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2019]

BINARIES: REMARKS ON CHAIM N. SAIMAN'S "HALAKHAH"

RICHARD H. WEISBERG*

As a way of capturing a small part of Chaim N. Saiman's immensely enriching new book,¹ I will talk about eight binary operations (to be found *in italics* below) arising from his text. By binary operations—"binaries" for short—I mean barriers to understanding brought on by emphasizing a dichotomy between seemingly opposed nouns. So, for example, we say "oil and water" or, more topically perhaps, "flesh and spirit." The "and" in binaries is meant to express diametrical opposition or at least real tension between the two linked nouns; so "Those two are like oil and water" or "Shylock and Portia map out flesh and spirit as *The Merchant of Venice* proceeds." The first seven of my examples propound the *elimination* of the binary as false and unhelpful, substituting for it new code words—found **in bold** below—that fuse the two parts into one. (Only the eighth and last example—a bizarre fusion crafted into the adjective "Judaeo-Christian"—deserves to be "re-binaried" i.e. split in two forever² instead of linked, as it often is in everyday parlance.) In full disclosure and in fairness to Professor Saiman, neither the last linkage nor the first three binaries are explicitly proposed by him in the book, but they are relevant, I think, to many of his claims.

1. "*Law and Literature*," the conceptual gathering place of this panel and the binary title of my fellow panelist Sandy Levinson's still mandatory edition³ on the similarities and differences within that contentious interdisciplinary. What did it mean to bring together such dissimilar human endeavors? In part, at least for some of us, it meant then and means now the elimination of the binary altogether. Going back to the Jewish Bible and to Cicero, these human endeavors have been *linked* in their common pursuit of expressing and organizing the world through language. The mod-

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1. CHAIM N. SAIMAN, *HALAKHAH: THE RABBINIC IDEA OF LAW* (2018).

2. Strongest on this is Nietzsche, who severed the perverse joinder of "Old" and "New" testaments: "In the Jewish 'Old Testament', the book of divine justice, there are men and things and speeches in such a grand style that Greek and Indic literature have nothing to equal them. . . . To have pasted this New Testament (a rococo taste in every sense) together into one book with the Old Testament, and to call this the 'Bible,' 'The Book,' is possibly the greatest recklessness and 'sin against the Holy Ghost' that literary Europe has on its conscience." NIETZSCHE, *BEYOND GOOD AND EVIL* 59–60, aphorism 52 (Marianne Cowan Trans., 1966)

3. SANFORD LEVINSON, *INTERPRETING LAW AND LITERATURE* (1988).

ern-day pioneer of Law and Literature,⁴ Benjamin N. **Cardozo**, put it this way, establishing and eliminating our second binary,

2. “*Form and substance.*”

Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity. . . . The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. They are the tokens of the thing’s identity. They make it what it is.⁵

Law and Literature, and the corollary Form and Substance, are not binaries: let’s finally agree to bring both together with a name: **Cicero**, or maybe **Cardozo**. And then, too, we might code word it **Admiral Nelson**, recalling what the narrator of Melville’s *Billy Budd, Sailor* says about the fusion of—

3. “*Writing and acting.*” Melville’s narrator states:

At Trafalgar Nelson on the brink of opening the fight sat down and wrote his last brief will and testament . . .; if thus to have adorned himself for the altar and the sacrifice were indeed vain-glory, then affectation and fustian is each more heroic line in the great epics and dramas, since in such lines the poet but embodies in verse those exaltations of sentiment that a nature like Nelson, the opportunity being given, vitalizes into acts.⁶

Writing and acting are not binaries. They form a unity, and let’s call it **Nelson** or at the origins, **Homer**.

Melville’s martial example, like my opening metaphor, gets me closer to Professor Saiman, with whom I now proceed more faithfully, helped among others by Robert Cover and Rabbi J. David Bleich (my colleague), as my paper circles nearer to his explicit arguments and to some of his conclusions. Remember, though, that we have four false and one true binary to go!

4. “*Halakhah as Nit-Picking Law and as Transcendent Ethics.*” Early in the book, Professor Saiman speaks of halakhah along a spectrum of what he calls “opposing poles”: “[as] a system of rules designed to govern human behavior . . . [or] as an object of Torah study, and even as literature.”⁷ Here he comes dangerously close to adopting a binary that can do more harm than good. His book from start to finish tries to grapple with a common perception—which hardly means it is a true one—that Judaism generally (and the Talmud in particular) is a legalistic enterprise

4. Benjamin N. Cardozo, *Law and Literature*, in *CARDOZO: SELECTED WRITINGS* (1947).

5. *Id.* at 340. See further, on eliminating this binary, Richard Weisberg, *Cardozo’s “Law and Literature”: A Guide to His Judicial Writing Style*, 34 *TOURO L. REV.* 349 (2018).

6. HERMAN MELVILLE, *BILLY BUDD, SAILOR* 58 (Hayford & Sealts eds., 1960).

7. SAIMAN, *supra* note 1, at 9.

“superceded” by some spiritually more uplifting belief system, such as Christianity. Fortunately, as Saiman’s text unrolls, a softening of the binary “legalism and transcendence” occurs frequently. My favorite section, to which I will return, is the part of chapter 4 called “Measuring Man,” in which Saiman fully grasps that halakhah’s governing “pole” of legalistic detail is usually in the service of and indeed intentionally *inter-twined* with an overriding and occasionally majestic teaching about human nature and experience. But there are also binary sub-divisions, once we allow the unhelpful thought that halakhah is best understood as *either* rules of law meant for governing *or* as a complex narrative designed to be studied and interpreted by unifying even the narrowest rules with the highest aspirations of the Jewish people. In my view, there is NEVER A DISTINCTION BETWEEN THESE TWO FEATURES OF HALAKHAH.⁸ Let us code this unity **J. David Bleich** in honor of my esteemed colleague at Cardozo, who in a wonderful paper on halakhah says:

Judaism is fundamentally a religion of law, a law which governs every facet of the human condition. . . . [Rambam Maimonides, to whom I will return below when we get to the laws of war,] records the doctrine that the Torah will not be altered, either in its entirety or in part, as one of the Thirteen Principles of Faith. The divine nature of Torah renders it immutable and hence not subject to amendment or modification. . . . But Halakhah must be applied in an infinite variety of circumstances that could not have been fathomed by Jews standing at the foot of Mount Sinai. . . . Torah is divine but “lo ba-shamayim hi—it is not in the heavens” (Deuteronomy, 30:12); it is to be interpreted and applied by man. [Bleich then reminds us that there is no binary in Judaism between the Written Law and the Oral Law:] Judaism is a religion of law. Judaism without Oral Law is not Judaism. Ambiguity and controversy were bound to occur, and, quite appropriately, the Oral Law contains canons for resolving such matters. The result is an exhaustive tradition of substantive, interpretive and decision-making rules, a tradition endowed with sanctity because it is divinely ordained.⁹

When Rabbi Bleich uses the adjective “exhaustive” he reminds us that halakhah’s detailed reasoning has worked across the centuries both to address new situations and to maintain and develop the divine ordinations about human nature and human behavior that are always entailed even in the seemingly most picayune Talmudic disputes. In his influential book

8. Professor Saiman concludes the first chapter not by abjuring the binary but modifying it somewhat: “It is the fluidity between halakhah-as-law and halakhah-as-Torah that enables it to assume its diverse roles.” See SAIMAN, *supra* note 1, at Chp. 1.

9. J. David Bleich, *The Principles and Nature of Jewish Law*, 40 *CARD. L. REV.* 3075, 3078 (2019).

The Philosophical Quest,¹⁰ Rabbi Bleich asks and answers the question “Is there a standard of conduct to which persons may be held, and according to which human actions may be judged, other than the standard reflected in normative law?”

Despite the nomenclature employed in describing this norm, viz., “lifnim mi-shurat ha-din—*beyond* the boundary of the law,” adherence to the standard denoted thereby is prescribed as normative and binding and hence endowed with the essential attributes of halakhah.

I read my colleague, who in private conversation recently continues to decline for halakhah a “law-spirit” dichotomy, to be saying that any law “beyond” the laws themselves is always already within those laws. This is for the outsider to halakhah (or as we shall see towards the end, the most influential critics of it, call them as Professor Saiman reminds us, Jesus and Paul) one of the hardest binary-destroying sensitivities to grasp. How much easier has it been through the last two millennia to dichotomize law and spirit (nomos and narrative?¹¹) turning “legalism” into a curse and ironically unleashing millennia of non-Jewish secular law that is harsher and often less “spiritual” than anything in the Jewish tradition could ever have imagined?

Although Rabbi Bleich’s book is cited early by Professor Saiman,¹² and although he retreats somewhat on his affirmation of this binary, he sometimes seems to replace Bleich’s “law-as-exhaustive” with his own “law-as-exhausting.” He calls halakhah’s endless elaboration of rule upon rule “legalized specification”¹³:

There are times when it seems that the Talmud knows nothing but law. [Speaking of Talmudic treatment of the story of David and Saul:] The Talmud, however, re-reads it through a thoroughly halakhic lens. Ignored are the drama, the emotion, the egoism, and all the juicy details of human life that course through the biblical saga.¹⁴

In this formulation, soon elaborated by reference to Jesus and his disciples and their famous antinomianism—to which I return in my final binary—Professor Saiman seems again to revert to a notion of law that avoids everything except minutiae. I doubt he intended that, because the richness of many of his subsequent analyses shows the erasure of the *law-ethics beyond the law binary* that this and other passages disturbingly evoke.

5. Let us go on to use the code word **Robert Cover** in the dissolution of the related binaries *Halakhah as Nomos and Narrative*. Towards the end

10. J. DAVID BLEICH, *THE PHILOSOPHICAL QUEST: OF PHILOSOPHY, ETHICS, LAW AND HALAKHAH* (2013).

11. *See infra* “Binary 5.”

12. SAIMAN, *supra* note 1, at chp. 1.

13. *Id.* at 20.

14. *Id.* at 22.

of the book, Professor Saiman perhaps tardily but very respectfully points to this legal scholar, whose untimely passing has left behind and bereft not only the Law and Literature movement to which he contributed brilliantly but also the world of twentieth and twenty-first century legal scholarship generally. Saiman points out: “Finally . . . that law consists not only of a regulatory (imperial) dimension but simultaneously relies on ‘world-creating’ and thought shaping (paideic) functions that make the state’s regulatory apparatus possible.”¹⁵ Now he may well have been relying on Cover’s ideas “throughout”—and he is obviously right that Cover “famously drew inspiration from Rabbinic sources,”¹⁶ but the scholar’s seminal essay “*Nomos and Narrative*”¹⁷ might have been brought in earlier. For Cover, halakhah embodied law’s *fusion* of *nomos* and *narrative*, the detailed elaboration of law by groups within the community who struggle every day to express not only the *is* but the *ought*. In the section called “Jurisgenesis”—the creation of legal meaning—“a bridge linking the concept of a reality to an imagined alternative . . . the application of human will to an extant state of affairs as well as towards our visions of alternative futures,”¹⁸ Cover cites the Talmudic tractate *Aboth* at considerable length, including commentaries by Joseph Karo the great sixteenth century commentator also cited by Rabbi Bleich¹⁹; Cover concludes:

Karo’s commentary and the aphorisms that are its subject suggest two corresponding ideal-typical patterns of combining corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, which according to Karo is world-creating, I shall call “paideic” because the term suggests: 1) a common body of precept and narrative, 2) a common and personal way of being educated into this corpus, and 3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law. Law as Torah is pedagogic. It requires both the discipline of study and the projection onto the future that is interpretation.²⁰

Robert Cover allows *no* law-“something higher” binary. And Professor Saiman, at his best as I at least read him when he discusses the Mishnah regarding capital punishment in chapter 4 of his book, is sometimes of the same mind. Indeed, Cover in *Nomos and Narrative* also discusses capital punishment in halakhic terms. Defending capital punishment in some situations—a view that disturbed some of Cover’s smartest and sincerest ac-

15. *Id.* at 232.

16. *Id.*

17. Robert Cover, *Nomos and Narrative*, in *NARRATIVE VIOLENCE AND THE LAW* (Minow, Ryan, & Sarat eds. 1992).

18. *See id.* at 101.

19. *See supra* note 9, *passim*.

20. Cover, *supra* note 17, at 105.

lytes²¹—Cover (citing Jewish law while possibly also thinking of the post-World War II Nuremberg trials) associated in some cases the narrow (legalistic?/violent?) language of the extreme punishment with “an inspirational narrative”: “Law’s expressive range is profound, and as with other resources of language, the relation of law’s manifest content to its meaning is often complicated. Consider the question of using capital punishment to *express* the dignity of human life and its ultimate worth.”²²

Professor Saiman is to the same effect when describing a highly “legalistic” debate in the Talmud about what, if any, clothing should be left on a man or a woman who has been condemned to stoning. Any reader disinclined to see anything in “legalism” but desiccated non-spiritual nit-picking—we’ll return to Jesus and his followers shortly—would take the language of Rabbi Yehuda (“[a] male is stoned naked, but a woman is not stoned naked”) as missing the forest for the trees. But Professor Saiman reads further in the debate, where values of dignity are weighed against the prolonged suffering occasioned by wearing any clothing at your own stoning. “Reading this Mishnah as Torah,” he says—but our argument again would make this statement superfluous. Since one must *always* fuse Mishnah and Torah!—“what began as a technical debate over the procedures of an imaginary system of capital punishment turns into a discussion about the relative weights of physical and psychological pain. This presentation,” he concludes, “takes the focus away from speculating whether the Sanhedrin [the highest court, when it existed] actually administered the stoning punishment. Rather, the Talmud is staking out an important claim: technical halakhic rules reflect on core questions of human nature.”²³ So it is that many debates that seem highly detailed and even absurd in a context where they stood no chance of being applied gain nobility because they are “expressive rather than regulatory”²⁴ and in their expression, give voice to such quintessentially Jewish values as dignity, reverence for all life, and mercy.

Seeing halakhah as Torah permits Saiman to work through a number of “legalistic” debates and temporarily conclude that such “spiritual” values are always already embodied in those debates. But this coloration has been muddied a bit, at least in my view, by the earlier pages’ binary, which tells us that our method should be to locate as on a spectrum the (merely?) legal on one side and the sharply dichotomized “core/human/spiritual/Torah” approach on the other. But they are all, always, interweaving.

Next, I bring up the very interesting discussion towards the end of the book about Jewish rules of war. This leads to the binary “*pragmatic-idealistic*

21. See, e.g., LAW’S VIOLENCE 214 (Austin Sarat & Thomas R. Kearns, eds., 1995).

22. See *supra* note 17, at n.22. Subsequent quotation from GREENBERG, SOME POSTULATES OF BIBLICAL CRIMINAL LAW (1970) omitted here.

23. SAIMAN, *supra* note 1, at 60.

24. *Id.* at 232.

tic.” The idea seems to be that Midrashic rules of law, developed while in exile, were (like capital punishment rules when there was no Sanhedrin or Jewish court to apply them) unrealistic once Israel became a state. Here the misleading binary can be re-stated as—

6. *Practicality (“let’s get real”) and idealism (“let’s ‘naively’ adhere to the norms of halakhah”).* This binary has no real place in halakhah, as with my somewhat limited knowledge I have come to understand it. The code word for rejecting it—or for merging the two is **Schlomo Goren**, who is featured by Professor Saiman towards the end of the book. Rabbi Schlomo Goren (1917–1994) ruled that a complete siege on Beirut in 1982 violated halakhah: “[A]nyone—including enemy combatants—trying to leave the city must be allowed to retreat unimpeded.”²⁵

Goren, the chief Rabbi of Tzahal, was among the first to examine in the newly founded state whether Hebrew sources serve as a basis for a moral code in today’s modern Israeli army. He answered affirmatively and based his sharp limitation on army behavior upon a Midrash of Maimonides himself, that “when a city is besieged to capture it, they do not surround the city from all four sides [‘ruhot’] but rather from three sides, leaving room for anyone who wants to flee to save his life.” The Rambam, as he is known, based his admonition in part on a verse from the biblical book of *Numbers* 31:7 and on the view that before making war (a generally disfavored activity under Jewish law), the Jewish authorities—however others were conducting their wars!—needed to announce their intentions, then offer peace, and only then wage the war if absolutely necessary while always leaving a fourth “wall” open.

In the world we live in these days, it was inevitable that, as Professor Saiman describes them, voices were raised as to the “serious pitfall in activating this halakhah.”²⁶ Two types of opposition to Maimonides’ rule were articulated as Israel went to war: some felt that a modern state needed to familiarize itself with the military laws of contemporary nations and of international law but go no further toward Jewish tradition and law that may in the situation have dictated more ethical actions; others thought it bizarre to apply rabbinic standards from the centuries of exile in which (as we have seen) Jewish law was being argued in a vacuum, whether it came to capital punishment, or military sieges or almost anything else relating to governmental behavior. There had been no Jewish government; now, for the first time in millennia, there was a modern state, and it had to play by pragmatic rules, not by ancient legalisms, no matter how revered in strictly Talmudic circles. Rabbi Shaul Yisraeli, described in the book as generally committed to halakhah, “pointed to the tactical futility of allowing Palestinian Liberation Organization militants to escape Beirut and re-group unharmed.”²⁷ To these objections was added, according

25. *Id.* at 225.

26. *Id.* at 224.

27. *Id.* at 226.

to Professor Saiman, that of such secular non-Israeli authorities as Michael Walzer who, in a famous essay *War, Peace, and Jewish Tradition*,²⁸ says, *inter alia*,

It is hard to see how a city could ever be taken [given Maimonides' fourth wall rule] Nachmanides, writing a century after Maimonides, strengthened the rule and added a reason: "We are to learn to deal kindly with our enemy." It is enemy civilians who are treated kindly here, for the ordinary or four-sided siege is a war against civilians. The radicalism of the Jewish law is that it pretty much abolishes siege warfare.²⁹

"But there is no acknowledgment of this," Walzer continues, "and other legal discussions assume the legitimacy of the siege and evince little concern with its impact on the civilian population."³⁰

In introducing this discussion, Professor Saiman enlists Professor Walzer, whose essay I do not read as unequivocally supporting it, into the *practical-idealistic* binary. "A three-sided siege is no siege at all," he says, and here Walzer seems to agree without necessarily opining as to whether the halakhah lacks all "practical" significance in the modern world. The rabbis might argue that since most besieged cities are no longer surrounded by four walls, the Midrash asks military leaders to leave a few streets free so that people can flee the onslaught. In so arguing, they have both history and idealism on their side. They might opine as follows, dissolving Saiman's binary:

During the Nazi siege of Leningrad (1941–1943) a natural "fourth wall" they didn't plan for came into existence: the frozen river on one side of the city permitted both the escape of people and the bringing in of much needed food, water and other supplies. If God's hand protected the victimized Russians from the Germans' very un-Talmudic cruelty, why should not His people plan in advance for such lenity? And then, too, permitting egress of people and influx of supplies improves the chances—in conditions of less than Nazi like oppression—that the beleaguered city will wish to make peace, which is of course the highest aim of the Halakhah.³¹

Saiman treats Rabbi Goren, who propounded the Rambam and the Ramban's view, although it dated to a time when Jews had no armies, with respect. But his conclusion seems to sustain a binary otherwise, in my view, foreign to halakhah: "This episode underscores the difficulty," he says, "of mixing spiritual ideals with the realities of governance. . . . In his

28. Michael Walzer, *War, Peace, and Jewish Tradition*, in *THE ETHICS OF WAR AND PEACE* (Terry Nardin ed., 1996).

29. *Id.*

30. *Id.*

31. This "Midrash" is by the present writer.

zeal to establish halakhah as the law of the state, he would commit the Jewish army to fight under unnatural conditions.”³²

Earlier, as I’ve noted, the analyst has accused the Talmud of “[ignoring] the drama, the emotion, the egoism, and all the details of human life that course through the biblical saga.”³³ Is not Rabbi Goren’s appeal to halakhic idealism precisely a recognition of the human condition in its worst agony: the making of war, with all its intended or unintended victimization?

7. My final binary—*Law and Mercy*—emerged during the Law and Literature panel’s lively discussion of *The Merchant of Venice*. I phrased the issue that afternoon as follows: “WWJDAS: What would Jesus *do* about Shylock?” Now you won’t find Shylock’s name in Saiman’s index; but you will find in the text a wishy-washy (to my eyes) defense of St. Paul’s treatment of Jewish law. It *is* legalistic, Saiman seems to be telling us, and the Jews who sparked Christianity at the get-go legitimately sought something more “spiritual”: “There are times,” he says with some repetitiveness, “when it seems that the Talmud knows nothing but law.”³⁴ Shylock as an easy target has epitomized for subsequent audiences that harshly legalistic view of both law and ethics; so St. Paul would on this view have no trouble pillorying him in much the same manner as do the play’s Venetian Christians (an unworthy group, though!).³⁵ Meanwhile, as my co-panelist and friend Sandy Levinson interjected that afternoon, Portia—whose “hermeneutic magic tricks” utterly defeat the Jew—seems to stand for “mercy.” And since Portia evokes the primacy of mercy,³⁶ her victory over the legalistic Jew appears to put the Bard’s imprimatur on the first Christians’ antinomian view.

But suppose Jesus himself returned to earth—prior to the second coming, somewhat discretely, curious about what has become of the religion that bears his name!—“WWJDAS”? **Jesus** would surely become our code word, he who dissolves the absurd binary. He would know better than anyone (except maybe for all Jews through the centuries and extraordinarily maybe the Bard of Avon) that the Jewish people have always linked law and mercy. He would know better than anyone (except maybe the Jews and the Bard) that Jews are instructed to do mercy and justice, that Jewish courts actually applying the death penalty twice in seventy years became known as “the bloody Sanhedrin,” that the Jewish deity demands along with seeking justice that Jews, as reflections of their one God, consistently do mercy.

32. SAIMAN, *supra* note 1, at 227–28.

33. *Id.* at 22.

34. *Id.*; see also *supra* at “Binary 4.”

35. See e.g., Richard Weisberg, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE (1992).

36. In her speech to Shylock, who of course as a studious Jew knows more about “mercy” from his own texts than she could ever imagine, Ivi (“The quality of mercy is not strained . . .”).

What would Jesus do about Shylock? He would not impose on the beleaguered Jew the horrible cruelty inflicted on him by Portia (and Antonio³⁷) through legalistic tricks unknown to Jewish law; he would instantly see the hypocrisy of his nominal followers' smug assertion of their own spiritual, supercessionism of their own false claim of superiority over the ethical, monogamous, Talmudic-yet-loving father, the Jew Shylock.

And this leads to—

8. Our last coupling reveals, as I have pre-saged, the *false linkage* that, unlike anything we've discussed so far, needs to be *re-established and forever retained* as a binary; it is the one discussed (too early and too lengthily, in my view) by Professor Saiman. In a section called "Was Jesus Right?"³⁸, he describes the early Christian writings as accusing the Jews of being "law-obsessed, Pharisaic, legalistic, etc—" and he could have added adjectives like stiff-necked, false, hypocritical, stubborn—all attacks on Jewish law that were accepted fatally and wrongly from then on, while at the same time a Christian-ized secular law eventually became crueler than anything they were attacking in its absence of mitigating oral and textual modifications that for Jews tended to eliminate the law—"something higher" binary.³⁹

Whether or not "Jesus was right" about Jewish legalism, his assessment—at least as reported in the Gospels and other sacred originary Christian texts—has in fact established the only "binary" that my account here actually accepts. Jews and Christians, as Paul implied, have separate and often conflicting views about belief, life, interpretation, speech, and especially law. The compound adjective "Judaeo-Christian" is false, and the hyphen must forever be chopped out of the atrocious binary. So, as Nietzsche⁴⁰ first boldly observed: that which is hopelessly opposed must be forever separated and never linked!

CONCLUSION

I have tried to unpack the rich opportunity for further discussion afforded by Chaim Saiman's book.

37. See Richard Weisberg, *Antonio's Legalistic Cruelty*, 25 C. LITERATURE 12 (1998). See also the best essay ever written on *The Merchant of Venice*: Anton Schuetz, *Structural Terror: A Shakespearian Investigation*, in LAW, TEXT, TERROR (Peter Goodrich, et al eds., 2006).

38. See SAIMAN, *supra* note 1, at 24.

39. See RICHARD WEISBERG, IN PRAISE OF INTRANSIGENCE chp. 3 (2014); see also "Binary 4" *supra*.

40. NIETZSCHE, *supra* note 2.

