

# Essays

## Nietzsche and Positive Law: A Discourse

*The following Essays seek to address a fundamental question of jurisprudence—the nature of positive law. Positive law is generally distinguished from natural law; positive law being law made by humans as opposed to law of some higher order. If this distinction is valid, then from where does positive law derive its authority or moral force? From reason? From force or threat?*

*Professor Nonet does not proffer theses or draw conclusions. Rather, he sets himself the task of working through the implications of the idea of positive law in Nietzsche and its relation to willing. Accordingly, the Essay traces the threads of “the unconditioned power to posit law” through the many-faceted thought of Nietzsche, whom Nonet views as “the thinker and prophet of legal positivism.”*

*In so doing, Professor Nonet’s Essay brings to light the paradoxical, and ultimately self-consuming nature of a conception of law that at once orders and destabilizes. The undercutting of all values by the “will to power” discloses a world of intoxicating possibility and bottomless subjectivity.*

*Heidegger’s conception of being as nothing, a “no-thing” grounding all particular beings, contrasts sharply with Nietzsche’s nihilism and challenges the all-embracingness of Nietzsche’s notion of positive law. Concentration on the incapacity of positive law to domesticate being (as opposed to beings) opens up the otherwise seamless totality of positive law in Nietzsche.*

*Finally, abjuring explanation for invitation and provocation, Professor Nonet follows Nietzsche through the doublings and paradoxes of the uncompromising and relentless shuttle between masking and unmasking. The so-called “major doctrines” of Nietzsche collapse into one another as will to power enacted through positive law consummates itself in cruelty and revenge.*

*Professor Berkowitz responds, arguing that Nietzsche’s writings teach and exemplify a love of truth, even, and perhaps especially, when they call the value of truth into question. Moreover, Berkowitz maintains that Nietzsche’s thought powerfully manifests the conviction that the noble, the just, and the good are intelligible, and rightly serve as standards for judging morality and politics. Berkowitz suggests that Nonet*

*fails to appreciate how the love of truth taught by Nietzsche condemns the piety which honors Nietzsche as a prophet rather than questioning Nietzsche's revelation concerning the death of God and the supremacy of the will.*

*Professor Nonet offers a brief reply.*