# THE CRIMINAL – A NIETZSCHEAN PROFILE AND ITS LEGAL IMPLICATIONS

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**Abstract** - This paper examines Nietzsche's view of the criminal, based on his "The Pale Criminal" in Thus Spoke Zarathustra. Nietzsche has two major reasons to be interested in the criminal. First, Nietzsche claims that there is a common denominator between criminals and artists-- so much so that one must consider whether one does not have the right to account all great men evil? This claim is at once infuriating and outrageous, yet at the same time presents us with an opportunity to re-set, as it were, our ideas about the criminal mind. Second, and more relevant for the legal context, Nietzsche altogether rejects the concepts of responsibility and guilt and therefore criticises the received procedures of judgement and punishment.

**Index Terms** - Nietzsche, The criminal, Strong person, Crime

Nietzsche maintains that most people seek a rule-governed life, a life of discipline and submission to the law[1]. So pronounced is this tendency that he declares it an inborn trait of human nature. Nietzsche affirms the existence of a human "nature," of traits that do not arise from the circumstances and experiences of one's life, and are not part of one's history, but are inborn. The propensity to obedience is such a trait. Given these traits, it is only "natural" for people to willingly live their lives in accordance with restrictive rules.[2]At the same time, he contends that the future of humanity lies in the hands of those who are both capable, and desirous, of iconoclasm, going against the stream, doing as they see fit, defying social convention, subverting the 'system,' or as he puts it, those who straighten up and liberate themselves from the burdens of the past. "Those who broke through the spell of a custom by means of a deed ... they are called criminals. Whoever has overthrown an existing law of custom has hitherto always first been accounted a bad man: but ... history treats almost exclusively of these bad men who subsequently became good men! (D 20). Only these iconoclasts can open up new horizons, and lead the rest of humanity on untrodden paths. Nietzschefoundthesocially-exceptionalindividualaltog ethercaptivating, and his admiration is evident in the many places where he discusses the aberrant individual in his writings.

Moreover, Nietzsche sees crime as falling under the rubric of "rebellion against the social order" (Nachlass10[50]) and even argues that "all innovations in moral thinking" are "the effect of successful crimes" (D98). This accounts for his great interest in the criminal, particularly in the criminal qua exceptional, as one who flouts social conventions. Nietzsche's claim that there is a common denominator between criminals and artists--according to Nietzsche, so much so that one must consider"whether one does not have the right to account all great men evil?"

(Nachlass 35[18] )—is at once infuriating and outrageous, yet at the same time presents us with an opportunity to re-set, as it were, our ideas about the criminal mind.

We can discern several different types of criminal mentioned in Nietzsche's writings. First, the hereditary criminal, who belongs to "the criminal race" (Nachlass10[50]).[3] Nietzsche has no interest in this sort of criminal, and suggests that the appropriate means of dealing with such criminals is incarceration, even pre-emptive, i.e., prior to commission of any crime. A second type of criminal mentioned is the pathetic, feeble individual who cannot cope with demands and challenges, and breaks the law out of weakness. According to Nietzsche, this sort of criminal is exemplified by the Apostle Paul. Nietzsche has only contempt for this sort of criminal. A third type of criminal has internalized society's values, for instance, love of money and power, and seeks a quick and easy way to actualize them.[4] Although Nietzsche sees this type of criminal as possessing some sort of "will to power," and deems those who do not have much of this drive to have "little, pale existences" (Nachlass 10[148]) and those who lack it entirely to be degenerate; he has no interest in this type of criminal either.[5]

[1] *BGE* 188, 199

[2] See *Nachlass* 14[161]

[3] Until about twenty years ago, there was opposition in liberal circles to any scholarly discussion of the criminality–race nexus, which was deemed to be tainted by eugenics. Nietzsche himself, however, ponders the possibility of recourse to eugenic means of enhancing the human race, see *Nachlass* 23[1] .

[4] See D 204.

[5] The "robber genius," who technically does not break the law, but rather amasses wealth by plundering cultural assets that are not protected by property rights (HH 110), also falls into this category. This type of robbery is possible because the law does not recognize the ownership rights of the creators of these artistic treasures, leaving them with no legal recourse, and allowing others to appropriate the said works of art. See

The fourth sort of criminal is the strong individual whose resort to crime is the result of sickness. It is this sort of criminal that Nietzsche finds interesting,[6] and it is on the psychological profile of this sort of criminal that the present paper will focus.

The term Nietzsche uses to denote such a criminal, "this ... strong type of person" (TI, Skirmishes 45), is revealing, as it points to an underlying premise also found elsewhere in his writings. Nietzsche avers that every individual is born with what we would today term a "genetic make-up" that determines her character, behaviours, and moral outlook. In the introduction to On the Genealogy of Morality, Nietzsche says, speaking of himself, but obviously, with general intent: "ourthoughts, values, every 'yes', 'no', 'if ' and 'but' grow from us with thesame inevitability as fruits borne on the tree – all related and referring toone another and a testimonial to one will, one health, one earth, one sun" (GM, Introduction, 2).

Nietzsche was, of course, well aware that social and environmental conditions can influencethe course of an individual's development, hence to be more precise, Nietzsche would say that every individual has a genetic make-up that dictates not only his character traits, but also the ways in which he would respond to external influences. The external influences themselves, however, operate independently of the individual's inborn make-up, and in this sense the individual's future is nonetheless to some extent contingent upon the specific external circumstances she will encounter during her lifetime.

Likewise, a given individual's mental health is the product of a combination of factors specific to him, and there can be no universal prescription for mental health.

For there is no health as such, and all attempts to define such a thing have failed miserably. Deciding what is health even for your body depends on your goal, your horizon, your powers, your impulses, your mistakes and above all on the ideals and phantasms of your soul. Thus there are innumerable healths of the body; and the more one allows the particular and incomparable to rear its head again, the more one unlearns the dogma of the 'equality of men', the more the concept of a normal health, along with those of a normal diet and normal course of an illness, must be abandoned by our medical men. (GS 120)

One's inborn genetic make-up determines, as I said, an individual's capacity to be influenced by external events that befall her. There are individuals whose genetic make-up is such that they have the capacity, provided they are exposed to the appropriate influences, to develop in a certain direction, just as there are individuals who, even if exposed to the said influences, remain utterly impervious to them. This serves to demarcate the type of criminal who, in Nietzsche's words, belongs to "the criminal race"—one whose genetic make-up does not allow her to extract herself from the circumstances into which she was born, circumstances that induce her to engage in criminal activity—from the type that interests him, namely, the "strong person made ill." The latter rubric denotes the individual whose genetic make-up enables him—should he encounter suitable life circumstances--not only to rise above a life of crime, but even to be a great man.Nietzsche asserts that there are indeed some--the artist and the creator--whose genetic make-up enables them to overcome negative life circumstances.

This picture accords with Nietzsche's deterministic outlook, and with his claim that were we all-knowing, that is, were we acquainted with both each individual's inborn make-up,and the external circumstances she has encountered, we would be able to predict all her actions.[7]

One who becomes a criminal of the "strong person made ill" type, Nietzsche avers, "very often gives proof of exceptional self-control, self-sacrifice and prudence" (D 50). Such criminals are basically strong individuals who are willing to challenge convention, but are "made ill" (TI, Skirmishes of an Untimely Man45).[8] Ultimately, these criminals are unable to actualize the power latent in them, and are pulled into a life of crime.What makes them ill? Society cannot tolerate individuals whose character is exceptional. It therefore denounces them as bad,ashereticsandwitches, even though they are altogether blameless.Initially, such an individual's 'badness' is no more than his being different. But

> his virtues are ostracized by society. ... It is in society, our tame, mediocre, emasculated society, that a natural person from out of the mountains or the adventures of the sea necessarily degenerates into a criminal. Or almost necessarily: there are cases where a person like this proves stronger than society. (TI, Skirmishes of an Untimely Man 45)

Creative individuals, such as scientists who defy convention and forge new paths, military heroes, and avant-garde artists, are stronger than the broader society, whose repudiation of their non-conformity does not impair these outstanding individuals' creative abilities. As a defense against society's rejection, and to secure acceptance of their message, such trailblazers and anomalous individuals commonly have to masquerade as deranged, or even "make themselves"(D 14) deranged. Such insanity is often

EckhardHöffner, *Geschichte und Wesen des Urheberrechts* (Munich: Verlag Europäische Wirtschaft,2010).

[6] See *Nachlass* 10[108].

[7] See HH 1:106.

[8] This aphorism directly follows a long discussion of the genius (TI, Skirmishes, 44).

perceived as divine, and can therefore be influential: "I have killed the law, the law anguishes me as a corpse does a living man: if I am not more than the law I am the vilest of all men. The new spirit which is in me, whence is it if it is not from you? Prove to me that I am yours; madness alone can prove it" (D 14).

But those of the unique individuals who are not strong enough to withstand society's disdain, gradually internalize society's view of them,develop guilt feelings about their 'badness,' and seek to commit crimes that will justify their having been branded 'evil.' The insight that crime is the result of guilt feelings experienced **prior to** commission of the offenses in question would soon be articulated by Freud: "Paradoxical as it might sound, I must maintain that the sense of guilt was present before the misdeed that it did not arise from it, but conversely--the misdeed arose from the sense of guilt."[9]

Nietzsche speaks of this phenomenon even more explicitly in the chapter "On the Pale Criminal" in Thus Spoke Zarathustra, as Freud himself indeed acknowledged. Thechapter portrays a criminal proceeding that is drawing to a close, focusingontheaccusedmurdererandthepresidingjudge whosentenceshimtodeath. In so doing, it sketches the psychological profile of the criminal. Speaking of the impulse to commit a crime in order to justify the way one has been labelled by society, Nietzsche declares: "Listenyoujudges,thereisstillanothermadnessanditisbe forethedeed.Oh,youdidnotcrawldeeplyenoughintohiss oul."

"On the Pale Criminal" is very important for understanding Nietzsche's approach to criminality. Carl Jung, who devoted a multi-year seminar to psychological analysis of Thus Spoke Zarathustra, harshly criticised this chapter: "Here Nietzsche really becomes an intellectual criminal that is the disgusting thing. He reaches here one of the pre-stages of his own madness." [10] Jung seems to have understood the chapter as a paean to the criminal, to the murderer. In my view, however, Nietzsche is at his best here: eloquent, critical, incisive, and fascinating. He is not praising the criminal, but rather critiquing both society, and a specific social institution, namely, the judicial system."On the Pale Criminal"addresses three key themes: illness, labelling, and suffering. The illness is that of the exceptional individual "who was made ill" by society's inability to accept him as he is, and its insistence on labelling him, branding him, as it were, with the mark of Cain. The labels used to stigmatize the exceptional individual, Nietzsche tells us, vary with the prevailing socio-cultural climate. And the suffering is the criminal behaviour to which the ostracized individual has been driven.

It is crucial to emphasize that although thisanalysis—the idea that society cannot tolerate exceptional individuals who do not follow the herd, and by labelling them 'deviants,' itself generates and then reinforces their criminality--constitutesaseriousindictmentofsociety, it is not a **moral** indictment. Nietzsche is pointing to the forces that act on the exceptional individual, causing him to turn to a life of crime, but it should not be inferred from this that Nietzsche deems society morally culpable vis-à-vis the criminal. For on Nietzsche's deterministic worldview, there is no room for ascribing moral blame either to individuals or to societies.

No one gave him qualities, neither God nor his parents; no one is responsible for his being, for his being thus and thus, for his being under these circumstances. ... as if somewhere there were a responsibility.The revolt of the man who 'suffers', againstGod, society, nature, forebears, education, etc.,imagines responsibilities and forms of will that do not exist. (Nachlass 11[156])[11]

We can only speak of culpability where someone took on a particular obligation and failed to discharge it. Apart from that, Nietzsche maintains, as we just saw, that we are all fated to be what we are, to do what we do.

At the same time, however, it is possible to identify societal forces that affect the exceptional individual and make him ill, that is, make him behave criminally. Those members of a society who are deterministically predisposed to become aware of this causal nexus, or in other words,are predisposed to be receptive to Nietzsche's insight, may internalize Nietzsche's critique, and consequently, cease to reject and exclude the exceptional individual. Such a shift in thinking, and in conduct, will gradually engender different social forces, whose attitudes and actions will have a different effect on the exceptional individual, in which case he will not become 'ill.' This message is certain to get a frosty reception, inasmuch as, in asserting that it is due to society's response to the exceptional individual that the latter behaves criminally, it will be taken to imply that society is at fault. Hence to avert this anticipated hostility to his message, Nietzsche expresses the same idea—that societal rejection renders the exceptional individual sick, and this sickness is manifested in criminal acts—in a different way elsewhere (D 202), premising the argument on society's own assumptions.[12] The argument goes like

[9] S. Freud, "Criminals from a Sense of Guilt" (1916) in *Some Character-Types Met with in Psycho-Analytic Work*, *Standard Edition* 10:332.

[10] C.G. Jung, *Nietzsche's Zarathustra: Notes on the Seminar Given in 1934-1939*, edited by James L. Jarrett (Princeton: Princeton University Press, 1988), vol. 1, 459.

[11] See too TI, The Four Great Errors 8.

[12] Nietzsche is quite fond of this mode of argumentation, using it, e.g., in GS 120; HH 2: WS 23. When he does so, he himself does not accept the premises he assumes for the sake of making the

this. You—society—believe that acceptance and adoption of your positive morality is indicative of good mental health(if x is mentally sound, x embraces your morality). (Nietzsche himself does not accept this claim).This view is not merely upheld, but is deeply entrenched in society. Yet in holding this view, Nietzsche goes on to say, society is necessarily committed to the logically-equivalent form of that claim,[13] namely,that anyone who does not conduct himself in accordance with society's positive morality is ipso facto sick.[14]

Obviously, this approach—that the criminal is sick, not guilty--has implications for the treatment of criminals. The point I am making here, however, is that Nietzsche seeks to persuade his readers, on the basis of their own assumptions, that a change in their attitude to the criminal is warranted, that the criminal should be viewed as a sick person in need of treatment, not punishment. It should be noted that willingness to ascribe illness rather than culpability to the criminal might reflect a condescending sense of superiority on the part of the 'healthy,' and Nietzsche cautions us not to take this attitude. Indeed, he goes so far as to claim that sickness is essential to health, and hence the unwell should be appreciated for contributing to guidance of the healthy. "Finally, the great question would still remain whether we can do without illness, even for the development of our virtue; and whether especially our thirst for knowledge and self-knowledge do not need the sick soul as much as the healthy" (GS 120).[15]

The "pale criminal" is juxtaposed to the "red judge."[16] Who is this red judge? Let me suggest that we read the entire chapter about the pale criminal in the light of a short story by Guy de Maupassant, whom Nietzsche, in speaking about French psychologists, refers to as follows: "To single out one of the strong race, a genuine Latin, toward whom I am especially well-disposed, Guy de Maupassant" (EH, Why I Am So Clever, 3). The story is entitled "The Diary of a Madman." It describes the case of a very distinguished judge, revered and respected by the community, head of the high tribunal, and known for his uncompromising struggle against crime. He was quick to sentence criminals to death and to be present at their executions. After this judge died, and was much mourned, his diary was found. It reported in detail the gradual development of an irresistible desire to kill, indeed, a desire to experience the very feelings that had been felt by the many criminals the judge had sentenced to death. The judge had also become obsessed with meditating on the universal, but hidden, human craving for bloodshed. This craving, he wrote, was manifested in, among other things, the excitement people feel during wartime, and the great respect they have for soldiers who kill when at war, doing what the others secretly fantasize about. The diary also described the process by which the judge fulfilled his desires, committing two different murders without been suspected by anyone. Someone else was charged with the second murder, and the judge not only sentenced him to death, but, as was his practice, attended the execution.

Revolting though the story is, it contains an insight that cannot be totally dismissed. It suggests that a murder committed by a criminal, and an execution carried out by a man of the law, have much in common and are in some sense on a par, and raises the question--admittedly antagonistic--of what distinguishes violence carried out in violation of the law from violence carried out in the name of the law. This question invites critique of the justice system and the role of law in society, and indeed, such critique is at the heart of the chapter "On the Pale Criminal."

On my reading of the passage, Nietzsche is saying that the red judge, who is about to sentence the pale criminal to death, conceals his true motivation, namely, his own desire to kill. This is what Nietzsche is referring to when he says: "And you, red judge, if you were to speak aloud all the things you have already done in your thoughts, then everyone would cry, 'Away with this filth and poisonous worm.'" Unlike the criminal who acted openly and is now paying the price for his act, the judge hides behind legal procedures, masking his desire for blood with righteous zeal for law and order. Given that the execution can take place only after the prescribed procedures have been carried out, and the accused has confessed, the judge is protected. Nietzsche is alluding to this disparity between the criminal's act, which is overt, and that of the judge, which is camouflaged, inthe opening lines: "You do not want to kill, you judges and sacrificers, until the animal has nodded."[17] The red judge—who personifies the entire criminal law--is weak and cowardly, and takes advantage of his position to gain personal satisfaction. Society as a whole has created an ugly mechanism that enables its compliant, law-abiding members to indulge their bloodlust without risking punishment.

Nietzsche's linking of judges and sacrificers is significant.It underscores Nietzsche's claim that the legal process has no rational basis, and the offender, like a sacrificial lamb, is a victim of a ritual process

argument, but posits them so that his readers can accept the argument.

[13] Technically, the contrapositive of the claim. Nietzsche does not use this term, or the notion of logical equivalence, but it is implicit in his argument.

[14] See D 202.

[15] *See EH, Why I Am So Wise*, 2: ibid, *Why I Am So Clever*, 2: *TI, Arrows and Epigrams*, 8: *Nachlass*, 14[170], 15[39]

[16] Some contend that the expression "red judge" alludes to the red robes worn by judges. It is, however, equally plausible to take the judge's 'redness' as alluding to his blood-lust.

[17] On the significance of the criminal's, and the animal's, head nodding, see Jung, cited in footnote 10 above, 452.

aimed at filling a primitive societal instinct. For if the judges are sacrificers, the accused party is the sacrificial lamb, an innocent creature that is being punished though it has done nothing wrong—a scapegoat. This is indeed the role of the submissive, nodding, defendant who stands meekly before his pursuer, the judge, and admits his guilt.

The idea that legal punishment is little more than a cowardly manifestation of the murderous desire for blood and violence is voiced frequently in Nietzsche's writings, and constitutes his fundamental critique of the institution of punishment.He describes in great detail the festivities that take place whenever there is a public execution, and how popular such occasions are, affording the people an opportunity to celebrate and even consecrate bloodlust.[18]

Nietzsche would like to see punishment abolished, and replaced by provision of treatment that rehabilitates the perpetrator. This is the meaning of Nietzsche's admonition: "'Enemy', you should say, but not 'villain,' 'sick man,' you should say, but not 'scoundrel,' 'fool,' you should say, but not 'sinner.'" For the times, this was undoubtedly a revolutionary idea.

But Nietzsche's critique of the criminal law process goes even further. The criminal is described as "pale." What made him go white? "An image made this pale human pale. He was equal to his deed when he committed it, but he could not bear its image once he had done it." It turns out that that the deed, not having been carried out in pursuit of a goal, but for its own sake, was irrational. Nietzsche argues that the judge, by presenting the murder as the consequence of a robbery, by 'explaining' it, causes the act to lose its 'meaning.' The putative explanation strips the act of its experiential essence, which cannot be described or understood by others. In being given a name and an image, the act is taken to be just one instance of a broad category of cases, and loses its uniqueness. Moreover—and this is a profound Nietzschean insight that anticipated later criminological thought--the criminal himself falls into the trap of subsuming his action under a general category, and can no longer perceive it as sui generis.[19] He sees, not the act as he originally experienced it, but an image, an image he finds unbearable. Falling into this trap of perceiving the act as society perceives it is yet another manifestation of his illness, the illness of the exceptional individual, which is most acute after the criminal act has been carried out. At this point, the criminal, having come to terms with society's perception of his deed, is utterly defeated, and becomes pale. Not only does he now accept society's view of his deed, he even casts judgment on himself, so to speak. In the final analysis, it is the criminal's internalizing of society's label of "murderer" that is most devastating.

In "On the Pale Criminal," as I read it, Nietzsche subtly delineates three phases of the criminal's illness. The first is manifested before the crime, when the exceptional individual internalizes society's view that he is wicked; the second, when he attempts to make sense of this feeling by committing a crime; and the third, when, after commission of the crime, he can no longer perceive the deed as it actually was, as his unique act, but perceives it as a garden-variety robbery that became murder, or as a murder carried out for the sake of robbery.

This brings us to another classic Nietzschean motif that emerges from "On the Pale Criminal": no two cases are alike. Grouping cases together under one umbrella denies human experience and creates an artificial reality. Such generalizations erect a barrier between who we are and how we perceive ourselves, between one's self and one's self-image, between one's self and the internalized societal image of that self.

Nietzsche is adamant about the uniqueness of every act, and expresses this categorically and unequivocally in the following oft-cited passage:
There neither are, nor can be, similar actions ... every action that has been done, has been done in an entirely unique and inimitable manner. ... All precepts of conduct ... apply only to the coarse exterior ... by means of them, indeed, a semblance of equality can be attained, but only a semblance--in outlook and retrospect, every action is, and remains, an affair that cannot be penetrated. (GS 335)

Yet what Nietzsche admonishes us against doing is precisely what legal thinking is all about. Legal thinking strips the act of its peculiar elements, and looks at it through very selective glasses. It relates to the act not as it actually was, but in accordance with its legal description, something that--according to Nietzsche--is completely imaginary.

Franz Rosenzweig--who was, overall, a great admirer of Nietzsche—takes issue with him on this point. I will conclude this paper, which has focused on the "Pale Criminal," with Rosenzweig's argument, which focuses, not on the inner experiences of the criminal and the judge, as Nietzsche's approach does, but on the day-to-day functioning of the judicial system. In his Understanding the Sick and the Healthy, [20] Rosenzweig characterizes the position upheld by Nietzsche (though without mentioning him explicitly) as a sickness of the "common sense." According to

[18] See GM, Second Essay, 6.
[19] See BGE 109, 110; *Nachlass* 9[120].

[20] Franz Rosenzweig, *Understanding the Sick and the Healthy; A View of World, Man, and God*, trans. Nahum Glatzer, introduction by Hilary Putnam (Cambridge MA: Harvard University Press, 1999).

Rosenzweig, the judge cannot occupy himself with the complexity and contingency of the act. Rather, he sentences the criminal on the basis of the legal categorization of the act: “The offense has been given a name, and this is the decisive factor.” Rosenzweig’s argument is pragmatic: to occupy ourselves with the essence of the act, and to try to grasp its real meaning, would result in total paralysis of the legal system, and with it, total breakdown of the social order. We therefore have no choice but to rely on the names and images set down by the law to describe criminal acts. Nietzsche, who was no anarchist, and did notcompletely ignore pragmatic constraints, might well have conceded the validity of this pragmatic argument. Nevertheless, his critical outlook on the legal system andthe view that the problem of criminality should be addressed within the framework of the legal system--an outlook characteristic of Nietzsche’s approach to human culture in general—offers some compelling reasons for us to be less smug about the correctness of our received traditions about the rule of law.

## ABBREVIATION


[1] BGE Beyond Good and Evil (Cambridge University Press)
[2] D Daybreak (Cambridge University Press)
[3] EH Ecce Homo (Cambridge University Press)
[4] HH Human, All-Too Human (Cambridge University Press)
[5] TL Twilight of the Idols (Cambridge University Press)
[6] GM On the Genealogy of Morals (Cambridge University Press)
[7] GS The Gay Science (Cambridge University Press)
[8] WS The Wanderer and His Shadow (Cambridge University Press
[9] Nachlass Nietzsche’s works, posthumous fragments, and correspondence edited by Giorgio Colli and Mazzino Montinari


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