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Genealogy of guilt and punishment: what is the origin of and rationale behind valuing remorse in criminals?

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Genealogy of guilt and punishment: what is the origin of and rationale behind valuing remorse in criminals?

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1. Introduction

Guilt, remorse, bad conscience: when hearing these words, one probably thinks of the feeling they get after doing something bad or evil. This feeling is familiar for many people, and judges in a criminal court even expect to see this emotion in suspects. In fact, showing remorse helps suspects getting a lesser sentence (Reijntjes, 2019). When the suspect shows they feel guilty about their crime, it is thought that they are less likely to commit a crime again (Keulen & Knigge, 2020) and it helps victims of the crime to process what they have been through (Reijntjes, 2019). Moreover, feelings of remorse are seen as self-punishment, taking away the need for a very high sentence (Ohbuchi et al., 1989). Remorse is academically defined as “emotional distress or regret about ones actions following the commission of an act deemed shameful, hurtful or violent. Remorse is allied to shame, guilt and self-reproach,” (Martel, 2010, p. 423).

In a recent Dutch case, the court increased the suspect’s sentence from 12,5 to 16 years, partially because of his lack of remorse. The suspect sexually assaulted and killed an 11-year old boy and subsequently fled the country for more than twenty years in order to not get caught. Moreover, he did not show any feelings of guilt or regret during the court hearings. This caused much distress to the family of the victim and the judges thought the lack of guilt would increase the likelihood of recidivism (Gerechtshof ‘s-Hertogenbosch, 2022). It works the other way around as well: criminal judge Feuth gave a significantly lesser sentence to a man who broke into a house and stole jewelry, but apologized to the victim the next day while giving back the jewelry to her, after turning himself in to the police (De Rechtspraak, 2022).

However, the role of remorse in punishment is relatively new. According to Nietzsche, the vast part of history, punishment was merely a way of inflicting pain on the criminal in order to give a sense of fulfilment to the victim. At some point, though, people started to expect to see feelings of guilt and remorse in the convicted criminal (GM II, paragraph 3, p. 38). Nietzsche thinks this is a strange way of looking at punishment, since the feeling of remorse is a very rare emotion amongst criminals (GM II, paragraph 13). It often has a reason that the criminal committed a gruesome crime, after all, and that reason is not their strong sense of ethics. He does not agree with modern day

punishment and the role of remorse in particular, but he does acknowledge this phenomenon. Nietzsche describes this as the development of punishment as punishing the criminal instead of the crime: “the wrongdoer is isolated from his deed” (GM II, paragraph 10). This raises the question of why remorse became important in penal systems in the first place, what the motives were to take feelings of remorse into account, and if these motives are still compatible with how contemporary legal scholars feel about law and punishment.

Foucault describes a similar vision on punishment in his book *Discipline and Punish – the Birth of the Prison*. His theory is in line with Nietzsche’s: they both state that during a large part of the history of humankind, the *crime* was punished, and that this was done by inflicting pain on the convicted, preferably on public display. And more importantly: they both recognize the trend that during a certain period in time, the focus shifted from *crime* to *criminal*, and people started to connect punishment to the feeling of guilt, remorse, and bad conscience. Foucault identifies the corrective tendency that modern penal systems have, which is still an important factor in today’s penal system, and stresses the individual aspect of punishing: we expect the convicted to feel guilty, and we expect the convicted to change. This also brings the desire to decrease recidivism into the penal system: by trying to correct the criminal’s mind, the penal system tries to decrease the likelihood of the criminal committing a crime again.

Much has been written about the role of remorse in today’s penal systems. Most of the literature addresses how true and genuine remorse can be observed, and how this plays a role in sentencing. The sociological implications of remorse from criminals have also been described. However, historical context on this phenomenon is lacking. This is something that Nietzsche is cautious about: he was very worried about the lack of historical context of moral philosophers. Little has been written about why and when this change occurred. More specifically: when was the public torture of the convicted as a means to punish a *crime* replaced by the imprisonment and therefore punishment of the *criminal*, implicating the will to morally correct and reshape the behavior of the criminal? And why did humankind think remorse was negatively linked to recidivism? This question is especially relevant, considering that remorse certainly did not always have a role in punishment, as will become clear later in this research.

It is important to note that retribution is still an aspect in today's penal system, although punishment for grave crimes is limited to imprisonment. This can be seen in the victim's right to speak in court, and the victim's right to complain when the prosecutor decides to not prosecute: the penal system still pays attention to the victim's right to retribution (Wetboek van Strafvordering, art. 12 and 302)¹. However, the legal process leading up to punishment and the goals behind punishment mostly revolves around guilt and remorse. That is why looking further into this topic is relevant: to show why we punish the way we punish, and how this originated. More specifically, it will show when humankind started linking decreased recidivism to remorse, and if this notion is still accurate and applicable in the 21st century. Punishment touches upon a human's most fundamental right, the right to life, and therefore this topic will never lose its value. This research will focus on the developments regarding criminal law in parts of the world with a Christian background, Europe and the United States, in order to keep the results of this research reliable.

Several phenomena have become clear: i) judges today value remorse, thinking it will decrease recidivism, ii) remorse did not always play a role in penal law: it is a relatively new concept, and iii) there is a lack of evidence supporting the link between remorse and recidivism. This raises the question: why do judges still value remorse to a high extent? This thesis will show the crucial role that Christianity has played in the rise of the role of remorse in punishment. Evidence for this is found in both historical analyses and in Nietzsche's work. However, considering secularization, this still does not answer why judges *still* looks for remorse. Nietzsche's work will be used to answer that as well. The first part will be a literature review, analyzing the current literature on the role of remorse in sentencing and punishment. More specifically, this part will look into the existing evidence concerning the link between remorse and recidivism. This part will aim to answer the *why*-question: why do judges look at remorse in suspected criminals? The second part will dive into the genealogy of the phenomenon of remorse and recidivism in penal systems. As Nietzsche and Foucault propose, this change happened somewhere in the recent history – according to Foucault, somewhere between 1750 and

¹ Dutch Code of Criminal Procedure (many of these core principles are universal in Europe and the United States)

1850 (Foucault, p. 5). This *when*-question will be answered by using secondary literature about historical texts, about remorse and the history of criminal law. In the final part, an analysis will be made, with the primary goal of aiming to answer the questions posed in the genealogical part using Nietzsche's work, regarding why judges today *still* value remorse. The secondary goal is to use the genealogical part to give historical context to Nietzsche's work.

2. Literature review

There is no lack of literature about the role of remorse in criminal law. There is even no lack of literature showing the insufficient evidence connecting remorse to decreased recidivism. However, there *is* lack of literature about why remorse then has such a large role, and how it originated. As shown below, an academic debate about the role and desirability of the role of remorse is unfolding.

First of all, a large part of the recent literature about remorse focuses on the sociological, and sometimes philosophical, aspects of remorse. Martel (2010) wrote an extensive paper about the role judges attribute to remorse and responsibility regarding convictions and verdicts about parole. He stresses that the assessment of remorse is significant to decision making, but that it comes with risks: judges may make wrong assumptions about the suspected or convicted criminal (Martel, 2010, p. 422). This is the first pitfall of the role of remorse. Martel also sets forth why judges rely so heavily on it. First, he notes that it is rooted in Christian influences on law (p. 423). This will be further elaborated in chapter 3 of this research; Martel himself does not specify this further. Second, he states that neoliberal influences on the penal system promote *responsibilization* of the suspect or convicted (p. 423). This means the shift of putting responsibility on the individual's character for having committed the crime, and even more for not committing the crime again. This risk is thought to be increased as long as the person does not show remorse. The behavioral science behind this is that offenders' psyche works differently, and that this is the reason behind their crime. This goes hand in hand with Nietzsche's notion about criminals having deviant mental states as the source of crime, however, Nietzsche says that because of this reason, expecting remorse is irrational (GM II, § 6), whereas social scientists today do believe that this is possible. Behavioral scientists behind this idea believe that once they are able to feel remorse, the distortion in their psyche is corrected and the chances of recidivism are greatly reduced (p. 423).

Secondly, debate exists about the fairness of connecting remorse to a lesser sentence. Martel states that the penal system's aim at confession and remorse is thought to achieve the truth (p. 425). Suspects are motivated to act in accordance to that by being

promised a lesser sentence. This raises the question of if motivating confessing and showing remorse actually helps bringing the materialist truth to light. Confession, similar to remorse, has its roots in Christianity: the confessing of sins to a priest (p. 424). Although Martel mentions historical aspects of remorse and confession, he does not go into further detail about this.

A third topic that contemporary literature about remorse discusses is the severe worries about the reliability of the judges' assessment of remorse. Bandes (2015) wrote a paper about the reliability, efficiency, and desirability about the significance of remorse in punishment. She identified the following reasons behind *why* the penal system relies so heavily on remorse: i) the degree of remorse would predict recidivism and future threats to society, ii) it reflects on moral culpability, iii) it serves the restorative function of criminal justice, and iv) it responds to the retributive needs of society (p. 17). The latter corresponds with Nietzsche's view on the historical reasons behind punishment. This is also shown in the Jos B.-case, as the victim's family were deeply saddened by the lack of remorse that he showed. However, and this is another point of debate in literature regarding remorse, there is no significant evidence that compassion and remorse actually decrease chances of recidivism (Bandes, 2015, p. 15). This was already found in research conducted by Proeve et al in 1999 (p. 23). Therefore, it can be concluded that during the years between both researches, no meaningful evidence has been found that looking for remorse actually has the effect that it is thought to have. In addition to that, Bandes also claims that there is no overwhelming evidence that remorse can accurately be assessed based on nonverbal behavior like facial expression and body language (2015, p. 15).

A philosophical issue that comes with getting feelings of remorse get mixed up in criminal justice, is that, as Nietzsche puts it, the criminal is getting punished instead of the crime (GM II, paragraph 1). Bandes (2015) states that remorse shows the characteristics of empathy and compassion, or in other words, a better moral compass (p. 15). This leads to the question: is it in the current penal system the character that is getting punishment, or is it the crime? Or in the words of Bandes: "should sentencing depend on character?" (p. 15). A more practical issue is one Bandes pointed out by debating the reliability of a judge's assessment is that the assessment of remorse relies

on a gut feeling more than on objective signs. Many elements can be aggravating or mitigating factors in a criminal trial, but lack of remorse is an unofficial kind of evidence that relies on intuition (Slovenko, 2006, p. 398).²

Based on the discussed literature, the reason why judges look for remorse is mostly because remorse is thought to have a decreasing effect on recidivism. Besides that, remorse also shows in how far the criminal is to blame morally, it serves the restorative goal of criminal justice, and it satisfies the need of victims and society for retribution.³ However, scientific evidence supporting the main reason for the role of remorse is lacking. As shown in the discussed literature, there is no clear relationship between strong feelings of remorse and lower recidivism. This leaves the question: why does the penal system still value remorse to a large extent?

The literature found and used in this research uses sources that does not date any earlier than the 1980s. This makes it hard to use the literature as evidence for a genealogy of the role of remorse: the historical aspect of remorse in penal systems is rarely touched upon. In fact, other researchers have stated that penitence⁴ as an instrument in criminal law has not much been researched so far (Mäkinen & Pihlajamäki, 2004, p. 536). Almost all research is about the reasons behind the role of remorse and the effectivity and desirability of it. Therefore, it appears that there is a gap in current literature about the historical background of this phenomenon. Regarding the historical background, there is literature about the Christian phenomena of confession and penitence, but not in relation to penal systems. This makes it an interesting point for research, especially since contemporary research evidence does not show overwhelming support for using the assessment of remorse in preventing recidivism. If this did not start by scientific evidence showing how important remorse is in the rehabilitation of criminals and keeping society safe, then why did this phenomenon arise

² In this research, the issue of reliability will not be further discussed, as the focus is mostly on the philosophical aspects of punishment and not the practical issues that come with it

³ The latter is what Nietzsche describes as the creditor-debtor relationship, which will be elaborated later in this research.

⁴ The Christian concept of 'remorse'.

in the first place? This will be answered in the next chapter, and following that chapter, it will be explained why this phenomenon is still present.

3. Genealogy of remorse and punishment

Most civil law systems, like the one in The Netherlands and Germany, are built upon ancient Roman law. It has been elaborated over the years, but the key concepts like liability and compensation originates from the original Roman law – the first actual civil law system in the world (Anderson, 2009, p. 1). Their view on criminal law, however, has substantial differences. Nevertheless, this genealogy will start by analyzing Roman criminal law, as this is the first form of codified law and a point in history in which remorse did not play a role yet. The next big shift in criminal law occurred when Christianity started influencing it, which is also what will bring the answer to when remorse started playing a role. Therefore, Roman law will be used as a starting point in this genealogy, and Christianity is the next large modification in criminal law, especially regarding remorse.

In most of the Roman history, criminal law has been underdeveloped compared to private law (Bauman, 1996, p. 3). There are three aspects however that the Romans paid attention to in regards to criminal law: what acts were considered criminal acts, the procedure that tried the charges, and what forms of punishment could be imposed (p. 4). There are similarities and differences between the Roman penal system and the contemporary legal system. Advocates from both sides presented their side of the story, sometimes using evidence or witnesses, which is still the foundation of criminal trials in most countries, either common law or civil law. However, unlike in today's penal systems, the verdict did not contain a motivation (Riggsby, 2017). There were several factors influencing the assessment of guiltiness and the severity of the sentence, like the social status of the suspect, the severity of the crime, and the materialist truth (Harries, 2007, pp. 23-25), but remorse was certainly not one of them.

This brings the research to the period following the Roman Empire: the Middle Ages. Since there was no unity anymore like there was in the Roman Empire, it will focus on the broad influence underlying Medieval law, Christianity, and not on any countries in specific. Criminal procedures on the European continent were influenced by both Roman law and the Christian church (Schrieber, 1991, p. 535). For this research, the most interesting development in this period was the rise of the role of confession in

criminal law. This was seen as “the queen of proofs” (p. 538). Around the twelfth century, confession started getting a central role in life in that era, and shortly after that, it became the focal point within criminal law (p. 539). This subsequently led to the emphasis on inquisition and even coerced confessions. Today, a less cruel version of that exists, which is giving lesser sentences to those who confess (Martel, 2010, p. 425). This was the origin of torture as well. It must be noted however that torture was also a tool to gain confessions among Romans in Palestine (p. 540).

The confession, also known as the penitential sacrament, is directly linked to the feeling of remorse in the following way: the process of this act involves the confessor (the person to which the sinner confesses) inducing feelings of remorse to the person who is confessing (Thomas, 2012, p. 30). The name of this sacrament is not a coincidence: the word ‘penitentia’ means the feeling of remorse one gets after confession. This phenomenon became embedded into society with the rise of power of the Christian Church. Raymond of Penyafort, a legal scholar who was active in the twelfth and thirteenth century and responsible for writing Canon law (Jarvis, 2007, p. 113), wrote in one of his works that these feelings of remorse “pertains the avoidance of future deeds that would have to be regretted again” (Thomas, 2012, p. 30). The sinners should feel and show remorse so heavily that the confessor trusts that the sinner will never commit that sin again (p. 30). Today, this is called recidivism, and is the main reason why judges give lesser sentences to convicted individuals that have shown remorse. However, the kind of confession Penyafort writes about is not the kind of confession that takes place in a criminal trial: the penitential sacrament is part of practicing faith as a Christian, and in a criminal trial the confession is linked to punishment. And more importantly, Penyafort’s writing was about Canon law, and not national criminal law. At that point in history, this was still separate. Thus, the question of when this became common practice in criminal law remains.

So far, it can be concluded that remorse in criminal justice has its roots in the Christian forms of confession and when this concept started. It is not clear yet how Christianity and criminal law formed in relationship with each other, when did they get connected and when did secularism arise. Foucault proposes it happened between 1750 and 1850, but evidence supporting that time frame has not been found yet. This is especially

interesting considering that confession and remorse in canon law arose in the twelfth century, which is 600 years prior to what Foucault suggests. The next step is to analyze how canon law influenced criminal law.

Research has been done on the influence of canon law on the Anglo-American law tradition (Martinez-Torron, 1989). This means that the continental Europe civil law tradition was not part of his research. However, many historical elements apply to both the common law and civil law tradition, making it applicable to all countries with a Christian background (Martinez-Torron, 1989, p. 8). In England specifically, the Star Chamber, a high royal court, functioned as the channel through which canon law penetrated criminal law. This happened due to the Star Chamber following the Catholic Church's doctrines regarding the penitential system, after the eleventh century. This led to a shift from objective responsibility to the individualization of criminal responsibility. Objective responsibility means being responsible for just the crime itself, whereas individualized responsibility means that the person and circumstances are taken into account as well. The suspect showing remorse during his trial is part of this, making the trial more individualized. As a result, the "focus would no longer be on the crime but on the criminal," (Martinez-Torron, p. 13). All in all, this answers the question that this part aims to answer: Canon law, and mainly the Christian idea of confession and remorse, started influencing English criminal law in the twelfth/thirteenth century through a high royal court following Christian doctrines.

Another research (Mäkinen & Pihlajamäki, 2004) gave similar results, and focused on a broader scope: not just common law tradition and England in particular, but the general impact of Medieval Canon law on criminal law. Their research paper stresses the significance of the thirteenth century for the development of criminal law: the shift to individual criminal responsibility (p. 526). This entails the subjective and personal stories of the defendant, in the form of confessions. And as discussed earlier, a key element of confession is remorse. Individual criminal responsibility is the opposite objective responsibility, which focuses on the consequences of the crime, which was common practice within criminal law before the influence of Canon law arose.

As stated before, the thirteenth century was a turning point in the history of criminal law, largely due to Canon law and the legal scholars specializing in ecclesiastical law (Mäkinen & Pihlajamäki, 2004, p. 531). During this period, the Church started separating non-criminal sins and criminal sins. Sins were acts against Christian values, whereas crimes were acts considered illegal by the state, and some sins were also crimes. The non-criminal sins were subject to the penitential sacrament at Church, the criminal sins – the crimes – were subject to court bodies (p. 531). Nevertheless, the subjective side of the crime, entailing individual criminal responsibility including the aspects of confession, was also a part of the criminal trials. This individual responsibility was considered the ‘human individual will’, which made individuals bear moral responsibility over their actions (p. 527). Later, in the fourteenth century, this process of individualization also took place in the secular criminal law (p. 534). This individualization and the rising importance of subjective aspects was also thought to have a positive effect on the guidance of individuals to better behavior (p. 537).

All in all, it can be concluded that the role of remorse in penal law originates from Christianity and Canon law, specifically through the importance of confession and the process of individual criminal responsibility. However, Christianity is not as dominant in society anymore as it was back then, and yet remorse still impacts criminal trials. An explanation for this will be given in the next chapter, using Nietzsche.

4. Analysis

4.1 Introducing *On the Genealogy of Morals*

Nietzsche's *On the Genealogy of Morals* covers a great diversity of topics, divided into three essays, that eventually all connect together and that all have one red line through them: morals. Guilt and punishment is one of the topics he touches upon. Nietzsche's views on the role of morality in punishment offer an intriguing explanation to the questions that rose in the genealogy on the role of remorse.

After explaining Nietzsche's theory about guilt, punishment, and other topics relevant to this research, the historical genealogy of remorse will be used to give historical context to Nietzsche's text, and more importantly, Nietzsche's text will answer the question of why the penal system nowadays still values remorse in criminals.

4.2 Slave revolt and new values

Before Nietzsche's genealogy of punishment will be addressed, the slave revolt needs to be introduced first, since the values that were created during this time are connected to the developments in punishment.

The slave revolt is an important and recurring topic in Nietzsche's work. This revolt was born out of a feeling of resentment that slaves felt against their masters. Although the slaves were low in social ranking and considered weak, they were clever, and came up with the ultimate revenge against their masters: re-evaluating classic values. This means that they replaced the classic values like strength, which were connected to people with a high social ranking, with values like suffering, guilt, and humility, which were connected to the life of the slave. These new values are also known within Nietzsche's work as the *ascetic ideals*. In prehistory, man was able to indulge in someone's suffering, which Nietzsche describes as "a true feast" (GM II, § 6). He thinks it is inherently human to enjoy watching someone suffer, but the slaves turned this desire inwards, by turning the suffering of themselves into a virtue. However, although that was a clever move, Nietzsche finds it unnatural to human nature. The slave revolt was successful, meaning that the weak succeeded in prevailing over the strong, because they were the majority

and besides that more intelligent. And although finding it unnatural to human nature, Nietzsche does not necessarily reject the slave revolt. He uses it as an explanation for certain events and phenomena, like the rise of ascetic values, which also play a role in the development of punishment, as will be shown below.

4.3 The genealogy of punishment and guilt in Nietzsche's view

A society without some form of a agreements is unthinkable. Nietzsche sees agreements as a promise that has been made between people, with a creditor on one side and a debtor on the other side. This is also seen by Nietzsche as the source of the original form of punishment: if the debtor did not deliver his part of the agreement, the creditor was allowed, entitled even, to punish the debtor. Because watching someone suffer or even inflict suffering on someone was considered a feast (GM II, § 6), this used to be seen as a fair way to substitute the original debt with. Or in other words, to restore the balance between creditor and debtor. Thus, the primary reason for punishment was simply to get the debt repaid (GM II, § 4). The creditor was able to discharge their anger by inflicting pain, and because the primal human still allowed himself to enjoy suffering, he was able to restore the debt in this way. The amount of suffering was related to the severity of the debt (GM II, § 5). Crimes could also be seen as some sort of debt, with the criminal being the debtor and the victim being the creditor, as the agreement that has been broken was the agreement to *not* do certain things, like stealing or murdering. Important to note is that this is all pre-slave revolt punishment: no notion remorse is seen in this form of punishment, or any other post-slave revolt values, nor any Christian values.

An effect of punishment was that it put society into a “social straightjacket”, because it kept civilians’ memory sharp of what was allowed and what was not; man was made calculable (GM II, § 2). Pain was an important factor in creating this sharp memory: “only something that continues to hurt stays in the memory,” (GM II, § 5). This pain taught humankind not to break agreements of any kind. The creditor-debtor relationship was not just the source of punishment: it was also the source of feelings of guilt, as guilt was initially feeling guilty of one’s debt (GM II, § 5). However, this is not the same as punishing to *make* someone *feel* guilty. This feeling of guilty indebtedness was

merely the result of society, and using punishment as a means to make someone feel guilty developed later.

As society developed, so did punishment and its purposes: it started to have other purposes than merely getting a debt paid – punishing the *crime* –: it started to get the purpose of imposing ascetic ideals onto the debtor – punishing the *criminal* – by trying to let him suffer from feelings of guilt. The criminal was punished for not behaving differently in a situation where he could have behaved differently. These feelings of guilt are also referred to as the *pang of conscience* or *bad conscience*.⁵ However, Nietzsche states that those feelings are extremely rare amongst criminals, and by expecting to see feelings of guilt in the criminal, people are violating the psychology of the history of mankind. He also argues that punishing the criminal can actually be counterproductive: “the whole, punishment makes men harder and colder, it concentrates, it sharpens the feeling of alienation; it strengthens the power to resist,” (GM II, § 14). So if anything, it makes them more skilled recidivists. And secondly, the ways in which criminals were prosecuted and punished, like being tortured, were done by people with *good conscience*. This showed society that it was not the deeds itself that were criminalized, but the circumstances in which they were practiced (GM II, § 14). This part is all in accordance with the process that was found in the historical part of this research: the increased individual criminal responsibility, where the person of the criminal and the circumstances started playing a role. Assuming that the judges in this period aimed to lower recidivism by trying to inflict feelings of guilt, as found in the historical sources mentioned in chapter 3 of this research, Nietzsche’s answer might be that the opposite of that goal was reached. As argued in this quote, prisons can teach criminals skills that can make actually make them proficient recidivists, by making them “harder and colder” and “strengthening the power to resist,” which can be interpreted as resisting the power of the state.

⁵ The word ‘guilt’ can be read as ‘remorse’.

4.4 Comparing Nietzsche's genealogy to the genealogy of remorse

So far, it has been found that the developments that Nietzsche has found, such as the shift to individual responsibility and the role of guilt and remorse, corresponds to the developments that have been assessed in the genealogical part of this research. The genealogy of the role of remorse in punishment has much in common with Nietzsche's genealogy of punishment. However, the question of *why* this is still practiced remains. This will be further discussed in chapter 4.4.2.

One issue in Nietzsche's genealogy, which is the lack of historical context in *On the Genealogy of Morals*, is solved by the genealogy of this research. Owen (2007) addresses this issue as well in his review of Nietzsche's work, specifically about if the historical accuracy of Nietzsche matters in relation to its value (p. 138). Although Nietzsche writes about history in this book, no years are named. There is no exact historical context. It can even be questioned whether the slave revolt and the re-evaluation of values ever happened, or if it happened in the way he described it. Giving historical context to his work helps validating it, since the question of whether the events in his book actually happened or not is no longer left unanswered. Moreover, the answer of morality that is given to the historical events have more value this way as well, since it is clear to which events Nietzsche is referring to.

4.4.1 Historical context

Firstly, the way Romans looked at criminal law corresponds with how Nietzsche describes pre-slave revolt punishment. The Romans looked at the actual crime itself and the severity of it, and sentenced the convicted to a punishment accordingly (Harris, 2007, p. 25). The subjective side, like possible feelings of remorse within the criminal, did not play a role. As described in the paragraphs above, the pre-slave revolt way of punishment also solely looked at the crime and not the criminal, and the punishment was directly related to the severity of the debt. Thus, it is a possibility that the period of the Roman Empire is what Nietzsche is referring to when writing about the pre-slave revolt era.

Secondly, the rise of Christianity has many similarities with Nietzsche's notions of slave revolt and ascetic ideals. Additionally, Canon law seems to be the post-slave revolt

punishment. It is already known that Nietzsche blames the Christians for the ascetic way of life. Denying oneself of natural urges like hunger, lust, and the desire to see other people suffer, are all Christian values after all, and Nietzsche has written about that specifically too (BGE, § 55). The integration of Canon law into societies and the growing role of Christianity in everyday life corresponds with how Nietzsche describes the integration of ascetic ideals into everyday life. More specifically, this entails the penitential sacrament becoming embedded in the life of civilians (Schrieber, 1991, p. 539). The confessor was trained to impose feelings of guilt and remorse onto the sinner, which are ascetic ideals. In Canon law, confession and remorse had a crucial role: the Ecclesiastical Courts expected to see feelings of guilt in the sinners criminals. Parts of Canon law then slowly became embedded in secular criminal law as well. It is stressed in the literature how during that period the focus on punishing the *crime* shifted to punishing the *criminal* (Martinez-Torron, p. 13), which is striking, as Nietzsche mentions something similar: isolating the criminal from his deed (GM II, § 10). Therefore, it can be assumed that in the twelfth century, the slave revolt had already happened. Unfortunately, there are many ages between the fall of the Roman Empire and the rise of Canon law, making it hard to pinpoint when exactly the process of what Nietzsche calls the slave revolt happened.

4.4.2 Nietzsche's answer to the role of remorse

Finally, an explanation for why guilt and remorse still have such a large role in penal law will be answered by using Nietzsche's theories on morality. In today's world, morality and punishment are deeply intertwined. This works both ways: the penal system corresponds to what is thought to be morally good and morally bad, and criminal law shows society what is allowed and what not, thus showing what we should think is good and bad. The connection between punishment and morality becomes evident in the role of remorse as well: besides the recidivism argument that favors the role of remorse, the morality argument bears some of the weight too, as people find it objectionable if the criminal does not show remorse.

Nietzsche would explain this morality-punishment connection by showing how morality became deeply embedded into society and created and shaped the system of justice. Nietzsche does not think morality has its roots in justice, but rather the other way

around: our conception of justice is based on moral values that have become part of society, on “the morality of custom and the social straitjacket,” (GM II, § 2). And the roots of today’s morals lie mainly, as described above, in the slave revolt, and – in Christian countries - the rise of Christianity. Although these events both created mostly similar values, guilt being one of them, and they might have some overlap, they are separate phenomena. The genealogy on the role of remorse showed that Christianity had a large impact on the development of remorse in penal law, and although Nietzsche has strong thoughts about Christianity, it is still a point of debate whether or not Christianity is a precondition to the role of guilt in punishment according to Nietzsche. The following part will therefore focus on the role of morals and Christianity, and how these two come together in punishment.

Morals are inherently irrational and unnatural (BGE § 188). Because Nietzsche feels so strongly about that, he blames the contemporary philosophers for looking for rational foundations for morality and for lacking historical context (BGE, § 186). This historical context is an important factor in how Nietzsche looks at the philosophy of morality, which is why this research aimed at establishing the history context of remorse first. According to Nietzsche, these philosophers of morals look at history with – figuratively speaking – contemporary morality-colored glasses on. They assume there is such thing as ‘one’ morality, and subsequently assume that this morality has always existed. That is the reason why they fail to successfully analyze the history of morality. He also points out the importance of their church in regards to their limited view on morality. This passage is relevant to this research, because it shows the pitfalls of thinking and writing about morality. It also shows how Nietzsche sees morals: as something irrational, fluid, and subject to time and space. It is not something that exists outside of ourselves, but inside ourselves, as something that man creates and keeps creating.

So far, it can be argued that Nietzsche’s explanation for the lasting role of remorse in punishment is the slave revolt and the rise of Christianity and the values that came from it. The initial forms of punishment were truer to human nature, where it was merely a way for the creditor of getting their debt paid. This already created the morality of customs. However, it was the slave revolt and Christianity that gave deeper meaning to ascetic ideals like the notion of guilt, which transformed punishment, even though

expecting to see feelings of guilt in criminals is irrational. Thus, the short answer to the why-question of remorse, is: morals. And the development of punishment was built upon these moral values. However, this still leaves some questions. It is yet unclear how exactly the notion of guilt that was expected in criminals originated. It is clear *that* it happened, but not *how* it happened. It is one thing to expect it from the people surrounding you, yet another thing to expect it to see it in someone who clearly violated the moral standards. Moreover, the role of Christianity, however clear in the genealogy in the first part of this research, leaves room for interpretation in essay 2. And since this so clearly shaped the role of remorse, as seen in the historical genealogy in this essay, it is important to find out how Nietzsche views the impact of Christianity on remorse. Therefore, in the following part secondary literature will be used to answer these questions.

Burdman (2018) conducted research on a similar subject as this research, connecting punishment to both morals and religion, and helps interpret the last paragraphs of essay 2 about Christianity. Burdman points out that many readers of Nietzsche's neglect the link between legal, religious and moral factors that shape human action and overlook the role that law *and* religion play in shaping the moral valuation of human action (p. 3). He interprets essay 2 as a critique on judging actions through impersonal punishment, which is impersonal in the way that it is the state who takes the power from the creditor regarding punishment, which creates "an imbalance in the economy of pain that underlies social interaction," (p. 3). He argues that the concept of *guilt* is grounded in the infliction of pain. This type of guilt, however, is different from the type of guilt that is attempted to inflict upon criminals, which is *moral* guilt (p. 8). Burdman stresses the distinguishment between these two types. And this form of guilt, according to him, was created by the transformation of punishment, which was a result of the creation of the State (p. 9). This is intriguing, since essay 2 can also be interpreted as explaining that punishment transformed as a result of the creation of moral guilt. According to Burdman, punishment lost its meaning since the creditor did not get his feeling of retribution, and the debtor was not able to repay his debt, resulting in guiltiness he had to carry with him forever. Nietzsche argued before that senseless pain is the definition of suffering, and since this new way of punishing was senseless, the debtor needed a new meaning for the pain inflicted on him by the punishment. This new meaning was the

feeling of guilt. Burdman describes this as the ultimate sacrifice: this credit for guilt had to be carried forever due to the impersonal punishment, and God is the only entity that can redeem this debt. Nietzsche calls this Christianity's stroke of genius: "none other than God sacrificing himself for man's debt, none other than God paying himself back, God as the only one able to redeem man from what, to man himself, has become irredeemable – the creditor sacrificing himself for his debtor, out of love (would you credit it? –), out of love for his debtor! . . ." (GM II, § 21). All in all: the Christian god gave a *moral* meaning to guilt in the following way. The development of the state caused the shift from personal creditor-debtor punishment to impersonal state-level punishment, taking away the original meaning of punishment: the retributive meaning. This made the pain inflicted by punishment senseless, and the debtor had no way to ever repay his debt. It took meaning away for both creditor and debtor. Thus, man sought a new meaning for punishment, and the answer was found in the Christian god and inflicting guilt.

Applying Burdman's explanation of moral guilt to today's penal system and the role of guilt and remorse, would still make sense. The retributive aspect of punishment has subsided greatly, and this impersonal way of punishing still exists: the state has a monopoly for punishment. This leaves society to look for another meaning for punishing criminals in this impersonal way, which is hoping that it teaches them they did something wrong and immoral, and hoping that they will regret what they did, or in other words: society hopes that punishment makes the criminal feel *guilty*. Nietzsche's quote "the creditor sacrificing himself for his debtor," (GM II, § 21) also explains this: victims of crimes are no longer able to get direct retribution from punishment, and sacrifice their ability to discharge anger, for trying to make the criminal feel guilty, and to hopefully morally correct them. So, although evidence for decreased recidivism is lacking, society still holds onto the remorse-argument. If the retributive purpose of punishment is nihil, the purpose of rehabilitating and decreasing chances of recidivism are left. This new meaning for punishment has Christian origins. And the morality today has Christian roots, even though not everyone is Christian anymore. In short: Christianity caused the role of remorse, and the deep embeddedness of morality in society is what kept the role of remorse.

5. Conclusion

The research question can be answered in one paragraph. The reason why we look for remorse in criminals nowadays is because it is thought that this makes them less likely to commit this crime again. This idea originates from the Christian Church, and more specifically Canon law implementing the confession, that slowly influenced secular criminal law as well. Though, when remorse started to play a role, it was much more than just the recidivism-argument, such as the process of individualizing criminal responsibility. Punishment lost an important function, the retributive function, when it became impersonal, and man needed ways to make it meaningful. The new meaning was found in Christianity, by inflicting feelings of remorse and guilt in the convicted, which are values that are rooted in morality. And according to Nietzsche, morals are irrational, which explains why practical evidence for the recidivism-argument is lacking. Since morals are embedded so deeply into society, it is not surprising that these morals rooted in Christianity are still present today. Evidence for these claims is found in both the historical genealogy for remorse as in Nietzsche's *On the Genealogy of Morals*.

This asks for further research on this topic. However, arguments in favor of the role of remorse also exist. One of these is that Christian moral values still play a large role in today's world, also in secularized countries. Christian values like compassion and humility are still appreciated by the vast majority of people: it shaped the morality that is still present in today's world. Remorse is one of those values that are still appreciated, and one that is also very important to victims of crimes, whether that is rational or not. The role of remorse in punishment could then be regarded as a value, and not as an objective means to decrease recidivism. However, in any case, the re-evaluation of that role should still be further researched, at least for making the judicial system aware of the motives behind it. If the aims of remorse in punishment do not have significant evidence supporting them, *and* the history behind why jurists began relying on remorse does not correspond anymore with today's society, then that seems to be a clear indication for such re-evaluation.

6. Literature

- Anderson, C. (2009). *Roman law*. Dundee: Dundee University Press.
- Bandes, S. A. (2016). *Remorse and Criminal Justice*. *Emotion Review*, 8(1), pp. 14–19.
- Bauman, R. A. (1996). *Crime and Punishment in Ancient Rome*. London: Routledge.
- Burdman, J. (2018). The Importance of Mutual Injuries: Nietzsche on God, Law, and Impersonal Punishment. *Law, Culture and the Humanities*, 00(0), pp. 1-18.
- Foucault, M. (1995). *Discipline and Punish: the Birth of the Prison*. (translated by A. Sheridan). New York: Pantheon Books.
- Gerechtshof 's-Hertogenbosch, 20 november 2020, ECLI:NL:GHSHE:2022:232.
- Harries, J. (2007). *Law and Crime in the Roman World*. Cambridge: Cambridge University Press.
- Jarvis, R. M. (2007). St. Raymund of Penafort: Patron Saint of Law Professors. *Barry Law Review*, 8, pp. 111-116.
- Keulen, B. F., & Knigge, G. (2020). *Strafprocesrecht*, pp. 1-14. Deventer: Wolters Kluwer.
- Mäkinen, V., & Pihlajamäki, H. (2004). The Individualization of Crime in Medieval Canon Law. *Journal of the History of Ideas*, 65(4), pp. 525–542.
- Martel, J. (2010). Remorse and the production of truth. *Punishment & Society*, 12(4), pp. 414–437.
- Martínez-Torrón, J. (1989). Comments on the Influence of Canon Law on the Common Law Legal Tradition. *Revue générale de droit*, 20(1), pp. 5–30.

- Nietzsche, F. (1994). *On the Genealogy of Morality*. (translated by K. Ansell-Pearson). Cambridge: Cambridge University Press.
- Nietzsche, F. (2015). *Voorbij Goed en Kwaad (Jenseits von Gut und Böse 1886*, translated by T. Graftdijk and revised by P. Beers). Amsterdam: De Arbeiderspers.
- Owen, D. (2007). *Nietzsche's Genealogy of morality*. Durham: Acuman Publishing.
- Reintjes, J.M. (2019). *Berouw en strafmotivering*. TPWS 2019/81.
- Riggsby, A. (2017). *Roman criminal law*. Oxford: Oxford Classical Dictionary. Retrieved from <https://doi.org/10.1093/acrefore/9780199381135.013.8153>.
- Schreiber, A. M. (1991). The jurisprudence of dealing with unsatisfactory fundamental law: a comparative glance at the different approaches in medieval criminal law, Jewish law and the United States Supreme Court. *Pace Law Review*, 11(3), 535.
- Slovenko, R. (2006). Remorse. *Journal of Psychiatry & Law*, 34(3), pp. 397–432.
- Thomas, A. (2012). Canon Law and Fraternal Subversions of the “Silent Middle Term” in Piers Plowman B and C Texts. *Modern Philology*, 110(1), pp. 24–48.