

FROM A BIOPOLITICAL POINT OF VIEW: NIETZSCHE'S PHILOSOPHY OF CRIME

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Although Michel Foucault's reading of Nietzsche is involved in the reasoning of this essay, this paper does not deal with the topics most philosophers focus their attention on when they praise or severely criticize Foucault's so-called "Nietzscheanism." As a matter of fact, Foucault made rather scholarly use of Nietzsche. By "scholarly" I mean that he did not celebrate *à la française*, the famous "will to power" as a principle of heroic vitalism like so many of Nietzsche's enthusiastic readers throughout the last century. What really interested Foucault was the less apparent aspect of this famous "principle of a new evaluation" as Nietzsche himself conceived of the "will to power." Foucault did not seek this principle in the mountainous regions where Zarathustra and his author preferred to live; instead, he searched for it in those environments of enclosure where the air is impure and almost no sunshine penetrates. As we all know, around the year 1800, the prison was starting to become the preeminent instance, the model and ideal, of all the enclosed environments used by the so-called disciplinary societies to organize their (vital) forces.

All his assertions to the contrary cannot obscure from the reader that in the case of the criminal, Nietzsche, in both his effects and his thoughts, moves again and again into a zone of indifference, which at the same time is a zone of the utmost difference. In his writings, Nietzsche takes both the position of the highest and the healthiest, and the position of the lowest and most underprivileged, and alternates abruptly and in an unusual way between the two. Nietzsche dismisses the crime but not the criminal. Although the criminal is without an essence and all the moral ways of suppressing him are of course forbidden for a free

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spirit and immoralist, Nietzsche substitutes for this lack of essence what we may describe as an empirical knowledge of the criminal, which shares common ground, as we shall see, with all the philosophies in the age of human sciences. Despite his lack of essence, the figure of the criminal can well be the subject of a philosophical form of inquiry. We can follow the example of Jacques Derrida, who in his *Spurs*, attempted to collect the “large number of propositions which treat of the woman”¹ in Nietzsche’s philosophy—statements which encompass a whole range of stylistically different modes of expression—and try to collect and analyze Nietzsche’s various propositions about the criminal and what he perceives to be criminal behavior. In this way, we can resume the variety of references “in a finite number of typical and matrinal propositions,”² and at the same time seek the internal logic of the theses we derive from Nietzsche’s texts, a logic that, I believe, can best be described as “biopolitical.”

In his writings on the modern will to knowledge, Michel Foucault characterizes the biopolitical discourse as one of the most decisive turning points in the history of “western man.” “For the first time in history, no doubt,” Foucault writes, “biological existence was reflected in political existence; the fact of living was no longer an inaccessible substrate that only emerged from time to time, amid the randomness of death and its fatality.”³ What Nietzsche conceived as “great politics” and “great health” is obviously affected by the crossing of the “biological threshold of modernity.” “[M]odern man is,” as Foucault argues in an allusion to Aristotle’s famous definition, “an animal whose politics places his existence as a living being in question.”⁴ Nietzsche is undoubtedly the philosopher of this modern man and his politics insofar as he no longer grafts—as was done throughout the philosophical tradition of pre-modern Europe—the good life (*bios*) onto mere physical existence (*zoe*) (what Foucault calls “substrate”), but conceptualizes the content of good life as the result of processes that continuously intervene into the “bare life” (*zoe*) and gives it form. The categories Nietzsche uses to determine the nature of these life-forming processes constantly shift between the semantics of cultivating and the semantics of breeding.

¹ JACQUES DERRIDA, *SPURS: NIETZSCHE’S STYLES* 95 (Barbara Harlow trans., 1979).

² *Id.*

³ 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 142 (Robert Hurley trans., 1978).

⁴ *Id.* at 143.

The provocation of biopolitics for any kind of legal theory has been clearly stated by Foucault, who points out that biopolitics “would no longer be dealing simply with legal subjects over whom the ultimate dominion was death [by the sovereign state-power], but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself.”⁵ Following this line of reasoning, Foucault makes an interesting statement that is more or less addressed to lawyers. He reproaches them for living in a certain state of self-deception with respect to the role of law under the biopolitical conditions of modern societies. One must add that the statement is provocative not only for the professional lawyer but also for the general observer of modern societies, who witnesses steadily increasing juridical prescription at every level of modern life. Foucault writes:

We have entered a phase of juridical regression in comparison with the pre-seventeenth-century societies we are acquainted with; we should not be deceived by all the Constitutions framed throughout the world since the French Revolution, the Codes written and revised, a whole continual and clamorous legislative activity: these were the forms that made an essentially normalizing power acceptable.⁶

One may point out that the discrepancy between law and norm, or between law and normalizing processes, which Foucault emphasizes, is also discernible in the “great politics”⁷ envisaged by Nietzsche in his late works. This “great politics” requires a type of philosopher who acts as a “legislator.” In the late texts and notes published after his death—in *Ecce Homo* and in the so-called *Will of Power*—compilation of *Studies and Fragments*—Nietzsche refers repeatedly to the philosopher as the “legislator of the future.” “For us the philosopher must be a legislator. New types.”⁸ These statements are quite obviously in contrast to the view of Nietzsche and his relation to legal theory that, for example, Edgar Bodenheimer propagates when he openly accuses Nietzsche of “legal nihilism”: “The outstanding characteristic of this phenomenon is an erosion of the belief in law as a beneficial institution of societal organization.”⁹ This thesis completely

⁵ *Id.* at 142-43.

⁶ *Id.* at 144.

⁷ FRIEDRICH NIETZSCHE, *THE WILL TO POWER* para. 978, at 512 (Walter Kaufmann ed., Walter Kauffman & R. J. Hollingdale trans., 1967) [hereinafter NIETZSCHE, *THE WILL TO POWER*].

⁸ *Id.* para. 979, at 512.

⁹ EDGAR BODENHEIMER, *POWER, LAW, AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW* 1 (1973).

ignores the new role played by law in the context of what Foucault calls an “essentially normalizing power.”¹⁰ Professor Bodenheimer misinterprets the new function that law acquires in the process of establishing this normalizing power as a complete loss of law. A careful reading of Foucault allows us to correct this perspective. In reality, we live in a society in which the power of law is not simply diminishing but is being integrated into the mechanism of differently functioning power processes. Foucault classifies these new power processes under the term *norm* (as opposed to *law*).

Nietzsche was very aware that the role of legislation had completely changed when he described the new philosophical legislator as a “legislator of evaluations”¹¹—and not simply of laws. *Evaluations* (“*Wertschätzungen*”) indicate the presence of what Foucault calls an “essentially normalizing power,” which is the prerequisite for our societies’ acceptance of the “clamorous legislative activity” of our political institutions. In Foucault’s analysis, normalizing power operates in a comparative field—a space of high inner differentiation the borders of which are flexible and shifting. The social “value” of human beings is therefore not permanently fixed by unchangeable, eternal laws defining justice, but constantly redefined as a result of normalizing, i.e., of their readjusting themselves to statistically obtained average norms. The zone of normalcy is produced by a “value-giving measure,” as Foucault refers to it.¹² Nietzsche’s high regard for the creation of *distance*—in every respect—is a reflection of the problem that modern “egalitarian” societies produce differences which are no longer simply guaranteed by the cosmological or ontological order of things. As the difference to all the differences—within the zone of normalcy—a boundary is drawn against the abnormal. The paradoxical status of this class of the *abnormal* results from the fact that on the one hand it is part of the normalcy zone, but on the other hand its “elements” have to be vigorously expelled from this zone. The zone of normalcy is in a permanent state of pushing its boundary away and approaching it; it oscillates equally, so to speak, between the spontaneous tendency towards the largest possible expansion of the spectrum of normalcy and the certainty that a boundary has to be drawn “somewhere.”

While “petty politics,” as Nietzsche refers to it, has the task of organizing and regulating the field of normalcy internally, “great

¹⁰ FOUCAULT, *supra* note 3, at 144.

¹¹ NIETZSCHE, *THE WILL TO POWER*, *supra* note 7, para. 972, at 509.

¹² See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 183 (Alan Sheridan trans., 1979) (“It measures in quantitative terms and hierarchizes in terms of value the abilities, the level, the ‘nature’ of individuals.”).

politics," which he discusses under the topics of "discipline and breeding" ("*Zucht und Züchtung*"), begins at the frontiers of this field. "Great politics" defines its relation towards the "abnormal," and that is why the criminal becomes an object of Nietzschean reflection. The ambivalence that Nietzsche feels towards the wide range of abnormal phenomena that are only relatively or comparatively separated from normal phenomena is embodied in a certain sense, as we shall see, in his view of the figure of the criminal. Criminals are the abnormal *par excellence* because they are simultaneously objects of great fear and great admiration. The former evil which turns out to be merely abnormal has a right to flowers, as we learn from Baudelaire. When the normal and the abnormal, the healthy and the pathological, are substituted for the former "ethically" based difference of good and evil—permitted and forbidden—a new politics of exclusion is required, which no longer simply rejects all abnormal phenomena but judges them according to how they contribute to the improvement, or betterment of the productive forces or complexity of modern society. "Great politics," as conceived by Nietzsche, is essentially politics of selection ("*Auslese*") which systematically shifts between the poles of screening ("*Aussieben*") and extinguishing:¹³ a selection of positively evaluated abnormalities over those that are negatively evaluated. The "question of [the relative] rank,"¹⁴ which Nietzsche discusses again and again in his late writings, can no longer be answered with reference to nobility or the "upper classes," but only by the social technique of judging individuals according to their faculties and expected development (covering chances and risks) on a scale of "degrees of normalcy" (Foucault). The basic permeability of the boundary between the normal and the abnormal, the continuity between these two states which are only relatively different, must be considered the fundamental prerequisite in the history of knowledge and power for what Nietzsche envisioned with his concepts of "great politics" and the "legislative philosopher," that is, the *evaluating philosopher*.

So what does Nietzsche say about the criminal? What styles does he bring into play when writing of the criminal? Does he share with him a certain "solidarity," a certain "common sense?" On the other hand, under what circumstances does he reject the criminal? Is it possible to define the figure of the criminal before

¹³ And thus produce a great amount of "refuse" or "waste" of human material, as Nietzsche quite frankly states. See FRIEDRICH NIETZSCHE, *ECCE HOMO* 257 (Walter Kaufmann ed. & trans., 1989) [hereinafter NIETZSCHE, *ECCE HOMO*].

¹⁴ NIETZSCHE, *THE WILL TO POWER*, *supra* note 7, para. 857, at 457. The German text literally says only: "question of rank."

the purpose or the various purposes of punishment are discussed? This immediately brings us to the vast field of “legal theory” and again to the historically shifting status of “the legal” and law.

Nietzsche’s first statement about the criminal deals with punishment. A criminal, though we may have completely different feelings about this morally, exists only insofar as there is a “will to punish.” The will to punish is rooted in the moral will, which aims at making individuals responsible for their acts. Following the example of Spinoza and his complete revolution of ethical common sense, Nietzsche considered one of his main philosophical tasks to be the elaboration of “the theory of complete irresponsibility,” as he refers to it in *Human, All Too Human*. He states at the beginning of aphorism 105: “The man who has fully understood the theory of complete irresponsibility can no longer include the so-called justice that punishes and rewards within the concept of justice, if that consists in giving each his due.”¹⁵ The right to punish derives from the metaphysics of free will, which Nietzsche criticizes throughout his philosophical works as one of the “four great errors.”¹⁶ According to Nietzsche, the right to punish—whatever purpose may be linked to it historically or culturally—should be considered a necessary supplement to a moral point of view that is apparently deeply rooted in everyday experience as well as in philosophical tradition—a moral view that, without the support of penal measures, would not have been effective historically. If we abolished the “fable of intelligible freedom” and the moral conviction based on it, we could also do away with the specific penal law this fable necessitates. One could stop here and finish my remarks with this purely negative result. Yet it is quite astonishing that Nietzsche, although denying the right to punish and its collateral moral theory, does not exclude the figure of the criminal from his writings. The criminal continues to play a significant role in Nietzsche’s philosophy and “legal thinking.” This is evidently not a contradiction in Nietzsche’s thought that commentators have so often observed and severely criticized. The reason for his ambivalent position towards the criminal is based much less on a philosophical than on an “empirical” observation of the attitude of society and certain experts towards criminal acts. The philosophical endeavor to reveal punishment, as Nietzsche writes in *Zarathustra*, as “what revenge calls itself: it feigns a good conscience for itself with a

¹⁵ FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN* para. 105, at 73 (Marion Faber & Stephen Lehmann trans., 1984).

¹⁶ See FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS* 30-37 (Richard Polt trans., 1997).

lie"¹⁷ has been followed by the juridical and, as we shall see, medical experts of modern societies since 1800. These experts are confronted with a question that was also taken up by Nietzsche, who expressed it in its most laconic form when he wrote in *Beyond Good and Evil*: "Is it not sufficient if the criminal be rendered harmless? Why should we still punish?"¹⁸

A certain immoralism is not a privilege of the philosophical "free spirit," but simply the expression of a tendency in the modern age that Nietzsche on the one hand, especially in his early writings, eagerly welcomes for philosophical reasons (its consequences for the metaphysics of the free will) but, on the other hand, considers a symptom of moral "sickliness" (as opposed to mere sickness), "decadence," "fatigue" or "weakness of the will." The criminal is absolved—at least partially—not only by the philosopher but also in a certain sense by society and by criminal justice itself, which "functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in non-judicial [in fact 'normalizing'] systems."¹⁹ In other words: "We punish, but this is a way of saying that we wish to obtain a cure." Punishments, of course, continue to be imposed, but in actual practice the function and meaning of punishment have fundamentally changed. This is recognizable by the fact that the status of the criminal is being brought closer and closer to that of the ill, or more specifically, the mentally ill or insane, and the sentence is perceived as a *therapeutic* prescription. "[W]ithin the very judicial modality of judgment, other types of assessment have slipped in, profoundly altering its rules of elaboration."²⁰ To judge is no longer to establish the truth of a crime but to determine the mental status and the degree of responsibility of its perpetrator.

In section 201 of *Beyond Good and Evil*, Nietzsche expresses his suspicion that the identification of crime and (mental) illness is in itself a symptom of cultural sickness. He writes:

There is a point of diseased mellowness and effeminacy in the history of society, at which society itself takes the part of him who injures it, the part of the *criminal*, and does so, in fact, seriously and honestly [that is to say, by way of elaborating scientific discourses on the anthropology of criminals]. To punish, appears to it to be somehow unfair—it is certain that

¹⁷ FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 162 (Richard Hollingdale trans., 1969) [hereinafter NIETZSCHE, *THUS SPOKE ZARATHUSTRA*].

¹⁸ FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* para. 201, at 125 (Helen Zimmern trans., 1964) [hereinafter NIETZSCHE, *BEYOND GOOD AND EVIL*].

¹⁹ FOUCAULT, *supra* note 12, at 22.

²⁰ *Id.* at 19.

the idea of “punishment” and the “obligation to punish” are then painful and alarming to people. “Is it not sufficient if the criminal be rendered *harmless*? Why should we still punish? Punishment itself is terrible!”—with these questions gregarious morality, the morality of fear, draws its ultimate conclusion.²¹

In the passage just quoted, Nietzsche puts the words “criminal” and “harmless,” that is, “not dangerous” (“*ungefährlich*”) into italics. In doing so, he explicitly calls attention to the anthropological concept of the potentially or virtually dangerous individual on which the new system of penal justice is based. With the concept of dangerousness (in French: “*dangerosité*”) criminology no longer views the crime on the level of manifests acts that have to be punished more or less severely according to the law, but from the perspective of the “risk” posed by an individual, that is, his inclination to commit a crime, which can be measured in degrees of probability. Criminal justice and its judgments seek to reconstruct a criminal act not only or primarily for the purpose of punishing the perpetrator, but to gain insight into his motivation, which can no longer be attributed to his “free will” but must be sought in new, deeper sociopsychological causes (such as “instinct,” “unconsciousness,” “environment,” “hereditary disposition”).

Nietzsche’s second statement regarding the criminal can therefore be reconstructed as follows: the criminal is the “dangerous individual” par excellence, and it is because of this dangerousness that the philosopher shows great interest in him. He cannot simply reject him on moral grounds, because the philosopher himself in Nietzsche’s understanding is a “preparatory human being,” deeply obliged to follow the maxim “live dangerously”—obliged to such an extent that Nietzsche, in *Ecce Homo*, finally draws the conclusion that later became famous: “I am no man, I am dynamite.”²² It is interesting to observe that this self-characterization was not Nietzsche’s own invention but an aphoristic version of a passage from an article on *Beyond Good and Evil* published in 1886 in the Swiss journal *Bund*. Nietzsche quoted the passage at length in a letter to Malwida von Meysenbug dated September 24, 1886. The title of the article was *Nietzsche’s Most Dangerous Book*, and the author of the article used the dynamite metaphor not only to express forcefully the dangerousness of Nietzsche’s thinking but also to distinguish between the virtuality of his dangerous philosophy and an actual outbreak of this danger: “The spiritual dynamite like the material

²¹ NIETZSCHE, BEYOND GOOD AND EVIL, *supra* note 18, para. 201, at 125.

²² NIETZSCHE, ECCE HOMO, *supra* note 13, at 326.

one," it says, "can serve a very useful purpose; it is not necessarily used for criminal purposes."²³ Thus, Nietzsche and those who wrote about his works did not take up the notion of "dangerousness" or "risk" by chance, as it was one of the key concepts to emerge in the discourses of criminal anthropology in the course of the nineteenth century. Nietzsche claims in section 202 of *The Dawn* that we stand "before the irrefutable insight" into the "physiology of the criminal" and "that there exists no essential difference between criminals and the insane" when the criminal ceases to be the enemy of society and is treated as a mental patient. If this is the case, we can no longer, as Nietzsche writes, "maintain our detestable criminal codes" and will have to replace them by appropriate measures to heal the criminal or at least render him "harmless." The philosophical problem resulting is that it no longer seems possible to establish "principles of a new evaluation" or to "reestablish *order of rank*."²⁴ An essentially normalizing power that is on the way to completely transforming the modality of criminal judgment is an essentially relativizing power. Nietzsche clearly noticed the epistemological implications of this new type of shifting opposition and also identified the field of knowledge in which this new "normalizing" approach to treating moral facts had been elaborated, that is, modern physiology, which claims that it is necessary to have knowledge of pathological or "morbid" states in order to explain the "normal" functioning of an organism. I quote from a note Nietzsche wrote in 1888:

It is the value of all morbid states that they show us under a magnifying glass certain states that are normal—but not easily visible when normal.

Health and sickness are not essentially different, as the ancient physicians and some practitioners even today suppose. . . . In fact, there are only differences in degree between these two kinds of existence: the exaggeration, the disproportion, the nonharmony of the normal phenomena constitute the pathological state (Claude Bernard).²⁵

In many unpublished notes concerning the generation or "breeding" of the so-called "strong" or "firm type," Nietzsche draws the philosophical consequences from this "normalizing"

²³ Letter from Friedrich Nietzsche to Malwida von Meysenbug (Sept. 24, 1886), in 7 FRIEDRICH NIETZSCHE, SÄMTLICHE BRIEFE KRITISCHE STUDIENAUSGABE 258 (Giorgio Colli &azzino Montinari eds., 1986).

²⁴ NIETZSCHE, THE WILL TO POWER, *supra* note 7, para. 854, at 457.

²⁵ *Id.* para. 47, at 29. In parenthesis, Nietzsche adds the name of the physiologist Claude Bernard, who, following the physician Broussais, drew from this theory the physiological consequences of a fundamental continuity between health and illness, or normal and pathological states.

epistemology. The strong type and the weak or fatigue²⁶ type do not exist, as one might first think, as two separate figures in permanent opposition to each other; rather, the strong type has to be wrested from the weak type in a permanent, never-ending struggle. One can only acquire strength and health, above all “great health,” by constantly passing through states of weakness, sickness and “corruption” and overcoming them. The second to last section of *The Gay Science*, in which “great health” is defined, makes this point very clear: “the great health” is a physiological state, “that one doesn’t only have, but also acquires continually and must acquire because one gives it up again and again, and must give it up!”²⁷ That is why those who in this sense may rightly be called healthy are, as Nietzsche puts it, “dangerously healthy;” they find themselves in a paradoxical situation as they are always risking their health in the effort to acquire it. The state of “great health” therefore remains temporary. Nietzsche does not ask: “What is health?” but rather: “How do we acquire health?” or, as he writes in a note from 1888, “[h]ow does one become stronger?”²⁸

It is astonishing to observe that Nietzsche, while adhering to the normalizing physiology developed by Broussais, Claude Bernard and others, rejects without exception theories affirming the equality and comparability of all human beings. The “new philosophers,” as he calls the “free spirits” who share his views, “desire precisely the opposite of an assimilation, an equalization: we teach estrangement in every sense, we open up gulfs such as have never existed before”²⁹ After closing the gulfs between the just and unjust, the permitted and the forbidden, and the good and the evil created by traditional criminal law and its ethical supplement, Nietzsche, as the most radical exponent of the “new philosophers,” tries to establish the “principle of a new evaluation,” the reverse of which is the annihilation of the non-value. As has often been remarked, the introduction of the concept of value into law is not at all an innocent undertaking. The German neo-Kantian philosopher Heinrich Rickert, a famous adherent to the concept of value (“*Geltung*”) in ethics and jurisprudence, points out that the “true act of evaluation is negation.”³⁰ If the main task of the new philosophy envisioned by

²⁶ See ANSON RABINBACH, *THE HUMAN MOTOR: ENERGY, FATIGUE, AND THE ORIGINS OF MODERNITY* (1990).

²⁷ FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* para. 382, at 246 (Bernard Williams ed., Josefine Nauckhoff trans., 2001).

²⁸ NIETZSCHE, *THE WILL TO POWER*, *supra* note 7, para. 918, at 485.

²⁹ *Id.* para. 988, at 516.

³⁰ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* § 3.1, at

Nietzsche is to strengthen life continually, this cannot be done without simultaneously excluding life that “does not deserve to be lived,” in the words of Karl Binding, a German penal law specialist. The new philosopher regards himself as authorized for the *Annihilation of Life Unworthy of Being Lived*.³¹ It is quite obvious that Nietzsche's philosophical biopolitics and particularly his writings that were published after his death under the title of *Discipline and Breeding* are a paradoxical effort to reestablish a new and radical antagonism within the zone of normalcy, paradoxical insofar as the normalizing power only accepts, so to speak, “weak” and constantly shifting differences.

So Nietzsche's third statement about the criminal is the result of his *dichotomizing* him. It is true, Nietzsche argues, that we are all potential criminals as we are all more or less ill, more or less weak. More important philosophically, however, is the attitude we adopt towards our physiological sickliness. We have two alternatives: *either* we accept our poor constitution as an inevitable fate and—following the law of the least effort—try to correct or manage it by applying norms of “relative health” from the field of normalcy *or* we find the courage to open up a “new gulf” and create a new “great health” *on the basis* of the physiologically generalized sickliness. Sickliness, or the disposition to commit a crime, then, has to be regarded as a fundamentally ambivalent phenomenon: it may not be rejected from a simple moral point of view or treated with methods that afford the ill only a relatively better status; rather, it has to be regarded as a *resource* for what Nietzsche calls the will to power. In section 740 of the posthumous compilation, Nietzsche sums up the main points of his philosophy of crime. It is obviously not, although this has sometimes been stated polemically, a criminal philosophy. In this text, Nietzsche distinguishes between criminals who “are a part of the concept of ‘revolt against the social order’” and what he calls “the race of criminals” (“die Rasse des Verbrechertums”), which he does not characterize empirically but simply refers to as a certain species. Now, from the perspective of a “free spirit” the philosopher must be regarded as a “criminal,” or better, “law-breaker” because he does not respect moral common sense and, as Nietzsche puts it, “finds something in our society against which war ought to be

137 (Daniel Heller-Roazen trans., 1998).

³¹ This is the title of the book Binding wrote in 1920 with Alfred Hoche, the professor of medicine. See *id.* § 3.1, at 136. This work was published—a not unimportant fact to mention—by Felix Meiner, “one of the most distinguished German publishers of philosophical works.” *Id.*

waged—he awakens us from slumber.”³² Although Nietzsche uses terms of war when speaking of the criminal act, in the entire text he does not give any examples of this kind of act; on the contrary, he explicitly reminds his readers that “one should beware of assessing the value of a man according to a single deed,” and refers to the authority of the political actor par excellence (at least in the nineteenth century), Napoleon: “Napoleon warned against this. For our *haut-relief* deeds are quite especially insignificant.”³³

As just mentioned, the “exceptional criminal,” whom Nietzsche values highly and exemplifies by pointing to the great political immoralists of the Renaissance, stands in sharp contrast to another type of criminal who is supposed to be “racially” conditioned and poses, in Nietzsche’s view, such an enormous threat that he is willing to help society to oppose him. He does so by explicitly allowing the social order “to wage war against him even before he has committed any hostile act,” and adds in brackets: “first act as soon as one has him in one’s power: his castration.” So we are faced with the seeming paradox that Nietzsche on the one hand justifies the “exceptional” and “rare criminal” as a rebel who declares war on society, claiming he should not be punished or even held in contempt for his action, but on the other hand joins the despised society and its institutions in the fight against the “race of criminals,” who like the “exceptional criminals” are not judged by the acts they commit but by their *disposition* to commit acts in the future. As an analyst of symptoms, the philosopher has to prove his ability by distinguishing between entirely different sorts of criminals: the criminal who acts out of strength and without remorse and the criminal who may act in a similar fashion but, as Nietzsche writes in the famous section of *Zarathustra* on the “pale criminal,” would not be able to endure the image of his deed “after it was done.”³⁴

But why does Nietzsche criticize the “pale criminal” so scathingly? Is it not likely—and this is precisely the argumentation that criminologists use in their discourses—that “pale” criminals, of whom there are many, do much more harm to societies in a statistically measurable sense than the few super-criminals who may attract the attention of the public for a short period of time? Nietzsche would answer: Even if this were the case, “weak” criminality must be rejected from a philosophical point of view because it bears the signs of sociability. The weak criminal is morally or socially weak because he cannot endure the image of

³² NIETZSCHE, *THE WILL TO POWER*, *supra* note 7, para. 740, at 391.

³³ *Id.* para. 740, at 392.

³⁴ NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, *supra* note 17, at 65.

his deed after he has committed it and because he cannot *resist* the impulse, the deep-seated urge, that causes him to perpetrate the act. The weak criminal shows weakness both before he has committed the crime and afterwards. He is too weak to resist his instincts and thus does not fulfill the criterion of nobility to which Nietzsche is so obliged. The weak criminals, the members of the "criminal classes" (Francis Galton), do not attract attention by spectacular deeds or monstrous dispositions but simply by the frequency of their acts. Rejecting the phenomenon of so-called mass criminality or minor criminality, Nietzsche affirms in philosophical terms a distinction that, according to Foucault's analyses in his recently published lectures on *The Abnormals*, strongly influenced the development of the discourse of forensic psychiatry in the nineteenth century. This discourse focused at first on the exceptional criminal or the "monster" to explain the phenomenon of great crimes without causes and ended with the figure of the so-called degenerated criminal, whose acts are not monstrous but occur in the dust of events and are characterized by their instinctiveness and social frequency. As a result of this development, the meeting of crime and insanity is no longer the exception but the normal case: minor crimes constitute minor insanities that are barely visible and have to be examined carefully.

Nietzsche's concept of decadence, as well as his descriptions of the "phenomena of degeneration," are based on the psychological notion of a "morbid immorality," which the philosopher explicitly distinguishes from states of manifest insanity.³⁵ He worries much about decadence because he conceives of it as a disease which afflicts seemingly normal and healthy individuals and can be symbolically connected with phenomena which are characteristic features of the cultural normalcy of modern societies—their way of life, so to speak. But as the "normal types" can eventually become accustomed to unfavorable socio-moral conditions, the "higher types . . . the lucky strokes of evolution, perish most easily as fortunes change. They are exposed to every kind of decadence: they are extreme, and that almost means decadents."³⁶ "Criminality reaches its peak," he argues in a fragment from 1888, "where *fatigue* dominates, where people work foolishly . . . in the sphere of commerce and industry. *Overwork, fatigue, need for stimulation* (vice), increase of

³⁵ See 13 FRIEDRICH NIETZSCHE, *Nachgelassene Fragmente 1887-1889*, in KRITISCHE STUDIENAUSGABE 429 (Giorgio Colli &azzino Montinari eds., 1988) [hereinafter NIETZSCHE, *Nachgelassene Fragmente 1887-1889*].

³⁶ NIETZSCHE, THE WILL TO POWER, *supra* note 7, para. 684, at 363.

irritability and of *weakness* (so that they become explosive).”³⁷ The cultural normalcy of these pseudo-diseases causes such a spread of crime or criminal inclination that Nietzsche does not see any alternative but to defend the social order against the onslaught of what he calls the “unsocial beings.” The fight against this order is only justified in the eyes of the philosopher, however, if it is led by the few exceptional criminals or “custom” and “law-breakers,” the so-called “privileged” (“Wohlgeratene”). “We *need* the abnormal, we give life a tremendous *choc* by these great sicknesses.”³⁸ The abnormal is justified if it can be linked to the “higher type,” if it occurs as a *choc* “given” by abnormal individuals, the “*new* barbarians,” who have an “excess of strength”;³⁹ it has to be eradicated if it occurs as an almost imperceptible process of “intoxication” of the organism.

We close this chapter by pointing out that it is far too easy to impute to Nietzsche an antisocial effect, as has often been done. Influenced by the studies of Francis Galton, the author of the famous *Heredity Genius*, which has come to a certain honor again in our day, Nietzsche persistently conceives of society as a “herd” and the ethical convictions of its members as a “herd morality.” However, as Foucault has shown, such a *pastoral* perspective on the social is typical for the development of the European “governmental rationality” or “governmentality,” which is a term that encompasses all activities aiming to shape, guide or affect the conduct of some person or persons. “Governing” is therefore not bound to the juridical form of political sovereignty but entails the exercise of power beyond the juridical constitution.⁴⁰ We must realize that these techniques of governing (oneself⁴¹ and others) include a wide range of measures including, in the age of biopolitics, interventions in the modality of human reproduction, which Nietzsche discusses under the title *Discipline and Breeding*. Nietzsche’s *pastoral* politics distinguishes between three fundamental “social” ranks, which are at the same time *classes of normalcy*. At the top are the “higher” or even “highest” types, whom Nietzsche also calls the “future masters of the earth”; they inhabit a zone of positively evaluated abnormality. Below that zone stretches a vast stratum made up of socially organized

³⁷ NIETZSCHE, *Nachgelassene Fragmente 1887-1889*, *supra* note 35, at 430.

³⁸ NIETZSCHE, *THE WILL TO POWER*, *supra* note 7, para. 778, at 408.

³⁹ *Id.* para. 899, at 478.

⁴⁰ See MICHEL FOUCAULT, *Governmentality*, in *THE FOUCAULT EFFECT* 87 (Graham Burchell et al. eds., 1991).

⁴¹ Nietzsche’s concept of the “severest self-legislation” necessary “to rear a master race, the ‘future masters of the earth.’” NIETZSCHE, *THE WILL TO POWER*, *supra* note 7, para. 504, at 960.

individuals who share, as Galton describes it, “the comfort of closest companionship.”⁴² Nietzsche designates them as the “herd,” whose instinct “considers the middle and the mean as the highest and most valuable: the place where the majority finds itself. . . . The herd feels the exception, whether it below or above it, as something opposed and harmful to it.”⁴³

As the herd is “incapable of leading itself,” it needs a political “shepherd,” who actually belongs to the group of “higher types,” but “lowers” himself to become the “*first servant*” of the herd. The herd “has therewith transformed a danger into something useful.”⁴⁴ It is important to observe that Nietzsche repeatedly states that “there is nothing sick about the herd animal, it is even invaluable.” Its incapability of governing itself is neither a moral fault nor a disease, but provides an opportunity for the “higher types” to act—directly or indirectly⁴⁵—politically, that is, to leave their hermitage in the “higher regions” and “serve” the herd. Nietzsche’s “great politics” aims at completely changing the role of the political shepherd. He is no longer considered the first servant of the herd, but the inaugurator of what Nietzsche calls “the experiment of a fundamental, artificial and conscious *breeding* of the opposite type” of the “herd animal.”⁴⁶ Obviously, this clearly biopolitical perspective does not reject the normal in favor of the exception. An essentially normalizing power does not allow any exception, any excellence or peak performance that is rooted outside the zone of normalcy or acquires its value or profile by simply ignoring the normal range of faculties and performance. “To view the contemporary European makes me very hopeful: an audacious ruling race is developing on the basis of an extremely intelligent herd mass.”⁴⁷ Unless this basis (“*Breite*”) is itself “extremely intelligent,” and Nietzsche makes this unmistakably clear, the biopolitical option will not have the slightest chance of succeeding.

This biopolitical option, on the other hand, is accompanied by the permanent threat of a steady “declining” of the “herd mass” or “a consistent growth of mediocrity” through the influence of the

⁴² FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 49 (2d ed. 1919).

⁴³ NIETZSCHE, *THE WILL TO POWER*, *supra* note 7, para. 280, at 159.

⁴⁴ *Id.*

⁴⁵ “The highest men live beyond the rulers, freed from all bonds; and in the rulers they have their instruments.” *Id.* para. 998, at 519. This reverses the “democratic” situation, where the highest men are expected to become rulers and function as instruments of the majority’s will or the “common sense.”

⁴⁶ *Id.* para. 954, at 501.

⁴⁷ *Id.* para. 955, at 501.

third rank, the “lowest kind.” What is true for the “highest kind” also applies to the “lowest kind”:⁴⁸ it is not separated from the middle or normal zone by insurmountable boundaries, but constantly crosses into it. The way these ranks relate to one another can only be understood in terms of dynamics, or better, energetics. Those who live in the zone of normalcy, or in Nietzsche’s terms, consider the middle region to be the most valuable, must mobilize their energy constantly to stay where they are, that is to say, to avoid rising too high (the risk of solitude) or sinking too low (the risk of becoming a criminal). In order for the “opposite type and its virtue,” that is to say, the highly valued “superman” to be extracted from the herd masses, it is necessary for normal life to receive a “tremendous *choc*,” that is, to be confronted with the possibility of losing all strength, of experiencing weakness and fatigue, of falling into decadence. Only under such conditions will the herd masses, Nietzsche calculates, be ready to cooperate with the new masters of the earth (who are no longer the old rulers, the “first servants” of the herd) to “breed” an even higher type of man and thus accomplish the philosophical task of biopolitics.

Nietzsche’s *final statement* about the criminal relates to the criminal resisting the biopolitical discourse. This is a statement Nietzsche adopts directly from Francis Galton. In the chapter entitled “Criminals and the Insane” of his *Inquiries*, Galton makes the following strange observation:

The deficiency of conscience in criminals, as shown by the absence of genuine remorse for their guilt, astonishes all who first become familiar with the details of prison life. Scenes of heartrending despair are hardly ever witnessed among prisoners; their sleep is broken by no uneasy dreams—on the contrary, it is easy and sound; they have also excellent appetites.⁴⁹

Despite his preoccupation with a dynamic or energetic world view based on the great fear of individual and social fatigue, or in physical terms, of entropy, there is evidence supporting the hypothesis that Nietzsche was very much attracted to the image of a higher state of being beyond all vital movement, all “*élan vital*,” knowing that this sort of “serene tranquility” was an assault on the productivist, modern industrial society, because it obviously weakened its forces for further collective development and “social improvement.”

We know that in his *Genealogy of Morals*, Nietzsche regards

⁴⁸ See *id.* para. 953, at 500.

⁴⁹ GALTON, *supra* note 42, at 42.

the “bad conscience” as the “gravest and uncanniest illness”⁵⁰ that has developed from the “self-enclosure” of man from society, a process which Nietzsche—long before Freud—also describes as “the internalization of man” or his “inpsychation.”⁵¹ The parallel that Nietzsche draws between society and prison is fully clear: the formerly “prowling” man who now has a bad conscience is confined within his inner self; he is cut off from all connections to the outside. He has become a “desperate prisoner”⁵² of himself. If a bad conscience is the (moral) sickness par excellence, then the lack of this sickness in those who are literally put into jail is a sign of hope for all the metaphorical prisoners who suffer from the “cage” of civilization. “Generally speaking,” Nietzsche argues along the lines of Galton, “punishment makes men hard and cold; it concentrates; it sharpens the feeling of alienation; it strengthens the power of resistance.”⁵³ “It is precisely among criminals and convicts that the sting of conscience is extremely rare; prisons and penitentiaries are *not* the kind of hotbed in which this species of gnawing worm is likely to flourish. . . .”⁵⁴ “Criminal psychology,” which emerges in Germany around 1800 in the context of the movement of German Idealism, acquires long before Galton and Nietzsche the conviction that remorse and the will to improve morally do not flourish under conditions where the punishment of the prisoner resembles the crime committed. According to criminal psychology, which is deeply rooted in the concept of moral education by aesthetic means (means that are supposed to address and shape the perception and sensation, the so-called “lower faculties,” of the human soul), punishment “is supposed to possess the value of awakening the *feeling of guilt* in the guilty person. . . .”⁵⁵ For criminal psychology, it is no longer the body of the prisoner but his “soul” that becomes the main target.

For Spinoza, Nietzsche remarks with this conceptual background in mind, “the world . . . had returned to that state of innocence in which it had lain before the invention of the bad conscience. . . .”⁵⁶ Nietzsche, who saw in Spinoza his only true philosophical predecessor, does not hesitate to compare his ethical theory with the behavior of those prisoners upon whom Francis Galton reflects in his *Inquiries*: “Mischief-makers overtaken by

⁵⁰ FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* para. 16, at 85 (Walter Kaufmann & R. J. Hollingdale trans., 2d ed. 1989).

⁵¹ *Id.* para. 1, at 57.

⁵² *Id.* para. 16, at 85.

⁵³ *Id.* para. 14, at 81.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* para. 15, at 83.

punishments have for thousands of years felt in respect of their 'transgressions' *just as Spinoza did* [Nietzsche puts the last four words into italics to stress the importance of this comparison]: 'here something has unexpectedly gone wrong,' *not*: 'I ought not to have done that.'"⁵⁷ What disturbs Nietzsche about the criminal is his tranquility as a prisoner. Nietzsche's last statement about the criminal is therefore an almost lyrical transcription of the reflection of Galton quoted above, an apostrophe, which at the same time is a kind of address to himself. We find several versions of this transcription in Nietzsche's unpublished notebooks. He chose one of them for *Zarathustra*, in the fourth book of which Nietzsche's alter ego says to his shadow, which is desperately looking for his "home": "Even a prison at last seems bliss to such restless people as you. Have you ever seen how captured criminals sleep? They sleep peacefully, they enjoy their new security."⁵⁸

Certainly, in the context of *Zarathustra*, a person's restless search for a home, any home, is immediately perceived as a "danger" because it prevents him from permanently transcending, from moving beyond the position he has reached. This, however, is precisely the duty of the Nietzschean "superman," who always tries to move beyond himself, who is in a permanent state of self-transgression and self-enhancement. Yet in the end we have to admit that we cannot be too sure whether Nietzsche's philosophy can be reduced to what the nineteenth-century discourse on the "human motor" (Anson Rabinbach) required it to be. In a letter Nietzsche wrote from Rapallo in December 1882 to his friend Overbeck, his main concern, as in many of his letters, is once again his permanent illness, from which he only recovers in very rare moments. "If only I could sleep!" Nietzsche writes, describing the devastating effects of the previous summer (the "affair" with Lou Salomé) on his psychological state: "I have suffered . . . as of a madness," he writes to Overbeck. "I am being broken on the wheel of my own feelings," thus describing his state with a reference to an ancient and cruel method of punishment. And he adds: Even "the strongest doses of my opiates help me no more than my six-to-eight-hour marches."⁵⁹

⁵⁷ *Id.*

⁵⁸ NIETZSCHE, THUS SPOKE ZARATHUSTRA, *supra* note 17, at 286.

⁵⁹ Letter from Friedrich Nietzsche to Franz Overbeck (Dec. 25, 1882), in 6 FRIEDRICH NIETZSCHE, SÄMTLICHE BRIEFE: KRITISCHE STUDIENAUSGABE 312 (Giorgio Colli & Mazzino Montinari eds., 1986) (translation by the author).