spring of 1882, I read Turgenev’s novella First Love aloud to him. ... the charming creature on her knees asks the preferred lover for something, but he lashes at her with his riding whip, so that red stripes become visible on her white arms. My brother accompanied the reading with all kinds of humorous remarks; but at this scene he expressed his disapproval of the lover’s behavior. So I could not help reminding him ... that there simply happen to be female natures who are held in check only by a brutal stressing of power on the man’s part, and who, as soon as they do not feel that symbolic whip over them, become impertinent and shameless .... At this mention, however, he leaned back on the sofa, and cried out with well-feigned astonishment: “Thus the Lama advises the man to use the whip!” ...

... A year later my brother met with me in Rome and there gave me the first part of Zarathustra. There I also came to the chapter where the old woman gives Zarathustra the advice: “You go to women? Forget not the whip!” - “O Fritz,” I exclaimed in alarm, “I am the old woman!” My brother laughed and said he would not betray that to anyone. Meanwhile, Fritz might have changed his view of women somewhat or learned something new since reading that novella, so that now in the whip story he felt the need to stress it especially strongly.113

A “level one” reading of the aphorism, then, is a sensational literal reading that either panders to or offends the first time reader. However, even Nietzsche’s sister, despite her notorious fascist leanings, could not sustain a literal reading. Indeed, it seems Nietzsche intended the literal

reading to have a highly unstable shock-effect in order to encourage the reader to seek the next level of meaning immediately. This seems evident from the following chance conversation with Nietzsche reported by Sebastian Hausmann, a vacationing law and political science student at the time. Hausmann told Nietzsche he had difficulty reading his works and gave as an example the whip aphorism, to which Nietzsche reportedly answered:

But, I beg you, surely that cannot cause you any difficulty! I mean, it is clear and understandable that this is only a joke, an exaggerated, symbolic mode of expression. If you go to woman do not let yourself be subjugated by her sensuality, do not forget that you are the master, that it is a woman’s truly not slight task to serve the man as a friendly companion who beautifies his life.

Nietzsche was surprised that a reader would not immediately make the transformation to level two and so helped that reader along to the next level.

**Level Two:**—“You are going to women? Do not forget the whip!”—The whip is symbolic; the man should have ultimate authority in a relationship. A liberal apologist for Nietzsche would stress that the whip is symbolic and treat Nietzsche’s misogyny as a period-bound aspect of his philosophy that is inconsistent, or at least detachable, from the rest of his philosophy. Such apologists point out that the advice is whispered, but as even Nietzsche’s sister realized, this “stage whisper” served to emphasize the point. There is no simple escape for liberal readers. Other readers, such as Stanley Rosen, rely on the above conversation to find resolution at a level two reading and are not troubled enough to dig deeper.  

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114 *Conversations*, pages 133-140
However, a close reader of Nietzsche should feel uncomfortable at level two. Section 129 of *Assorted Opinions and Maxims* foresaw the biographical reductionism of his sister:

*Readers of maxims.*—The worst readers of maxims are the friends of their author when they are exercised to trace the general observation back to the particular event to which the maxim owes its origin: for through this prying they render all the author's efforts null and void, so that, instead of philosophical instruction, all they receive (and all they deserve to receive) is the satisfaction of a vulgar curiosity.117

Indeed, one should be disposed to reverse all interpretations of Nietzsche proffered by his sister. One of Nietzsche's final additions to *Ecce Homo* was more to the point: “I confess that the deepest objection to the ‘Eternal Recurrence’, my real idea from the abyss, is always my mother and my sister.”118 Indeed, even Nietzsche's sister noticed that Nietzsche disapproved of the whipping in the story, a *res gestae* response that was probably a more reliable indicator of Nietzsche's attitude on the matter, until he found a rhetorical use for the incident.119

In section 113 of *Assorted Opinions and Maxims* Nietzsche praised “an artistic style in which the fixed form is constantly being broken up, displaced, transposed back into indefiniteness, so that it signifies one thing and at the same time another.” It would be unlikely that Nietzsche would invest so little in such a provocative, almost bating aphorism. Furthermore, Nietzsche uses “whispers” throughout his writings to indicate the presence of an esoteric message.

117 *Human, All Too Human*, page 243.
119 In law, *res gestae* refers to automatic and undesigned spontaneous incidents that are considered reliable enough as evidence to form an exception to the rule excluding hearsay (secondhand) evidence.
Nietzsche’s response to his sister—“Thus Lama advises...”—suggests that her reaction, even as a woman, suggested to Nietzsche a rhetorical opportunity to exploit reader expectations to set up a reversal. It is not surprising, then, that in May 1882, about one month later, after meeting the remarkable Lou Salomé, that Nietzsche arranged for a notorious photograph to be taken where Nietzsche and Paul Rée pull a wagon in which sits Lou Salomé holding a whip. Lou Andreas-Salomé would later recall the incident as follows:

... At the same time Nietzsche also was busy having a picture made of us three, despite stiff resistance from Paul Rée, who all his life never lost a morbid repugnance for any portrayal of his face. Nietzsche, in an exuberant mood, insisted not only on that, but also occupied himself personally and zealously with the arrangement of details—like the little ladder-wagon (which turned out to be too small) and even the kitsch of the lilac branch on the whip, etc.120

Level Three:—“You are going to women? Do not forget the whip!”—Creation of interpretive vertigo: who holds the whip? Nietzsche went to some trouble to arrange the photograph and some risk. Indeed, Lou Salomé later circulated the photo to cause scandal in Bayreuth circles, which distressed Nietzsche. Nietzsche’s para-textual gesture here is an obvious challenge to level-two interpretations of the whip aphorism. Level-three readers notice that the aphorism does not say who is to use the whip—“You are going to women? Do not forget the whip!”121 As in Wagner’s music in Tristan und Isolde, a tonally ambiguous chord is shown to be a false resolution—the tonal form was ambiguous. The emotional effect of this rhetorical ploy is to induce a limerent obsession to resolve the dissonance, to overcome the “distance” that has

120 Conversations, page 117.
121 Carol Diethe, Nietzsche’s Women: Beyond the Whip (Berlin and New York: Walter de Gruyter, 1996) at page 64 [hereinafter, “Diethe”].
been introduced. Nietzsche thus challenges and provokes the reader into an obsessive search to resolve the ambiguity, the dissonance in the music writing.

**Level Four:**—“You are going to women? Do not forget the whip!”—Woman is symbolic for truth and must continually spur the male to self-overcome. Readers such as Jacques Derrida find an epistemological interpretation that harmonizes better with the deconstructive aspects of Nietzsche’s writings.\(^\text{122}\) The tonality of the level four interpretation accords with memorable Nietzschean passages such as the following excerpts from the opening of the preface to *Beyond Good and Evil* and from the preface to *Joyous Science*:

Supposing truth is a woman—what then? Are there not grounds for the suspicion that all philosophers, insofar as they were dogmatists, have been very inept about women? That the gruesome seriousness, the clumsy intrusiveness with which they have usually approached truth so far have been awkward and very improper methods for winning a woman’s heart?\(^\text{123}\)

Perhaps truth is a woman who has reasons for not letting us see her reasons? Perhaps her name is—to speak Greek—*Baubo*?\(^\text{124}\)

Similarly, “Wisdom” is an important female persona in *Zarathustra*.

This level of resolution is a welcome relief to the first three levels, particularly as epistemology is a major theme throughout Nietzsche’s writing, especially its deconstructive aspects. However, a close reader’s sense of resolution should be challenged, particularly by Book Five of *Joyous Science*.

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Level Five:—"You are going to women? Do not forget the whip!"—The feminine is symbolic of life and fate: the reality principle. Clement Rosset develops this theme in Joyful Cruelty based largely on a reading of Joyous Science.\textsuperscript{125} A telling passage from the Preface of Joyous Science was important enough to repeat at the end of section 1 the epilogue to Nietzsche Contra Wagner, the last work Nietzsche produced:

The trust in life is gone: life itself has become a problem. Yet one should not jump to the conclusion that this necessarily makes one gloomy. Even love of life is still possible, only one loves differently. It is the love for a woman who raises doubts in us.\textsuperscript{126}

Harmonizing this interpretation with passages on Nietzsche's "life" philosophy creates a strong sense of tonal resolution, as Rosset's and even Lampert's work demonstrate. However, identifying woman with life introduces a new set of interpretive challenges.

Level Six:—"You are going to women? Do not forget the whip!"—A biographical reference to Nietzsche being whipped by his mother, aunts and grandmother growing up in his fatherless household. Alice Miller notes the apparent effects of physically abusive discipline on the life and writings of Nietzsche.\textsuperscript{127} Miller unfortunately does not develop her analysis in terms of specific Nietzschean passages. A close reader of the aphorism notes that Nietzsche writes "You are going to women?..." in the plural, hardly consistent with level one or two readings of the ideal marriage.


\textsuperscript{127} Alice Miller, The Untouched Key: Tracing Childhood Trauma in Creativity and Destructiveness, translated by Hildegarde and Hunter Hannum (New York: Doubleday, 1990).
Indeed, given the hint that life=woman=mother, it is hard not to read the “Other Dancing Song” as Nietzsche dancing to the sting of the whip as twelve lashes are counted out.\textsuperscript{128} Bells, after all, do not count. In fact, given the pre-eminence of section 310 of \textit{Joyous Science}, one hears in it and the Poem “Juvenilia” elements of the “Other Dancing Song.”

My youthful wisdom’s A and O
I heard again. What did I hear?
Words not of wisdom but of woe:
Only the endless Ah and Oh
Of youth lies heavy in my ear.

Oh man, take care indeed. The newly attuned ear then hears overtones of physical abuse throughout Nietzsche, such as “superfluous” metaphors, analogies or asides, as in section four of the second essay in \textit{On the Genealogy of Morality}:

..., as parents still punish their children, from anger at some harm or injury, vented on the one who caused it....

Little wonder, then, that Nietzsche’s mother was one of the greatest challenges to the Eternal Recurrence Doctrine.\textsuperscript{129} Overcoming his childhood experience meant overcoming the problem of life itself. This included Nietzsche’s rejection of the effectiveness of punishment as a means of moral betterment. As Rousseau wrote in his \textit{Confessions}, Nietzsche wrote that punishment generally has the opposite effect.


\textsuperscript{129} \textit{Ecce Homo}, “Why I Am So Wise?” section 3, page 11.
With Nietzsche, of course, all biographical muck is turned into gold\textsuperscript{130} and the resolution of biographical reductionism is always temporary. The pointers to Nietzsche's biography and Rousseau's leads one to a closer reading of Rousseau, one of the writers who continually fascinated Nietzsche.

\textbf{Level Seven:}—"You are going to women? Do not forget the whip!"—Sexual masochism.\textsuperscript{131} Rousseau wrote in his \textit{Confessions}:

\begin{quote}
Since Mlle Lambercier treated us with a mother's love, she had also a mother's authority... But when in the end I was beaten I found the experience less dreadful in fact than in anticipation; and the very strange thing was that this punishment increased my affection for the inflicter. ... I had discovered in the shame and pain of the punishment an admixture of sensuality which had left me rather eager than otherwise for a repetition from the same hand.... The second occasion, however, was also the last. For Mlle Lambercier had no doubt detected signs that this punishment was not having the desired effect....\textsuperscript{132}
\end{quote}

Rousseau being spanked by a mother figure was an entirely different experience for him than being disciplined by a father figure. Indeed, these two minor experiences determined Rousseau's sexual desires for life:

\begin{quote}
To fall on my knees before a masterful mistress, to obey her commands, to have to beg for her forgiveness, have been to me the most delicate of pleasures...\textsuperscript{133}
\end{quote}

\textsuperscript{130} Letter to Franz Overback, 25 December 1982, in \textit{Selected Letters}.
\textsuperscript{133} \textit{Ibid.}, page 28.
Rousseau’s sexual masochism drew him into two significant ménages-à-trois relationships with him being the subservient, celibate third in relation to a couple.\footnote{Barbara Foster, Michael Foster and Letha Hadady, Three in Love: Ménage à Trois from Ancient to Modern Times (San Francisco: Harper Collins, 1997) pages 56-67 [hereinafter, "Three in Love"].} As an adult, Rousseau maintained a prolonged, celibate affair with the Baroness de Warens, whom he called “Mamma,” even while she was in a relationship with Claude Anet, who did not object to the situation. After Anet died, Rousseau became the dominant male lover with a new, younger man taking the subordinate role in a reconstructed ménage. However, the relationship fell apart as it did not suit Rousseau’s nature. Rousseau later entered a similar relationship with Sophie d’Houdetot and the Marquis de Saint-Lambert. Rousseau’s infatuation was intimate but remained celibate. Moreover, the psychic energy from the situation was like a particle accelerator that propelled his creative energies, writing Julie at the time.

Nietzsche was four and a half when his father died—his mother was only 22. If Rousseau’s two governess-spankings imprinted sexual masochism for life, one can imagine the effect on Nietzsche, living in one room with his mother and sister in the back of his grandmother’s house in Naumberg. Nietzsche’s mother had many suitors after her husband’s death but she never remarried. A photograph of Nietzsche’s mother at about that time show her to be beautiful with striking eyes. The “Other Dancing Song” begins “Lately I gazed into your eyes, O Life…”

Other readers of Nietzsche have observed a pattern of sexual masochism.\footnote{Barbara Foster, Michael Foster and Letha Hadady, Three in Love: Ménage à Trois from Ancient to Modern Times (San Francisco: Harper Collins, 1997) pages 56-67 [hereinafter, "Three in Love"].} If one considers that Nietzsche’s father was much older than his young bride was, there is a pattern of relationships with Nietzsche where he has an intellectual relationship and a celibate infatuation with the wife of an older male. Wagner, for example, was the same age as Nietzsche’s father and Cosima was just six years older than Nietzsche. Similarly, J.J. Bachofen was much older than his
wife Louise. There is a strong element of sexual masochism in Nietzsche’s relationship with Lou Salomé and Paul Rée. Nietzsche proposed a celibate marriage with Salomé, which was rejected (probably twice). Nietzsche’s intuition about Salomé being a complementary spirit was not off the mark, as she would later enter a celibate marriage with Andreas while carrying on affairs with other men.136

Our interpretive horizons opened thus, some features of the Nietzschean landscape begin to look a little different. Nietzsche asks rhetorically in section “69” of Joyous Science—evidently playing on 69 and *vagina dentata*:

Would a woman be able to hold us (or, as they say, “enthral” us) if we did not consider it quite possible that under certain circumstances she could wield a dagger (any kind of dagger) against us?137

Again, the interpretive resolution of the aphorism is temporary. While Nietzsche unequivocally rejects repressing sexuality, he always finds ways to present it in sublimated form—turns biographical “muck into gold.” However, the biographical roots suggest the poetic Nietzsche might demonstrate “mythic imprinting” in the sense meant by Ted Hughes.

**Level Eight:** “You are going to women? Do not forget the whip!”—Sublimation of the dynamics of human mating sexuality to seduce into profound self-transformations to overcome excessive ego-rationalism—the Dionysus and Ariadne dynamic. Accepting, as Nietzsche did, that language and hence all moral codes are necessarily incomplete and will have to evolve

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135 Diethe; *Three in Love.*
136 Diethe.
137 *Joyous Science*, section 69. See also “Among the Daughters of the Wilderness” in Book IV of *Thus Spoke Zarathustra*, which Nietzsche republishes in *Dithyrambs of Dionysus*: “There I sit now, / In this smallest oasis, / Just like a date, / Brown, sweet through, oozing gold, lusting / For the round mouth of a girl, / But even more for girlish, / Ice-cold, snow-white, cutting / Incisors: for after these / Pants the heart of all hot dates. Selah.” *Zarathustra*, page 418. The incisors are “cutting,” just like the truths that “cut into our flesh with knives.” *Dawn* section 460.
continually as an unending series of brief habits, then some process is required to dissolve those brief habits and reconstitute them to respond better to values that were previously underrepresented. Sexuality is paradigmatic because mating mysteriously compels the ego or “somatic-DNA” aspect of the person to subordinate itself and reconstitute to reflect the interests of something that survives the self, the “germ-DNA” aspect of oneself and another. The key aspect of the human mating dance for present purposes is that when a male becomes attracted to a female, the interest is progressively heightened by the female appearing ambiguous as to interest and presenting obstacles. Sensing from deep within—“the old earth-shaker ... a bellowing bull”—that there is a potential source of power in the other (to satisfy the bodily instincts that pursue germ-DNA values) causes a masochistic interpretive obsession that results in a manic-depressive “limerence.” This voluptuous pleasure/pain ambiguity pervades Tristan und Isolde and its musical rendition of “longing.” Rousseau confesses how intense this can be for a man if “distance” is maintained by the woman:

I only felt the full strength of my attachment to her when she was out of my sight. ... [M]y disquiet when she was away became almost painful. My inability to live without her caused me outbreaks of tenderness which often concluded with tears... How often I have I kissed my bed because she had slept in it; my curtains, all the furniture of my room, since they belonged to her and her fair hand had touched them; even the floor on to which I threw myself, calling to mind how she had walked there! ... One day at table, just as she had put some food in her mouth,

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140 Joyous Science, section 60.
I cried out that I had seen a hair in it. She spat the morsel back on her plate, whereupon I seized it greedily and swallowed it.\textsuperscript{141}

Shrewd women are wise to this effect, as Fein and Schneider advise women how to get lasting male commitment of the 1990s in \textit{The Rules}:

If you're a genuinely nice person, you will probably feel cruel that you are making men suffer when you are doing THE RULES. However, you are doing them a favor and allowing them to experience longing!\textsuperscript{142}

Of course, one cannot forget the infamous photograph where Nietzsche insisted on the smallest details, such as the "kitsch" of the lilac branch on the whip. This suggests strongly that the whip in the hands of the female is less prone to abusive mis-use, that the inflicted pain would more likely be productive pain and not simply sadistic gratification.

In the Nietzschean logic of self-organized criticality, the simultaneous presence of attraction to power and distance results in an obsessive absorption of "small doses" of emotional experience relevant to the unincorporated teleology—in this case the needs of the germ-DNA over the somatic-DNA. The distance-preserving obstacle therefore generates a fractalization of the behavioral code to search for new rules to reflect the new teleology. As Jean Baudrillard further develops Nietzsche on this point, seduction replaces argument.\textsuperscript{143} Of Wagner, Nietzsche wrote:

\begin{thebibliography}{99}
\bibitem{141} \textit{Confessions}, pages 107, 108.
\bibitem{142} Ellen Fein and Sherrie Schneider, \textit{The Rules: Time-Tested Secrets for Capturing the Heart of Mr. Right} (New York: Warner Books, 1995) page 47.
\end{thebibliography}
He is distinguished by every ambiguity, every double sense, everything quite
generally that persuades those who are uncertain without making them aware of
what they have been persuaded. Thus Wagner is a seducer on a large scale.\(^{144}\)

Seduction changes behavior at the emotional source level, whereas argument merely maneuvers
within the level of rationalization.

The essential ingredients in this chemical reaction are the woman having some power
over or to offer the man—any kind of dagger—and distance. Nietzsche emphasized distance in
section 60 of *Joyous Science*, which linked sexuality to a passion for philosophical truth:

> The magic and the most powerful effect of women is, in philosophical language,
> action at a distance, *actio in distans*: but this requires first of all and above all—
> *distance*.

It is the distance between the ego/male/truth and offspring/woman/reality that generates a
passionate desire to incorporate emotional experiences that will fuel and shape the transformation
into new brief habits. The longing to bridge the distance—to incorporate the values of another—
is Nietzsche’s concept of love. Love-intoxication-madness is driven by the challenge of
overcoming inexhaustible differential production, the side effect of which is continual fractal
creativity. Nonetheless, distance must be continually generated to maintain love and creativity.

For Nietzsche, then, the sexuality of the erotic dance also governs a philosopher’s passion
for truth. In section 363 of *Joyous Science*, which Lampert identifies as pre-eminent because of
its location as the middle section of Book Five, the male need to possess is the core source of his
love. Without a masochistic longing to experience and incorporate the painful residues of reality
in excess of the logical projection of existing code, empirical investigation is only warm-blooded

\(^{144}\) *The Case of Wagner*, Postscript. See also *Dawn*, 330.
to the extent it satisfies the accidental neuroses of childhood. For Nietzsche, each philosophy is only empirically reliable insofar as it addresses the neurotic biography of the philosopher. Nietzsche as philosophical-moral historian asks: what kind of person would have needed a philosophy-morality such as this? Nietzsche's *philosophical* masochism, then, is required in order to expand "experience" and so passion for knowledge beyond the accidents of upbringing. This is radical empiricism in the form of education-seduction.

**Level Nine:**—"You are going to women? Do not forget the whip!"—Matriarchy. Apart from Nietzsche's merciless attacks on the "Bluestockings" of equality feminism, Nietzsche repeatedly casts woman in the dominant role, whether as truth, reality, life or goddess. However, Nietzsche also gives us small doses that suggest more, such as section 70 of *Joyous Science*:

> **Women who master the masters:**—A deep and powerful alto voice ... can suddenly raise the curtain on possibilities in which we usually do not believe ... women ... capable of and ready for rule over men...

The plural "women" in the aphorism now suggests a reading at the social level. Recall again that in the photograph Nietzsche placed a lilac branch on the whip. Authority to inflict pain in the hands of women is less prone to abuse. In section 311 of *Joyous Science* only "one of us"—the female—is apt to ask why it is necessary to hurt people.

But once this reading is suggested, all the maenad passages now leap off the page, suggesting the hidden history of universal matriarchy that Nietzsche's mentor, J.J. Bachofen, believed he had discovered through an analysis of Roman laws. Note the new esoteric sense that emerges from a passage from *Joyous Science* already quoted:
Perhaps truth is a woman who has reasons for not letting us see her reasons?
Perhaps her name is—to speak Greek—Baubo?

In the pre-eminent section 310 of *Joyous Science*, Nietzsche tells the “beautiful monsters” he will not disclose the “secret.” In *Ecce Homo*, the “beautiful monsters” are amiable maenads who are the complete women who tear apart when they love.\(^{145}\) The reference to the Greek tragedy *The Bacchae*, where Theseus is torn apart by maenads, including his mother, is unmistakable. Nietzsche “whispers” another small dose of Greek myth in the beginning of *Zarathustra* where “lame foot” is unable to cross a tightrope, a reference to Oedipus, suggesting another failure to sublimate a problematic mother-son relationship.

**Level Ten:**—“You are going to women? Do not forget the whip!”—Discipline of sons by mother with Oedipal overtones so as to educate men not to corrupt the development of women who can become masters over the masters, Ariadne to Dionysus.\(^{146}\)

In section 68 of *Joyous Science*, Nietzsche wrote that women are corrupted by men into disfiguring themselves to suit male sexuality.

‘... it is man who creates for himself the image of woman, and woman forms herself according to this image.’ ... ‘Men need to be educated better,’ said the sage and beckoned the youth to follow him.\(^{147}\)

Nietzsche’s solution in that section appears to be pedastry, a vestige of his adoration of Greek customs. However, Rousseau’s *Confessions* suggests more effective means:

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\(^{145}\) *Ecce Homo*, “Why I Write Such Good Books,” section 5.

\(^{146}\) The possible presence of this theme was suggested to me by J.C. Smith in discussions.

\(^{147}\) See also, *Twilight of the Idols*, “Epigrams and Arrows,” 13.
Who could have supposed that this childish punishment, received at the age of eight at the hands of a woman of thirty, would determine my tastes and desires, my passions, my very self for the rest of my life... Imagining no pleasures other than those I had known, I could not, for all the restless tinglings of my veins, direct my desires towards any other form of gratification.... My old childish tastes did not vanish, but became so intimately associated with those of maturity that I could never, when sensually aroused, keep the two apart. ... As can be imagined, this way of making love does not lead to rapid progress, and is not very dangerous to the virtue of the desired object. 

With Zarathustra, the Oedipal solution seems to have prevailed. This development made Nietzsche more consistent with his own sexual imprinting. Thus self-harmonized, in epigram 75 of *Beyond Good and Evil* he could write with confidence:

\[\text{The degree and kind of a man's sexuality reach up into the pinnacle of his spirit.} \]

This epigram can of course take on many meanings in tandem with any of the levels of the whip aphorism above level six. It also sheds light on Nietzsche's fascination with Rousseau. In *Twilight of the Idols* Nietzsche touched on ascetics and other decadents in section two of "Morality as Anti-Nature":

\[\text{The same means, castration, eradication, is instinctively chosen in the struggle against a desire by those who are too weak-willed, to degenerate to moderate their own desire: by those natures who need ... an abyss between themselves and a passion. ...Radical enmity, enmity to the death against sensuality....By the way,}\]

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148 *Confessions*, pages 26, 27, 28.
149 *Beyond Good and Evil*, Epigram 75.
this enmity, this hatred reaches its peak only when such natures no longer have enough stamina even for the radical therapy, for the repudiation of their "devil." Survey the whole history of priests and philosophers, and artists too: the most poisonous words against the senses have not come from the impotent, not even from the ascetics. They have come from the impossible ascetics, from those who were in need of beings ascetics...

Thus "lame-foot" could not cross or sublimate the Oedipal abyss. The ascetic avoids the abyss, but the weak-willed impossible ascetics cannot avoid the abyss and so attack it with resentment.

_My impossible ones._—... Rousseau: or the return to nature in _impuribus naturalibus_ [in natural uncleanness]^{150}

Rousseau could not sublimate his sensuality into philosophy and instead resentfully attacked it with his equality fetish and back to "nature" morality.\^{151}

_**Level Eleven:**—"You are going to women? Do not forget the whip!"—Where does it stop?_

The foregoing detonations of the whip aphorism demonstrate an interpretive genealogy where the same form is commandeered by numerous interpretations. Nietzsche evidently did not intend any one of them to the "correct" interpretation. The remarkable feature is how after being transformed from level to level, the same writings appear different, as Nietzsche would ironically suggest to the reader in the passage from _Dawn_ analyzed above and promise to his readers in the "Invitation" to _Joyous Science_. As the reader progresses up the levels, metaphors and other rhetorical figures that appeared accidental or superfluous, suddenly take on new significance. Nietzsche could thereby "hide" material on the surface, literal level of his text. No reader would

\^{150} _Twilight of the Idols_, "Raids of an Untimely Man," section 1.
dream of taking references to maenads, Baubo, women who rule men and such seriously until having gone through a series of interpretive transformations. The ultimate significance of the references is heavily obscured by multiple meanings—the Goddess simultaneously meaning sexuality, truth, life and reality. In this way, Nietzsche could stage the Salomé/Rée photograph with confidence that it would be experienced as comic (a satire of matriarchy) until sensibilities had changed sufficiently that it would be experienced as a curse on patriarchy, and yet further to cast a spell to reinforce matriarchy. This satire-curse-spell spectrum of shifting meaning depending on the reader’s unconscious disposition is exploited throughout Nietzsche’s writing and follows from Nietzsche’s insight that tragedy could be either a condemnation or a celebration, in the way Tristan und Isolde celebrates romance.

The total effect, then, of moving up these levels is like that of playing a computer-video game, where the reader accumulates small doses of emotional interpretive experience—hence Nietzsche’s need to provoke emotional reactions with the sometimes outlandish—which induces the player to “experience” the very process of self-transformation by self-organized criticality at the emotional level that Nietzsche wants the reader to “understand.” Only once the reader “understands” this will the reader have “ears” for the ultimate levels that contain the esoteric literal message. In this way Nietzsche could hope to achieve the “staged learning” effect by which children evidently acquire grammatical language.152

Was this effect deliberate? Consider again the “welcome” screen on Nietzsche’s computer-video game:

151 Ibid., section 48.
152 Terrence W. Deacon, The Symbolic Species: The Co-evolution of Language and the Brain (New York: W.W. Norton, 1997). Deacon explains that children experience perceptual overload and must select the most obvious meaning indicators as language is learned, and thereby ratchet up the full degree of comprehension in stages.
*Invitation*

Take a chance and try my fair:
It will grow on you I swear;
Soon it will taste good to you.
If by then you should want more,
All the things I've done before
Will inspire things quite new.

Before going on, it is perhaps useful to consider briefly another notorious “misogynist” aphorism—“Everything about woman is a riddle, and everything about woman has one solution: pregnancy.” This follows the same pattern of a level-one shock-effect inducing a search for symbolic attenuation. However, as one moves up the levels of the whip aphorism, a parallel process should happen with the pregnancy aphorism. Whose pregnancy? Nietzsche’s writings are replete with the idea of the genius, the male or indeed Nietzsche himself being pregnant. The ritualistic prayer-song at the conclusion of Part III of *Zarathustra*, “The Seven Seals,” has the soothsayer saying he is “pregnant.” After smashing old tablets, he goes to play dice at the table of the gods—unmistakably Persephone’s. In the context of “On Little Old and Young Women” where the pregnancy aphorism occurs, man is for woman a means—the *man* gives birth to the *overman*. This is repeated in *Ecce Homo*:

Love—in its methods war, in its foundation the mortal hatred of the sexes. Has my answer been heard on the question of how one cures—‘redeems’—a woman? One makes a child for her. The woman has need of children, the man is always only the means: thus spoke Zarathustra.\(^{153}\)

Woman, like a gem, becomes irradiated by the virtues of a world that has not yet arrived (the germ-DNA values) and, as man’s sexual plaything, refracts this light by whipping the man so as to give birth to the overman from his depths. Section 310 of Joyous Science, a source for the whipping in the “Other Dancing Song,” is immediately followed by “Refracted light” in which “one of us … is apt to moan…” It is so hard to hurt people—oh, why is it necessary!” Woman refracts the future like a gem. The whipping must be out of love—the kitsch of the lilac branch—and so woman is “never to be second.”

Music-Writing—The Medusa Aphorism

The pre-eminent aphorism in Zarathustra has no form: the eternal recurrence doctrine. The “Medusa” aspect of this has been analyzed by others. This section will draw extensively from the reading of Bernard Pautrat, however, from a rhetorical perspective some interesting aspects remain unexplored that have a bearing on Holmes and legal method. In particular, there is a mathematical source for the eternal recurrence doctrine that illustrates a powerful rhetorical device.

Nietzsche’s notes for Zarathustra make reference to the thought of eternal recurrence doctrine as a “Medusa’s head.” Medusa, of course, was the mythological maenad-Amazon with serpent-hair whose gaze petrified anyone who looked in her face directly. The Medusa is eventually slain by the hero, with the help of Athena. Perseus, for example, is portrayed looking away from the Gorgon’s head in mythological artwork. For Nietzsche, the Medusa’s head is

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155 Pautrat, 160.
“an emblematic metaphor... of that will to blindness by which one escapes petrification.”157 The eternal recurrence doctrine is in a sense defined by an absence in a context that suggests the need to make it present. Pautrat writes:

The eternal return does not exist as an articulated and developed thought anywhere but in Zarathustra, even if elsewhere it happens to be named. …

However, if the eternal return is there, in the text, the riddle comes precisely from the fact that it is not there: for what this thought says, what it “means” is never directly, positively presented in the form of a philosophical thesis.

The eternal return is, in theory, the hero Zarathustra’s principal teaching: it is the truth which has matured in him, and for which he himself has to mature. It is his child, his own fruit, his product. But he is never in a position to give an exoteric statement of it. The mode of presentation of the eternal return is either the dream or the riddle, the responsibility for which is always left to others, dwarfs or animals. And each version which is given of it is immediately contradicted by the master of the return, who fails to see his truth in it, the truth he wants to transmit to his future disciples. It is in this way that the most simple and facile interpretation, the cyclical interpretation, the very one which Nietzsche seems to adopt in some of the fragments of the Nachlass, is rejected by Zarathustra, in the form of an “it is not that.”158

Typical of the aphoristic pattern examined in the previous section, a sensational literal interpretation is rejected and an interpretive journey is launched that takes the reader through

157 Pautrat, 161.
numerous levels of illuminating, incomplete interpretations. Applying the level-eight seduction interpretation of the whip aphorism, Nietzsche presents a challenge—distance—but without giving form to that which creates the distance. Yet the reader feels a need—longing, love—to articulate the eternal return in conceptual form. Pautrat:

Nobody ever says this thought. ... If one is reduced to conjecture, it is precisely because one feels a need, from the moment of its enunciation is presented as imminent and fatal, that the eternal return be stated.\textsuperscript{159}

Indeed, the reader feels the absent Medusa to be a well-defined reality, but this is a rhetorical effect of Nietzsche the author standing above Zarathustra.

Everything takes place as if Medusa's head were engaged in combat with the "author" himself, who is above all an effect of the text, as though some censure were intervening to prevent his appearance.\textsuperscript{160}

Despite the felt need to state the eternal recurrence with conceptual consistency in a manner that resolves the dynamic between being (identity) and becoming, and despite the felt faith in the possibility of doing so, the text continually undermines any statement in a form that purports to be both consistent and complete.

A double censure which is still at bottom contradictory: it operates on the one hand against a thinking of the identical, incompatible

\textsuperscript{158} Ibid., 162-163.
\textsuperscript{159} Ibid., 164.
\textsuperscript{160} Ibid., 168.
with universal becoming, and on the other hand it prevents absolute difference from being articulated. On the other hand, its target is repetition as mimetic reproduction, on the other hand it is repetition as gap, cleft, and castration. We have, then, a logical difficulty, even if it appears right away that this double censure is dissymmetrical.\textsuperscript{161}

Logical difficulty, indeed. If we move from Pautrat’s psychoanalytic approach to mathematics, the logical paradox involved and the nature of the Medusa become more apparent. What Nietzsche has achieved, for a non-mathematical reader such as Pautrat, is a textual-doctrinal-metaphysical “difference well” whose dissymmetry continually generates “distance” with a “fractal” pattern of changing interpretations.

To support this claim and make it clearer, consider Nietzsche’s interest in the mathematician Georg Cantor, which rarely is mentioned by his commentators.\textsuperscript{162} Cantor devised an extremely clever algorithm to prove that there are different orders of infinity, using “Cantor’s Diagonalization Argument.”\textsuperscript{163} This can be demonstrated easily by showing how all the decimal numbers between zero and one could never be completely listed, even with a list of infinite length. The details of the proof are important because Nietzsche achieves the same effect.

Consider the set of positive integers. These form a natural infinite list: 1, 2, 3, etc. Now consider the set of positive and negative integers. These too can be put into the form of an infinite list: 0, 1, -1, 2, -2, 3, -3, etc. Thus one thinks of infinity as a well-defined concept. However, consider a list of the real numbers between zero and one. Plainly, there are “infinity.”

\textsuperscript{161} Ibid., 166.
\textsuperscript{162} Selected Letters, page 64, footnote 22. As noted in chapter 5 of this thesis, Nietzsche wrote in an April 5, 1873 letter to Carl von Gersdorff: “It was also necessary for me to pursue the most peculiar studies for this end—I even touched fearlessly upon mathematics, then mechanics, chemical atomic theory, etc.”. See “Introduction” in Philosophy and Truth, at page xx and at page 217.
However, is "infinity" a well-defined concept? Suppose a list were created that we claimed contained all the numbers between zero and one. Write the list in the following manner:

\[
\begin{align*}
0. & \; 9 \; 3 \; 8 \; 7 \; 2 \ldots \\
0. & \; 9 \; 8 \; 3 \; 7 \; 4 \ldots \\
0. & \; 3 \; 7 \; 4 \; 3 \; 7 \ldots \\
0. & \; 8 \; 7 \; 9 \; 8 \; 4 \ldots \\
0. & \; 2 \; 4 \; 7 \; 7 \; 8 \ldots \\
& \; \text{etc.}
\end{align*}
\]

Figure 6.1 Cantor's Diagonalization Argument

Now, using this list, construct a number between zero and one as follows. For each n-th number in the list, take the n-th digit after the decimal point and add one, making nine zero. Using the first five positions in the above list, we get 0.09599... It should be apparent that the number that will be constructed will not be anywhere in the infinite list. Moreover, if we add the number to the list, our algorithm will find another number that is not in the list, or any prior version in our genealogy of lists. Our "integer-list" language is not powerful enough to express the reality of infinity: it is incomplete. As speakers of the "integer-list" language, we have no well-defined concept of this greater infinity. We have a word "infinity" that creates an expectation of a well-defined concept and a desire to find one, but no list can be complete. The listing process undermines itself: it contains its own recipe for destruction. The idea of a listable infinity for all real numbers between zero and one is a Medusa's head: the speaker of "integer-list" would be paralyzed by inaction while attempting to complete the list.

This self-referencing turn is fundamental to modern mathematics, logic and computer science, resulting in Cantor's Paradox, Russell's Paradox, Gödel's Theorem and the halting problem. They all establish similar results about problems using a language based on conceptual

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reference, namely, that well-defined concepts are too meager to describe reality completely and that any self-referencing conceptual system will either be self-inconsistent or demonstrably incomplete in its ability to conceptualize even itself.

Life requires action and so one must act under the illusion that one’s list, from time to time, is complete. However, one must also cyclically sacrifice one’s faith in the completeness of the list to incorporate more numbers in response to pragmatic need to alleviate stresses that accumulate due to side effects of the incompleteness. Well before Zarathustra, Nietzsche noted that knowledge undermines knowledge. In \textit{Dawn}, Nietzsche applies ethics to ethics. The Medusa is that reality that exists “beyond good and evil”—“good and evil” being the current tablets or “list” of moral precepts, our brief habits, which must be broken from time to time. However, that Medusa-reality can never be seen directly through the concept-lens of list-making theoretical man. The metaphysical concepts “being” (the illusory identity and definitions of equality achieved by the presumed completeness of the list) and “becoming” are therefore in a continual war. Action, however, requires the illusion of “being.” Creativity is the continually changing, unstable and dissymmetric fractal byproduct of the attempt to bridge the unbridgeable distance.

The rhetorical genius of Nietzsche was to take Cantor and create a moral procedure that exploited fear of death in order for the ego/somatic-DNA to self-undermine in a way that gave fuller expression to sexuality/germ-DNA, that which survives death. Of course the other alternative is the delusion of idealism—believing in fictional eternal Being—slaying the Medusa—Plato. Much of Nietzsche’s later critique of morality and culture attempted to show

\footnote{164 See the discussion in Chapter 5 of this thesis, “Nietzsche’s Horrific Thought.”}
how such values are antithetical to life affirmation (germ-DNA values) by inducing sacrifices to illusory entities as a means of gaining power over others.

The Medusa’s head is no more a reality than the concept “infinity” is real in terms of “that which exceeds the capacity to list.” In terms of dynamics, the Medusa’s head concept refers to a procedure that continually self-undermines and thereby continually improves the list. It is in this sense that “Justice” is not a well-defined entity, but an idealized fiction as the ultimate product of continually applying a set of procedures to the laws as they stand from time to time. One learns to recognize “injustice” in the manner Zarathustra deconstructs attempts to slay the eternal recurrence, or as Holmes’s “bad man” rejects any heroic claim to have fully conceptualized law.

Of course outside the controlled context of mathematics, the procedure to generate new entries for the list, new brief habits, itself relies on the “magic” of self-organized criticality or the “genius” aspect of the brain—itself an unlistable phenomenon. In Nietzsche’s mythic field, one must not only refrain from slaying the Medusa, one must learn to play dice at Persephone’s table.

In terms of music writing, the effect Nietzsche has achieved is to create a gestalt, tonal expectation from its formal absence.

_Music-Writing—Educating through Ritual_

Given Nietzsche’s abiding interest in gestures and imaging as para-conceptual means of reinforcing thought patterns, one might expect him to use his music-writing to create rituals that more effectively reinforced the thought patterns he wanted his readers to understand. Nietzsche’s comments here and there about the effect of poetic rhythm and the eternal war between poetry and prose suggest that he explored means for his poetry to induce neural patterns conducive to
creative self-transformations. A promising line of inquiry would develop the "educator" aspect of Nietzsche in his use of poetic form. Rosen notes that "[t]here is a great deal of repetition in Zarathustra, in part no doubt for the practical purpose of inducing a hypnotic state in the potential disciple..." 165 Nietzsche's Zarathustra, or at least parts of it, might have been intended as educative ritual—incantation.

What language will such a spirit speak, when he speaks with himself alone? The language of the dithyramb. I am the inventor of the dithyramb. 166

In Ecce Homo, Nietzsche quotes the "Night Song" as an indication of the language of the dithyramb. 167 One particularly gets the sense of an educative incantation reading the last section of Part Three, "The Seven Seals (Or: The Yes and Amen Song)." What new rhetorical technology had Nietzsche "invented"?

Nietzsche made bold claims about Zarathustra, announcing a breakthrough in some form of imaging using rhythmic patterns and concept-gestures as music writing.

... an instinct for rhythmical relationships which spans forms of wide extent—length, the need for a wide-spanned rhythm is almost the measure of the force of inspiration... 168

There is no wisdom, no psychology, no art of speech before Zarathustra: the nearest things, the most everyday things here speak of things unheard of. The aphorism trembling with passion; eloquence become music; lightening-bolts hurled ahead to hitherto undivined futures. The mightiest capacity for metaphor

167 Ibid., section 7.
168 Ibid., section 3.
which has hitherto existed is poor and child's play compared with this return of language to the nature of imagery.\textsuperscript{169}

Nietzsche was either excited about a truly new rhetorical technique for using concepts to generate para-conceptual images, or he was a megalomaniac on the cusp of madness. Given reason to suspect that he staged his madness, which would allow him to "hide" his claim in a literal passage that no one (but initiates) would take seriously, and knowing him to have sought to invent a new technique of music-writing, some exploration is warranted.

Background work to this thesis explored links between poetic structure and the reinforcement of neural structures that process narrative flow by mapping syntax, semantic and development onto binary-trees structures with modal indicators. This pattern is evident from analysis of common forms of poetic rhythm, particularly evident in nursery rhymes.\textsuperscript{170} Moreover, the same pattern has been observed in musical tonality, particularly in the music of Mozart, which Leonard Bernstein in his Norton Lectures at Harvard University compared to Chomsky's deep structure grammatical analysis.\textsuperscript{171} In hindsight, such binary-tree structures of narrative processing can be inferred from principles of computational complexity studied in computer science and computational linguistics. Supposing that as a stream of text is processed small sets of words are converted into images, which in turn form composite images, it can be shown that binary chunking structures promote maximal use of a limited number of items of active memory of unresolved chunks. Moreover, the "rhythms" of computational, syntactic and semantic chunking and image composition as text is processed seem to match musical patterns.

\textsuperscript{169} Ibid., section 6.
This link between musical structure, poetic structure and the structure of narrative processing is highly suggestive as to how Nietzsche might have attempted to convey the experience of self-transforming dynamics in a para-conceptual manner. Nietzsche may have found ways to create rhetorical rhythms that reinforced the patterns of development he wanted his disciples to understand. He claimed he invented something of the sort, but a full analysis is a matter for later work—the present task is to argue that Nietzsche attempted para-conceptual rhetoric. Nonetheless, it is possible to derive some principles that appear to match an organic developmental architecture evident in Zarathustra, which Nietzsche referred to in The Wagner Case.

Throughout Joyous Science Nietzsche implicitly classifies the stages of cyclic growth into four phases that roughly match the four seasons, although the seasonal metaphor distorts one’s expectations as to the duration of each phase. Autumn is the phase that interested Nietzsche most in Joyous Science. The same seasonal pattern is generated by the modalities in the dynamics of binary-tree chunking using the following chord mapping:

<table>
<thead>
<tr>
<th>Season</th>
<th>Chord</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summer</td>
<td>I</td>
</tr>
<tr>
<td>Autumn</td>
<td>V</td>
</tr>
<tr>
<td>Winter</td>
<td>VII</td>
</tr>
<tr>
<td>Spring</td>
<td>I*</td>
</tr>
</tbody>
</table>

Figure 6.2 Season and Musical Chord Correlation

The return to tonal resolution, however, entails a new appreciation for the opening tonal context. In a final recapitulation after the development section, the “A” theme sounds different, the ear having become “more intelligent,” as Nietzsche described the effect for those of the highest echelon of musical taste.

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172 See, for example, Joyous Science, sections 4, 23, 24, 87, 149, 343, 356 and 370.
This chord progression suggests a grand architecture underlying the first three parts of

*Zarathustra*, which makes clearer the relationships between Zarathustra, Dionysus and Ariadne.

Disciple/student  
Dionysus / Ariadne  
Dionysus

Zarathustra/educator  
Wisdom/Life/Eternity  
Ariadne

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Seduction</td>
</tr>
<tr>
<td></td>
<td>(magnanimity)</td>
</tr>
<tr>
<td>V</td>
<td>Annihilation</td>
</tr>
<tr>
<td></td>
<td>(self-undermining logic)</td>
</tr>
<tr>
<td>VII</td>
<td>Gift-giving; destruction</td>
</tr>
<tr>
<td></td>
<td>(reception)</td>
</tr>
<tr>
<td></td>
<td>(genius, rebirth and growth; or nihilism)</td>
</tr>
</tbody>
</table>

**Figure 6.3 Seasonal Chords in *Thus Spoke Zarathustra***

Zarathustra, having already experienced the Dionysian role, now seeks to educate others in this way. The disciple goes through three metamorphoses: camel (accumulate stresses), lion (brave enough to self-sacrifice) and, with luck, re-birth as the infant. On the other side of the chart are the three female personae: Wisdom (the gift giver, bird-wisdom), Life (the provider of experience), and Eternity (chance, Persephone, Chaos).

This is also the pattern of every “strong scene” that Nietzsche created as a miniaturist. The strong scene has become grand architecture in *Zarathustra*. Nietzsche spends the first three parts seeding the reader with small doses of irrationality—salt—in various forms, especially through his use of the aphorism network. The “impregnated” reader comes to term at “The Other Dancing Song” in the penultimate section of Part III. After roaring as a lion, cracking the whip, Zarathustra hands over the whip and suffers an annihilating whipping. In terms of the chord
progression, Zarathustra and the reader have entered the seventh chord—the hiatus of solitude as Fate turns her wheel. In *Ecce Homo*, Nietzsche tells us his solitude had seven skins, and to reinforce himself ritually during the seventh-chord hiatus he presents his prayer-song “The Seven Seals (Or: The Yes and Amen Song).”

The purpose of this ritual-song is evident from its structure and content: it is a prayer to Eternity/Chaos to permit a blessing—a child—to be delivered by “bird-wisdom.” The suppliant is “pregnant” in section 1; has broken tablets in section 2; prepares to play dice with the gods in section 3; has incorporated the “salt” of small doses of irrationality and undergoes chemical transformation in section 4; sets out to sea, leaving the “coast” of illusory certainty in section 5; becomes a dancing body in section 6; and, finally, in section 7 receives instructions from “bird-wisdom” to let his body sing. Part III ends on a massive seventh chord. Nietzsche has “tied the knot” so tightly that only a god can cut through. Nietzsche refers to the same knot-tying architecture in section 153 of *Joyous Science*, referring to the knot of morality, but says he will slay all gods in the fourth act. The only remaining god is Eternity—Chaos. At the end of Part III Nietzsche is attempting to reinforce ritually a going-under to play dice at the table of Persephone, hoping that the reader will come to understand the grand irony that that going-under is the experience to be understood as the dynamics of Becoming.

The above chart of the chord progression also makes clearer the respective roles of Zarathustra, Dionysus and Ariadne. An “educator” is an impresario to a student playing the Dionysian role. Zarathustra educates, in part, by relating his own journey of self-transformation. Zarathustra, in a sense, acts as a benevolent agent of the three women Wisdom, Life and Eternity. Ariadne is not the same as the three women. Ariadne is to be Dionysus’ marriage partner. As

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173 This can be correlated further to the four Greek causes, self-organizing criticality and pagan myth structures.
Crawford shows, in Nietzsche's drafts of Empedocles the Dionysus and Ariadne figures were to leap into the volcano together in the fifth act and Nietzsche wrote to Cosima Wagner as Ariadne as he "leapt" into madness.\textsuperscript{176} Crawford's analysis makes it clear that both Dionysus and Ariadne undergo self-transformations. Zarathustra is also an educator of women, though Nietzsche qualifying himself in section 231 of \textit{Beyond Good and Evil}; not having had the "experience" of a woman, his advice as educator is obviously second-hand. Nonetheless, it is plain from Nietzsche's use of myth, his "Dithyrambs of Dionysus" and his evolutionary biology, that Ariadne is the superior agent of Wisdom/Life/Eternity in the formation of their nuptial union.

\textit{Neo-Classical Music-Writing}

After the grand operatic achievement of \textit{Zarathustra}, Nietzsche shifted his poetic talents to more elemental and classical forms. For example, Henry Staten is able to infer profound insight into will to power from Nietzsche's device of shifting affect, particularly in the third essay of \textit{On the Genealogy of Morality}.\textsuperscript{177} Similarly, Tracy Strong shows how Nietzsche uses degrees of inclusiveness of pronouns to achieve a series of false interpretive resolutions, in a manner similar to the second act of \textit{Tristan und Isolde}.\textsuperscript{178} Nietzsche has poetically imploded the message of genealogy and a never-ending series of temporary resolutions into different formal elements of the work. Indeed, Strong notes that any number of formal techniques of consonance and dissonance could be used to create and then defeat tonal expectation. For example, this thesis in Chapter 3 has applied the techniques identified by Staten and Strong to reveal grand architectures organizing \textit{On the Genealogy of Morality} and other late works. The full range of such techniques

\textsuperscript{172} See also, \textit{The Case of Wagner}, section 9.
\textsuperscript{176} Crawford, \textit{supra}.
Nietzsche used to induce a musical experience—a "resonance between Nietzsche's words and the (reader) reading harmonizing with them"—and thus "understanding" in the reader, has yet to be determined.

To investigate Nietzsche's rhetorical technique further, one would want to seek links between the four causal errors in *Twilight of the Idols* and the usage of false resolution. One would expect Nietzsche to use false implications of completeness (pronoun-inclusion) that match instances where that logical-causal error comes into play. Conversely, one would expect compositional reinforcement of causal patterns Nietzsche felt to be true but left to be "divined" by the self-initiating listener. This linkage could be generalized into a broad principle of "music-writing."

The chemist replies: translate Wagner into reality...

Nietzsche could employ compositional principles that match fundamental causal relationships or causal stages of becoming. As the reader's "ear" becomes more "intelligent" and learns to perceive hidden themes, the reader will have simultaneously acquired and ritually reinforced a new skill for listening to causalities in nature.

### 6.4 Holmes's Rhetoric

*The Path of the Law*

Much has been written about the rhetoric of the "The Path of the Law." Sheldon Novick calls it a "great poem" in the literature of the law. Many commentators focus on the speech's effect
on its audience or its late Nineteenth century legal readers. The delivery was well received, which palpably distinguishes Holmes from Nietzsche as a public speaker. Holmes reported to Lady Castletown by letter dated January 11, 1897:

I fired off my long projected discourse—on the law—with unexpected success... The room was crowded the air not too good—and I was preceded by more than an hour of prayer and discourse on the finance of the institution (a relatively new Law School) and summaries of the little glories achieved by graduates until I saw the listeners eyes began to roll with poisoned slumber—and I started sadly enough—but to my great satisfaction I had them all wide awake pretty soon and kept them so.183

The issue here is how Holmes uses the elements of rhetoric to convey an understanding of the nature of collective legal reasoning outside or between the lines of literal communication in theoretical concepts. Specifically, how does his rhetoric implode his philosophy into the drama of formal elements? By “reverse engineering” from the rhetoric to the theory that produces it, we can gain an understanding of Holmes that overcomes self-contradictions that have plagued readers who ignore rhetoric as window-dressing and attempt to classify Holmes into various pre-established theoretical categories.

The broad structure of the speech is transparent. Many commentators remark that the speech moves through three distinct rhetorical modes, variously described as follows:

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Holmes begins by exhorting us to study the law as a “bad man” who ignores moral content and focuses only on the outcomes of cases. Law develops differently than morals—though they are mutually interactive—so using moral language would only distort attempts to predict judicial behavior. Nor can law be reduced to a precise edifice of antecedent logic of its own apart from morality. The first part of the speech attacks attempts to reduce law to systems of pure antecedent reasoning. The second part of the speech claims that law should ultimately strive to achieve socially desirable ends, so that judges should deconstruct tradition and themselves to identify implicit utilitarian and political choices and endeavor to make them explicit, thereby transforming law into a self-conscious science. However, a social science that eliminates risky choices is an unattainable ideal and tradition remains a necessity of circumstance, so the student of law must be content to become a master who dutifully contributes to the project of improving the law and whose satisfaction comes from duty pursued and an occasional glimpse of the infinite.

Joan Schwarz’s analysis comes closest to the present task by examining the rhetorical form of the speech to imply the jurisprudential content, in a manner similar to Staten’s analysis in

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183 Quoted from Reed, page 273.
185 Parker.
186 Schwarz.
187 Ibid.
Nietzsche’s Voice.\textsuperscript{188} Schwarz observes that in “The Path of the Law” Holmes used three distinct “enthymemes”—presumed holistic structures of ideas and their relations. The idea here is that in an argument the “rhetor” seeks to establish a thesis by exposition of a minor premise in the context of a major premise shared with the “auditors” but often elided from the work. The enthymeme is the unstated major premise, which is more than a mere set of propositions, including a whole field of ideas, their relations and a style of reasoning. Schwarz draws interesting conclusions from Holmes’s use and violations of rhetorical expectations.

According to Schwarz, the first part of the speech operates in a “value” level of enthymeme, which is marked at the elemental level by verbs that evaluate, or by a copula and a value form. The second part of the speech operates in a “consequential” level, marked by verbs of causation or verbs of influence. The two different rhetorical positions are thus evident in the contrasting uses of language throughout the speech.\textsuperscript{189}

The first part of the speech makes evaluative claims such as “the law is a well-known profession.” However, Holmes does not attempt to manage the audience’s common store of values, thereby denying himself a major premise from which he could draw a conclusion. Holmes’s strategy of placing incompatible ideas together “would have been designed merely to dislodge or unsettle his auditors’ beliefs rather than to convince them firmly of any new conviction.”\textsuperscript{190} However, this effect becomes upsetting if continually imposed, much like a motif repeated too often in music, creating a growing sense of dissonance. Moreover, Schwarz notes that Holmes simultaneously implies a policy enthymeme that law should not be considered “coextensive with any system of morals” so that the rhetor’s insistence on a forced choice

\textsuperscript{189} Schwarz, page 238.
\textsuperscript{190} Ibid., pages 240-241.
between incompatible value structures could lead to serious alienation between rhetor and auditor.

Hence, by the exhortative use of language, emphatically concrete and descriptive (the rhetorical characteristics of deliberative discourse), a rhetor such as Holmes could expect a strong emotional response from his auditors.\textsuperscript{191}

In the first part of the speech, Holmes gives only one reason for rejecting moral language, namely, that intentions are not fully discernable from external linguistic expressions. Holmes implicitly asserts a nominalist philosophy of language where words merely externally represent and communicate ideas and cannot fully reflect mental processes. Consequently, the external, prediction approach to law is implicitly justified by the inherent inadequacy of language. Interestingly, Schwarz identifies the type of "poetic implosion" typical of Nietzsche in that Holmes expresses this through the very elements of the rhetoric as para-conceptual, performative reinforcement.

Holmes’s language choices reveal a representational use of language, a faculty with no real subject matter of its own, merely a technique or vehicle to communicate ideas. When language is thus reduced to its methodological function, technique is separated from ethical consequences. As a matter of fact, in the first half of the speech, Holmes’s rhetorical strategy corresponds with the substance of his speech; i.e., both the rhetoric-used-as-technique and the law-defined-as-prediction have been divorced from ethics and are purely instrumental in purpose and function.\textsuperscript{192}

\textsuperscript{191} Ibid., page 241.
\textsuperscript{192} Ibid., page 243.
Before entering the second part of the speech, Holmes eases the unsettling effect by noting it is not the time to work out a theory in detail, only claiming to provide a series of hints to throw light on the path of law and two pitfalls along the way.\footnote{Ibid., page 243.}

Applying Schwarz’s rhetorical analysis, it appears that Holmes sought to provoke a strong emotional reaction and unsettle the audience and readers with an implicit theme of nominal language and how it challenges those who desire to do well as lawyers to seek an empirical, scientific approach to legal prediction. However, Holmes’s para-conceptual communication has its risks. As Schwarz notes, Holmes does not explicitly say why the “bad man” should be the reason to consider the law as a business with prediction as its primary goal. The two-clause enthymeme (law is not coextensive with morals; look at law as bad man) easily reduces to a single clause: the law operates for the bad man.\footnote{Ibid., page 240.} Indeed, this seems to be among the most frequent mis-readings of Holmes.\footnote{Many papers received from first year law students contain spirited mis-readings that affirm Schwarz’s analysis that Holmes’s reticence invites a reduction of law to a crude, amoral positivism and that a strong emotional response would be provoked.}

The second part of the speech contains an implicit reversal of epistemological stance, from bare prediction of judicial behavior using case outcomes alone, to consequentialist evaluation of the effect of alternative decisions. Again, Schwarz concludes that ‘[t]he shift in epistemological positions is evident most dramatically in the change in language usage and rhetorical strategies.’\footnote{Schwarz, page 244.} However, Schwarz observes that Holmes only \textit{appears} to be shifting to a strategy of argumentative synthesis or persuasion.\footnote{Like Nietzsche, Holmes set up a false resolution using pronoun shifting from “we” to “they” and, after “lulling the audience into an attitude of complacency and acceptance of his views” as a “rhetorical ploy,” he imposes another}
disjunction on his auditors. Holmes then focuses on the relativity and contingency of external factors that affect judicial decisions. Thus, two divergent epistemologies of law—law as a closed system of inner development *versus* law as socio-functional analysis—conflict below the literal level of the text as discordant theories that cannot be easily reconciled with one another. Schwarz describes the rhetorical effect:

The best assumption that can be made now, however, about his auditors at the time of the speech is that, with the shifting theoretical grounds, they must have been left quite confused about the existing reality of the law. ... To compound the confusion, Holmes uses a third rhetorical strategy in the conclusion itself.

The third strategy is the rhetorical device of transcendence in "whereby rhetor and auditors are urged to submerge—even if only temporarily—all differences of opinion or policy in the name of some commonly agreed on higher value or goal—here the goal being the Ideal of Law and its universal interests in which people can believe." Holmes, however, cagily avoids any fighting tag such as "Ideal of Law" or, as one would have expected, "Justice." Schwarz's rhetorical analysis leads to the following conclusion:

Holmes's audience in 1897 as well as readers since then have been left to resolve on their own the contradiction inherent in these two conflicting legal theories and world views. Given the rhetorical complexity of this speech, discerning Holmes's purpose is a little like trying to comprehend the complexity of the law and its "unfathomable process."

\[197\text{ Ibid., pages 244, 249.}\]
\[198\text{ Ibid., page 245.}\]
\[199\text{ Ibid., page 248.}\]
\[200\text{ Ibid., page 248.}\]
\[201\text{ Ibid., page 249.}\]
\[202\text{ Ibid., pages 249, 250.}\]
Schwarz reveals a fundamental insight into Holmes’s presumable educative design: Holmes appears to have intended the rhetorical confusion and intended the requirements for its resolution to be an exercise that mimics how one should approach law as a science. Schwarz’s analysis advances to the threshold of the claim that the grand rhetorical design of Holmes’s “The Path of the Law” with its unnamed, unseen “Ideal of Law” is roughly equivalent to Nietzsche’s grand rhetorical architecture of the Medusa’s Head in Zarathustra.

Beginning with the title—“The Path of the Law”—Novick notes it was plainly a reference to Bushido, the way of the Japanese warrior, a chivalric code. Its alternative title was “Law and the Study of Law.” When working on the speech, Holmes referred to it as “a discourse on legal education” and as his “discourse on the Theory of Legal Study.” Both Nietzsche and Holmes seem to take the rhetorical stance of wise Eastern master who educates the disciple by posing unanswerable questions. Moreover, the speech uses the image of “a narrow path, a kind of sword-bridge, with fatal pitfalls, on either side,” not unlike Nietzsche’s image of crossing a tightrope stretched over an abyss. Holmes is principally an educator who sends students off as warrior-scientists to study the law as a dutiful way of life.

Robert Gordon moves us closer to the mark with his observation that this speech “re-enacts the narrative of Holmes’s own journey—perhaps in the battlefields of the Civil War, perhaps earlier—from loss of faith in ideals and morals toward a newfound faith of the scientist

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203 Novick, page 54.
204 Reed, page 285.
205 Reed, page 297, Holmes to Lady Castetown, September 17, 1896.
and the soldier." It seems every self-conscious Promethean is compelled to reproduce poetically his journey into the underworld—in Holmes’s case, going under as the “bad man.”

In the battlefields of the Civil War, if not before, Holmes abandoned moral idealism and began his journey into the underworld as a “bad man.” The “The Path of the Law” opens with the bad man tragically undermining the morally confident law student. Holmes injects chaos into jurisprudence by attacking the use of moral terminology, and indeed, the aspiration of language in general. As Richard Parker observes, for Holmes “language is too much the master.” Rather than dissemble with inadequate words, Holmes the bad man leads us to the mute, chaotic world of action to preserve all excess of conceptual meaning contained in law’s dramas.

Holmes’s audience would have been enraged with such a forthright statement of fact. Holmes cleverly veils this disturbing epistemological insight behind his rhetorical stance and it only reaches consciousness to demonstrate its utility in exposing how moral language distorts doctrinal development. Holmes exploits the audience’s pragmatic, emotionally grounded desire to predict cases as practitioners and simultaneously insinuates a language philosophy heretical to conscious thought. Holmes begins to set the reader’s mind against itself. A masterful seduction is in play.

Holmes’s philosophy of language treats law’s concepts as genealogical repositories of a different constellation of forces than morality, and so law needs its own set of markers. Indeed, law as science might work better starting with Tarot cards than moral concepts. Considerations

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209 This strongly qualifies any biographical reductionism that has Holmes being forced into law by his father. Holmes may have resisted his father’s pressure had it not seemed a suitable path for his philosophical journey as the “bad man” of moral philosophy—beyond good and evil, one might say.
210 Parker, 1034.
211 I thank April Lee, a first year law student at UBC for this insight. April Lee, “Holmes, Law and Tarot Cards; or Why Lawyers Should Charge $3.99 a Minute” (unpublished paper). In terms of this thesis, Tarot cards are capable of taking on alternative meanings, depending on the context of the reading as it develops, which appear to match.
of morality must come in through another route. Nevertheless, chaos is not to be mastered simply by perfecting a shadow-morality in the logical edifice of law. Language can only quantify relations in ways that leave causal residues. Form alone, whether moral or logical cannot hold law—chaos will come again, as Civil War should the delusion persist too long. Holmes urges judges to anticipate such strife through conscious deliberation of consequence, both by analyzing social utility, and by listening to the active agency of dis-utility, political struggle. Holmes is weaning his audience and vi-de-ence from naively blind love for falsely eternal formal causes. To achieve this, Holmes shifts focus to consequential critique.

To craft a renewed formal cause, the final and efficient causes of utility and politics must alter the material cause—the inertia of tradition. To discern tradition's most pliable joints, Holmes becomes the genealogical historian. Holmes risked becoming the consequentialist darling of utilitarianism and economics, or the sociological brute of the power politics of Social Darwinism, depending upon what the reader wants or fears most in Holmes. However, as Schwarz noted, Holmes used rhetorical ploy to undermine this false resolution. Science, like morality or law as logic, is a product of language and so doomed to ultimately uncertain incompleteness. The point is perhaps not made forcefully enough in "The Path of the Law"—Holmes would emphatically correct this potential misimpression in his next major speech, "Law in Science and Science in Law"—but it was already implicit in that the final lesson from political economy is that every choice entails giving something up. Close readers of "The Path of the Law" such as Tracy Higgins seem to get the point that Holmes's cynical acid dissolves faith in social science as well as morals and logic. Tracy E. Higgins, "Straying from the Path," 110 Harvard Law Review 1019, 1021 (1997). Parker notes that "in context, it's utterly obvious": Parker, 1036.
But judges must decide; their soldier’s duty compels them to run into the gunfire of uncertainty and illusion. In what faith might this duty be grounded? Holmes answers by exhorting us to become masters of our craft who by dutiful, piecemeal assault on law’s tradition, using the best science and political economy have to offer from time to time, reinvent the forms of law from time to time under the name of jurisprudence, and thereby catch a glimpse of the infinite from time to time. Holmes here speaks to initiates—those whose “experience” enables them to “understand” that which eludes direct expression in concepts. Holmes wrote to Lady Castletown, December 4, 1896:

I think you appreciate the pleasure of weaving the mystic phrase, that twinkles and does not abide, yet conveys a flash to the chosen.\textsuperscript{213}

Shifting focus back to the grand architecture of the work, Robert Gordon observes that “Holmes in The Path is not putting forward a theory of law, but rather (to paraphrase Wallace Stevens) thirteen ways of looking at law—sketches of approaches to the legal system that will present it in a new light.” Tracy Higgins more plainly notes both the incompleteness of each of morals, logical form, economics, statistics and social science in Holmes and their irreconcilable nature for Holmes.\textsuperscript{214} However, for modernists for whom the logic of \textit{reductio ad absurdum} with its law of the excluded middle is the only legitimate grid system to map empirical landscapes, the alternative to moral language is either social science or a “retreat to positivism.”\textsuperscript{215} Like the Mithraic Perseus, the modernist must slay the Holmesian bull with head turned away, lest the Medusa’s head achieve its effect. \textit{Reductio ad absurdum} is the aegis of Athena—warding off the

\textsuperscript{213} Reed, page 296.


\textsuperscript{215} \textit{Ibid.}, 1021.
residues of the excluded middle that might paralyze the will’s need for certainty and submerging legal method back into the unconscious as renewed interest in “natural law.”

Holmes’s rhetorical success then depends on creating in the reader an overwhelming romantic desire to overcome that which skepticism says ultimately cannot be overcome, without diminishing that skepticism. Holmes must use style to create a feeling of this “sweet undersong” in the poetic fashion of Nietzsche’s musical dramatizations of their mythic fields.

Style at bottom, of course, is a question of totals, not of single words. It is the personal equation of the writer… When the style is fully formed if it has a sweet undersong we call it beautiful, and the writer may do what he likes in words, or syntax; the material is plastic in his hands to image himself…

As Holmes’s path moves through its three modes, in the undersong Holmes plays out what law resembles but is not—moral foundationalism (Hegelian transcendence and natural law), logical form (formal cause), tradition (material cause), political struggle (efficient cause) and the economics of utility (final cause)—while what law “is” hovers above us as a rhetorical effect or gestalt of “Justice” that generates a love of “our mistress the law” as a side-effect of the Heraclitean war between reason and reality.

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216 Domnarski, page 255.
217 It should be clear that Holmes forcefully rejects any tidy thesis-antithesis-synthesis classification of progress that would suggest transcendence in any enduring sense or as being a risk-free or inevitable road to progress.
219 See Figure 1.2 in the introductory chapter to this thesis, “Emerson’s Twins.”
Holmes's Judicial Opinions

Holmes wrote over two thousand opinions as a judge. Commentators agree Holmes was a masterful prose stylist and that this is what perhaps distinguishes him most among American judges. However, as Novick observes, echoing the evaluation of Edmund Wilson, Holmes's prose style, though good, was not great enough to account for his distinction. For some, such as Thomas Grey, Holmes's appeal stops here: his craft was a merely matter of artistic pride and not relevant to the process of justice. Similarly, for others, Holmes's style is engaging because his fascinating personality shines through. More interesting for the purposes of this thesis are the evaluations of Novick and Wilson, who sense a surging philosophical mind seeping into the very elements of his style—what this thesis has been calling poetic implosion. Novick quotes Wilson:

It is Holmes's special distinction—which perhaps makes him unique among judges—that he never dissociates himself from the great world of thought and art, and that all his decisions are written with awareness of their wider implications and the importance of their literary form. He was not merely a cultivated judge who enjoyed dipping into the belles lettres or amusing himself with speculation: he was a real concentrator of thought who had specialized in the law but who was trying to determine man's place, to define his satisfaction and his duties, to try to understand what humanity is.

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221 Some recent articles on Holmes's opinions include: Domnarski, supra; O'Connell, supra; Grey, supra.
222 Novick, 104.
223 Grey, 5, 6 and 11.
Posner likewise classifies Holmes as a "writer-philosopher." Posner vaguely tells us this means something more than "a bright coat of paint on a philosophical chassis" but he leaves undeveloped this intriguing connection between rhetoric, philosophy and justice that he senses in Holmes's opinions. Closer to the mark, from the perspective of this thesis, Novick suggests Holmes somehow conveyed legal thought along a different medium than English prose.

When people praise Holmes's style, I think they sometimes have a quite different thing than style in mind. Holmes's medium was not really English prose; it was legal thought itself. Holmes's opinions, with their special form and style, were contrived to present with special force Holmes's own though, alive and wriggling.

However, in the end Novick suggests we preserve Holmes merely as an expression of the spirit of his time.

Holmes is not important to us now as a great originator of ideas but because he expressed the spirit of his time in vivid form: in a country that generally does not honor poets and philosophers, Holmes is our Tennyson, our Hugo, our Gorky, and our Schopenhauer. There is something great in this spirit we fear to lose.

The present issue for this thesis is how the stylistic elements of a judicial opinion might play an integral role in the process of justice. Taking seriously the philosophy of language and psychology of decision-making seemingly common to Nietzsche and Holmes, one can begin to understand how a judicial opinion is fundamental to the process of justice. In this view, a judicial

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226 Ibid., xviii, xxiii.
227 Novick, 105.
228 Novick, 107.
decision is more than a mere resolution of a dispute, often with doctrinal “reasons” to legitimate
the use of force and perhaps even some suggestions for improving doctrine. A judicial decision
should also be a deed in a collective learning effort—communal empiricism—and it is through
the written opinion that the deed resonates to influence subsequent decisions. The judge as
scientist must report the results of the great doctrinal experiment at the point of contact in the
particular case as educative grist for subsequent theory making. Mere dispute resolution is not
“law”—that is a deed without an echo, a non-event in the development of law. But how does a
judge transform deed into event? We can infer how judgments gain effect by working back from
Holmes’s instructions in “The Path of the Law” on how to study law, with a little help from
Nietzsche.

The music-writing aspect of Nietzsche’s text is suggestive of how a reader of legal cases
might engage with judicial text. The “residues” of justice are not to be found in the words and
theory of a decision but in the deed, in the fact-outcome pairing of the case decision. The “bad
man” strips away the doctrine to “feel” the cases and develop an “ear” for the implicit themes.
The law-and-economics jurist selects a series of commercial cases and “hears” the least-cost
insurer motif organizing case outcomes from below the surface chatter of doctrine’s circular
concepts. Professor J.C. Smith has generalized this approach to law, calling it “deep structure”
analysis.229

In this sense then, Nietzsche used music writing as a means to imbed causal patterns in a
work-book or case-book to be used to train the close reader to a higher “order of rank.”
Nietzsche’s order of rank means the power-law degrees of criticality in one’s absorptive pattern-
recognition capability—the Richter-scale measure of one’s capacity to perceive thematic

229 See chapter 2 of this thesis for discussion and cites.
complexity outside the concepts of existing theory. The skill to be learned is one of emotional-experience-driven self-transformation, not merely a skill in analyzing the compositional techniques. One develops an “ear” for a genre of music by listening well and getting used to it, until one is capable of “divining” the trajectory of its pathos. As educator, then, Nietzsche used music writing to encode patterns of a different means of pattern-recognition. The art of the educator is to match the means of encoding patterns into musical expectations with the patterns of causality and evidence. Music writing, a coding process, is the inverse of deep-structure analysis, a decoding process.

The writer of the judicial opinion is likewise an “educator,” a transmitter of collective experience primarily as a writer of drama. The drama should be a portrayal of action and decision that “cuts into the flesh like knives.” To be sure, the judge must provide a surface analysis to placate and guide mere theoretical man with doctrinal concepts and allow him to act with a reasonable sense of confidence, but the “diviner” of common law will ultimately rely on the underlying drama to collect the residues of justice and to transform the law poetically.

Did Holmes seek to achieve this? It is unclear to what extent he developed a conscious understanding of the role this aspect played in his judging. It is clear from “The Path of the Law” and “Law in Science and Science in Law” that Holmes saw the judge as humble participant in a greater project of collective learning. A dissent—presumably wrong in result, wrong in reasons and an illegitimate basis to use force—in some way educates. Holmes had an intuitive understanding that he was to infuse the dynamics of justice with universal insights into causality through the very elements of his style. His style was to create a concise drama with strong

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230 See especially, sections 310 and 373 of Joyous Science.
emotional impact that identified those consequential costs that most affected his sensibilities as decision-maker—all that the bad man needs to understand law.

A sampling of Holmes quotes perhaps best conveys his desire for drama and effect in his opinions. Judgment opinions must be dramatic.

[I have finished] two dissents that I wrote with gaiety of heart, in a railroad and a telegraph case that I was pleased to have decided as they were, but in which I couldn’t swallow the pretense at logic of Harlan and White. If they’d just brusqué the thing and said: Logic for law-school—this is business—and when a railroad has a right to come into a state it comes in with all its roots, I probably should have grinned and shut up. My form of expression is evidently modeled on what I heard an actress saying—that if she should recommend a play to Mr. Frohman he would read it politely and return it and say “That is literachoor—what we want is drayma.”

Drama entails an emphasis on external action with concise portrayal in concrete images. Drama ought not to be merely derivative from doctrine as moral lessons. Such pedantry fails to transmit the factual causalities of the human situation.

I have on hand the second part of Faust with Bayard Taylor’s translation for another try at that. I am prejudiced against it. If a man chooses the form of a play, it seems to me that his first duty is to make it good in the external sense i.e. to give it a coherent, interesting, easily intelligible movement. If it doesn’t have that I don’t care much for inner meanings. Let the author put them in a treatise but a play must in the first place be a play—not be a lord among wits and a wit among lords.

232 Quoted in Novick, page 106.
233 Quoted in O’Connell, 521.
The conciseness and brevity must reach down into the elements of the prose in an emotionally gripping way.

I don’t believe in long opinions which have been almost the rule here. I think that to state the case shortly and the ground of decision as concisely and delicately as you can is the real way. That is the English fashion and I think it civilized.\(^{234}\)

I abhor, loathe, and despise those long discourses [of lawyers], and agree with Carducci the Italian poet who died some years ago that a man who takes half a page to say what can be said in a sentence will be damned.\(^{235}\)

... a sentence gets its force from short words. That is all.\(^{236}\)

I think it is permissible to end a sentence with an insignificant word. Not a paragraph, however. That should end with the blow of an axe.\(^{237}\)

I don’t care for it if it does not fulfill the end of art for me by pulling the trigger of an emotion.\(^{238}\)

The drama must also tie in its thematic connection to the universal, which is the most difficult aspect of the task. Weaving in the universal—which this thesis presumes means the causal understanding Nietzsche labored to convey—while retaining the impact of conciseness is mastery.

\(^{235}\) Quoted in Domnarski, 256
\(^{236}\) Quoted in Domnarski, 257.
\(^{237}\) Quoted in O’Connell, 543.
\(^{238}\) Quoted in O’Connell, 543.
Your business as thinkers is to make plainer the way from something to the whole of things, to show the rational connection between your fact and the frame of the universe.\textsuperscript{239}

[T]he thing to aim at is to see as much as one can the great forces behind every detail—a wavelet of the Atlantic Ocean is different from one of Buzzard’s Bay. Therefore after a man has a working knowledge of his job—at least if he is a judge—I would advise him not to be eternally reading late cases but to let in the streams of philosophy, sociology, history, economics, etc. etc. I guess it tells. I was more pleased than I can say by a letter on my 70\textsuperscript{th} birthday from our leading law writer quoting a French remark…and applying it to my decision—that he had one foot on the finite and the other on the infinite. It pleased me that anyone should see my intent—to look at the particular in the light of the universal.\textsuperscript{240}

... there is always the fun of untying a knot and trying to do it in good compact form.\textsuperscript{241}

Did I ever tell you of Corot—the painter—that I heard once that he began as most careful draughtsman working out every detail and came to his magisterial summaries at the end? I have thought of that in writing opinions latterly. Whether the brethren like it I don’t know. Of course—the eternal effort of art even the art of writing legal decisions is to omit all but the essentials—“The point of contact” is the formula—the place where the boy got his fingers pinched—the rest of the machinery doesn’t matter. So the Jap. Master puts five dots for a hand—knowing they are in the right place.\textsuperscript{242}

Of course, any understanding beyond the reach of existing theory is apt to be obscure to ears trained only in the discourse of existing theoretical concepts.

\textsuperscript{239} Quoted in O'Connell, 542.
\textsuperscript{240} Quoted in Novick, 105.
\textsuperscript{241} Quoted in Donnarski, 257.
One cannot be perfectly clear until the struggle of thought is over and you have got so far past the idea that it is almost a bore to state it; but decisions can’t wait for that, and writers usually won’t. Therefore I do not regard perfect luminosity as the highest praise. An original mind at work is hardly likely to attain it. Those who are perfectly clear are apt to be nearer the commonplace.\textsuperscript{243}

However, an opinion without guttural impact is a deed with effect, a non-event.

\ldots the boys generally cut the genitals of [my prose when they edit] in the form of some expression that they think too free.\textsuperscript{244}

The vulgar hardly will believe an opinion important unless it is padded like a militia brigadier general. You know my view on that theme. The little snakes are the poisonous ones.\textsuperscript{245}

Felix Frankfurter wrote that Holmes had a “favorite remark, when as a naughty boy, he used to put some stinger in an opinion. With a mischievous twinkle in his eye he would say such and such phrase or sentence was ‘calculated to give the brethren pain.’”\textsuperscript{246} One gets the impression Holmes sought out to write compelling drama whose clear line will “cut into the flesh with knives.” The judge must select and present the facts and tie them to the outcome in a dramatic form that connects to law’s dynamics of communal empiricism. For Holmes, law’s eternal becoming manifests causal universals, the same causalities that animated other mythic poets such as Nietzsche.

\textsuperscript{242} Quoted in Novick, 107.  
\textsuperscript{243} Quoted in \textit{Honourable Justice}, page 283 chapter 20 footnote 35.  
\textsuperscript{244} Quoted in Domnarski, 254.  
\textsuperscript{245} Quoted in \textit{Honourable Justice}, page 283 chapter 20 footnote 34.  
\textsuperscript{246} Quoted in Domnarski, 253.
Did Holmes succeed? Thomas Grey, for whom Holmes’s craft was pure ornament, nonetheless gives a usefully frank evaluation:

I am always amazed at the excitement and drama he was able to inject into the most mundane lawsuit. We misunderstand him if we think of him primarily as a practitioner of the plain style... His models in English prose were Carlyle and Emerson, neither one a plain stylist. His compressed, tense, sometimes paradoxical opinions are notoriously hard to understand. Their stylistic virtues are more those of a Metaphysical poet than of an English civil servant.247

Novick, also without considering the role of style as an element of justice, likewise senses the drama generated by Holmes’s opinions.

They were fundamentally *dramatic*; their impact was almost physical.... Holmes’s opinions often swept his colleagues into agreement, and they continue to carry us along. His opinions seem to defy logical analysis; they move at quite another level of thought and feeling.248

Justice Cardozo, himself a gifted writer and eminent figure of American law, wrote that “law in [Holmes’s] hands has been philosophy, but it has been literature too. If any one has ever been skeptical of the transfiguring power of style, let him look to [Holmes’s] opinions.”249 One can conclude, then, that Holmes succeeded in using style to make his opinions cut into the flesh of his readers—judges, lawyers, students and others seeking to be “educated” in law.

Holmes’s effect is comparable to Lord Denning’s effect in more recent Anglo-Canadian jurisprudence. Law students in a first year “perpectives” section at the University of British

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247 Grey, 10-11.
248 Novick, 106 (emphasis in original).
249 Domnarski, 251.
Columbia were asked to select and write headnotes for cases from their substantive courses that exemplified various principles of legal reasoning explored in this thesis. The majority (23 of 35) selected Lord Denning judgments in response to the following question: “Select a case where the judge is noticeably using rhetoric to seduce (emotionally engage) subsequent judges into empathizing with the fact-outcome mapping of the case.” All were able to find a case. Eight different judgments by Lord Denning were chosen.\(^{250}\) *Hinz v. Berry*, a nervous shock damages case, is perhaps the best illustration, with one of Lord Denning’s most memorable opening lines: “It was bluebell time in Kent.” One student, Scott Johnston, after quoting the opening line, described the effect as follows:

Denning gives great detail as to the qualities and serenity of a family on a picnic who are tragically hit by a Jaguar and the husband is killed. The widow is portrayed as almost an angelic woman—“remarkable” in Denning’s words. The accident is described much like a script-treatment for a motion picture, complete with the gore of “…blood… streaming from their heads” and “…children strewn about.”

Another student, Thomas Lamb, noted that in *Hinz v. Berry*, Lord Denning, “like Demosthenes, convinces before he argues.” The preponderance of Lord Denning judgments is significant in that most of other cases (9 of 12) were Canadian cases, which better reflects the proportion of Canadian cases in the first year curriculum. It is no mere coincidence that Lord Denning’s

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judgments come to mind most vividly and remain in the curriculum—they “educate” in the sense of Holmes and Nietzsche.\textsuperscript{251}

The quality of Holmes’s opinion writing now becomes more apparent. His opinions are compelling dramas that hold us as embodiments of the real, much as Shakespeare’s plays grip us. Moreover, Shakespeare’s plays resist being reduced to the latest psychoanalytic, biographical, historical, moral or whatever other reduction.\textsuperscript{252} Holmes’s opinions must be evaluated as canonical literature, in the sense of Dimock’s literary justice, whose lasting value is measured by how well they capture the universal in the human condition, rather than whether its concepts have survived into the latest doctrinal fashion. Thus \textit{Buck v. Bell} is great opinion writing, not because of the outcome but because the drama cuts into the flesh so deeply:—his “harsh tone” warns us: “this will hurt” and it stings. Stripped of the anesthetizing layers of doctrinal padding, the whiplash of the “residue” smarts even more and so remains imprinted in the canonical education of lawyers as an object lesson in justice and the human condition.

\textsuperscript{251} A comparison of Holmes and Denning would be interesting. They shared a sense of the importance of dramatic impact in judgments. Denning, however, seems to have been more apt to transform doctrine single-handedly to achieve justice in the particular by deconstructing precedent. Holmes seems to have been more resigned to doctrinal reformation being achieved collectively rather than through the efforts of a single judge.

\textsuperscript{252} Harold Bloom, \textit{Ruin the Sacred Truths: Poetry and Belief from the Bible to the Present} (Cambridge, MA: Harvard University Pressm 1989).
CONCLUDING REMARKS

This thesis set out to ascertain the theories of justice of Holmes and Nietzsche. The way to their understanding of justice has proved multi-faceted and more labyrinthine than anticipated. Consequently, the scope of the task has generated a much larger thesis than expected.

The overall conclusion is that Holmes and Nietzsche did indeed have a coherent theory of justice organizing their works. Each thinker's understanding of justice evolved as a working intuition and neither produced a systematic account. Without the concepts of self-organizing criticality, it is not apparent how they could have done so. Rather, each used rhetoric masterfully to create within the diligent reader, potentially, a perlocutionary effect that could induce an experiential understanding of the principles they struggled to communicate.

Nietzsche's esoteric techniques cleverly address several problems. Nietzsche had to hook readers with a style that induced them to seek meaning in his text obsessively, although most readers would be ill disposed to his ultimate conception of justice. The reader's desire to make Nietzsche's philosophy seem coherent and to solve his esoteric puzzle motivates working through a text designed as a workbook to train the type of inductive creativity Nietzsche understood as the foundation of his understanding of justice. Nietzsche encoded the core of his esoteric content using a myth-scheme that the reader could only solve with an understanding of self-organizing criticality and an interest in matriarchal interpretations of the myths. In this way, Nietzsche could protect the core of his thinking from ill-disposed readers and so not pre-emptively undermine his potentially greater sphere of influence.

Holmes achieved a similar educating effect with "The Path of the Law," exploiting the lawyer's desire to succeed in the profession to motivate an obsessive search for new meaning within case precedents. By relying on an established canon of cases, Holmes could produce a
much more succinct work than Nietzsche—a guidebook instead of a workbook. Nietzsche, in effect, had to create his own canon of precedents, particularly to manage his subliminal introduction of matriarchal elements. Although Holmes was well disposed toward and inspired by strong, intellectual women, he evidently did not consider matriarchy and provided no obvious signals that he wrote with an esoteric message. In sum, Holmes’s rhetorical task was far less demanding than Nietzsche’s task. Nonetheless, for both Holmes and Nietzsche, their understanding of justice could not be approached without careful examination of their rhetorical writing techniques as means to stage self-organizing criticality within the reader.

The conclusion of this thesis as to the content of their theories of justice is difficult to summarize succinctly. Holmes and Nietzsche were nominalist skeptics. Justice involves an open-system dynamic of doctrinal evolution that reacts to a series of cases. If the cases challenge the doctrine at its least-fit points—with fitness measured in terms of better accommodating conflicting values by better applying current know-how and budgeted resources—then the system is more likely to achieve self-organizing criticality and thereby enhance its adaptive self-transformations. The principles of self-organizing criticality suggest norms for regulating the bandwidth of pragmatically relevant considerations, for capturing such considerations within cases narratives, for inductively finding patterns therein, and for transforming the doctrine to accommodate the new patterns while minimizing potential harm to existing values taken for granted and not understood. Holmes and Nietzsche’s theory of justice generates constructive and testable norms to foster the effectiveness of this institutional process.

Both Holmes and Nietzsche viewed humans as inherently social beings who lead more psychologically fulfilling lives by drawing on reproductive instinct (sexuality in a broad sense) to motivate self-sacrifice for community. Although Holmes and Nietzsche viewed community as more important than the individual, strong community requires individuals who become robustly
creative by applying the same developmental principles at the personal level. As only an individual experiences the full nuances of the "precedents" in his or her own development that are essential to the process of self-organizing criticality, justice entails considerable respect for individual autonomy and opportunity to self-manage development. In other words, Holmes and Nietzsche did not posit individual rights as fundamental; rather, individuals are granted leeway because it fosters community growth. This generates new criteria for managing the boundaries of individual liberty, more in accord with feminist attempts to revise public and private distinctions, such as in Robin West's *Caring for Justice*.

Nietzsche went beyond Holmes by asserting that constitutional management of institutions would also require additional management of unconscious male discretion. In Nietzsche's view, the male's evolutionary disadvantage as uncertain parent has lead to the evolution of instinctive and unconscious a-social male tendencies. Given that justice entails an adaptive dynamic that depends on the discretionary creativity of its most talented individuals, community growth would be fostered by female supervision of male discretion. Just how far Nietzsche thought such matriarchal controls should go is not apparent, although further work might reveal additional detail in his esoteric prescriptions.

Further research emanating from this thesis could proceed in numerous directions. There is an obvious need to re-examine Holmes's judicial opinions. Nietzsche's use of "music-writing" and multi-plane rhetoric as a means to promote staged learning of inductive creativity is significant in terms of educational methodology. Nietzsche's application of "Neuro-Mythic Archeology" suggests both a new approach to mythic analysis and a new role for developmental psychology as a fundamental concern within the problem of justice. Nietzsche's provocative conclusions regarding matriarchy warrant research as to how developmentally inevitable male demonism need be. Nietzsche's call for a new science of incorporating knowledge through
gestures suggests re-characterizing ideology as a necessary technology of using gestures, myths and doctrines to manage individuals' subliminal sense of cultural priorities, which should be ironically managed.

In terms of justice, the theme of Holmes and Nietzsche that most warrants additional research is to make justice a more empirical discipline. Recent advances in computer modeling as a research tool, for example, have confirmed the enhanced adaptability of genetic recombination strategies. Future work could test the credibility of the conjecture that an adaptive intelligence emerges from collective application of the dynamics of the precedent-based, accommodative decision-making described in this thesis.

Holmes and Nietzsche's derivation of individual liberties from communal goals warrants further investigation. With self-organizing criticality as an essential element of self-development, much of the detail of self-development cannot be communicated, and so individual autonomy must be highly respected. Nonetheless, the communal origin of the need for individual autonomy provides criteria for critically identifying bad-faith abuse of the autonomy. These criteria are stronger than in theories of justice premised on individualism. This element of Holmes and Nietzsche accords with the common-law trend in Canada to look behind legal rights and prohibit their use in ways that cannot reasonably be justified in terms of recognized social goals. Feminist scholars have similarly sought new criteria to revise the public and private spheres of individual rights. Further research could usefully correlate feminist critique of "rights" with Holmes and Nietzsche's communitarian duties tempered by principles of self-organizing criticality.

More generally, although the critical implications of the new causal paradigms applied by Holmes and Nietzsche were to a large degree already manifest in Marx's writing and have influenced 20th century critical thinking, the full salutary potential of dynamics-based critique can only be achieved in conjunction with analysis of computational and developmental plausibility.
All idealism rests on computationally or developmentally fanciful presuppositions and these should be exposed as empirically implausible. This new standard of critique has just recently been extended from the natural sciences to some of the social sciences. Ironically, its modern origin was the humanities (notably Giordano Bruno), and Francis Bacon attempted to apply the humanities to rehabilitate method in the natural sciences. The science of self-organizing criticality promises to re-animate the venerable wisdom of the humanities.


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