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# Remorse in the French Criminal Justice System A Subterranean Influence

**VIRGINIE GAUTRON<sup>1</sup>**

## **Abstract**

A comparison of the theory of French criminal law and its practical implementation reveals a strange paradox. Aiming to maintain the positivist tradition of scientific, rational laws detached from morality and the religious roots of penal philosophy, legislators are writing texts devoid of the slightest reference to how offenders feel about what they have done and the extent to which they feel remorse. Judges, however, regularly refer to those feelings at every stage of the criminal process. Providing objective evidence of the influence of those feelings on judicial decision making is nonetheless a hazardous undertaking, not only because French judges are not required to fully explain their reasoning, but also because those feelings are diluted in a broad spectrum of overlapping criteria. Based on the results of empirical research using both qualitative and quantitative methods, this contribution aims to highlight and explain the subterranean role remorse and broader attitudes around responsibility for the offence play in criminal judgments. This role is strengthened as multiple professionals charged with providing information to judges, from arrest to the carrying out of the sentence, focus on suspects' and offenders' feelings about the offence. Police officers, social background investigators, psychiatric experts and probation officers use similar methods to typify and interpret those feelings, and most draw on them to categorize the situations they assess, then use them to support their arguments in the documents they submit to judges. Influenced by all these medical, criminological and moral inferences, judges then tend to penalize emotional deviance.

As evidenced by this book, international research is beginning to unearth the influence of remorse as a judicial decision-making criterion. French researchers, however, have focused primarily on the role admissions of guilt play in establishing the truth, and have rarely addressed their "effect on the moral identity of those who make or concede to" them.<sup>2</sup> In French criminal

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justice, statutes, regulations and ministerial circulars make no mention of the concept of remorse or the various related emotions (regret, shame, guilt, etc.). They thus seem to relegate the religious sources of penal philosophy, which gave pride of place to penitence, moral regeneration and pardon, to the past.<sup>3</sup> After World War II, lawmakers and most criminal law scholars progressively set aside the concept of "moral improvement" (*amendement moral*) in favour of "social readjustment" or "resocialization." Marc Ancel, founder of the New Social Defence movement that influenced lawmakers for several decades, decried the "somewhat simplistic view of a *homo delinquens* who, thanks to solitary confinement, would recover his senses, become aware of his wrongdoing and, riddled with remorse, resolve not to slide back into delinquency."<sup>4</sup> Ancel emphasised the "deep, natural, psychological feeling of responsibility," but tended to "distrust both a certain masochism of requested or accepted punishment and, conversely, a certain ease with which one redeems the wrongdoing cheaply through later penitence. . . . The New Social Defence . . . rejects obsessive remorse as sentimental expiation."<sup>5</sup> Yet the concept of improvement has certainly not disappeared entirely: in recent years the French Constitutional Council<sup>6</sup> has held that the need to "promote the improvement" of offenders<sup>7</sup> and "the moral recovery of delinquent children"<sup>8</sup> are fundamental principles recognised by the laws of France. Furthermore, an Act of August 15, 2014 paved the way for a troubling regression by reintroducing 'improvement' as a purpose of punishment (French Penal Code, Article 130-1) although the transcripts of the parliamentary debates reveal no particular reason for this amendment and certainly no moral one.

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<sup>2</sup> Dulong, R, (1999) *L'aveu comme fait juridique et comme phénomène moral* (Paris, EHESS), 22.

<sup>3</sup> Merle, R, (1985) *La peine et la pénitence. Théologie, droit canonique, droit pénal* (Paris, Cerf/Cujas).

<sup>4</sup> Ancel, M (1953) 'Science pénitentiaire. Notes bibliographiques' 1 *Revue de Sciences Criminelles*, 181.

<sup>5</sup> Ancel, M (1959) 'Responsabilité et défense sociale' 1 *Revue de Sciences Criminelles*, 182.

<sup>6</sup> The Constitutional Council is a court charged, *inter alia*, with review of the constitutionality of legislation.

<sup>7</sup> Decision no. 93-334 DC of 20 January 1994.

<sup>8</sup> Decision no. 2002-461 DC of 29 August 2002.

Nonetheless, since the historical analyses and philosophical writings of Michel Foucault<sup>9</sup>, Paul Ricoeur<sup>10</sup> and Vladimir Jankélévitch<sup>11</sup> on confessing, guilty conscience, remorse and pardon, very few empirical studies have analysed the possible influence on sentencing practices of “emotional deviance”: feelings or the expression of feelings that are socially inappropriate.<sup>12</sup> The reason legal researchers have, with few exceptions,<sup>13</sup> shown little interest in this topic is that it is hard to assess by close analysis of case-law the influence these feelings have on sentencing and its means of execution. Except for judgments issued by the criminal chamber of the French Court of Cassation,<sup>14</sup> the publication of case law is very patchy in France. This is a legacy of France’s inquisitorial past. The courts have traditionally been granted complete discretion, and the criminal chamber of the Court of Cassation has held that except where required to by statute,<sup>15</sup> the courts do not have to explain why they have chosen a particular punishment (neither the length of the sentence, nor the type of punishment). In the future, however, access to the courts’ reasoning will be made easier thanks to several cases which have reversed the established jurisprudence<sup>16</sup> and have been reinforced by the new Articles 365-1 and 485-1 of the Criminal Procedure Code requiring the courts to explain their reasoning, albeit briefly.

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<sup>9</sup> Foucault, M, (2012 [1981]) *Mal faire, dire vrai, fonction de l’aveu en justice*. Cours de Louvain, 1981. Eds F Brion and BE Harcourt (Louvain, Presses universitaires de Louvain).

<sup>10</sup> Ricoeur, P, (1988 [1960]) *Philosophie de la volonté*, Tome II, *Finitude et culpabilité* (Paris, Flammarion).

<sup>11</sup> Jankélévitch, V, (1966) *La mauvaise conscience* (Paris, edns Aubier-Montaigne).

<sup>12</sup> Thoits, P (1985) ‘Self-labeling Processes in Mental Illness: The Role of Emotional Deviance’ 91(2) *American Journal of Sociology* 221.

<sup>13</sup> Herzog-Evans, M, (2013) *Le juge de l’application des peines: Monsieur Jourdain de la désistance* (Paris, L’Harmattan).

<sup>14</sup> This is the highest and final court of appeal in relation to matters of law in criminal cases in France.

<sup>15</sup> Crim. 19 Dec. 1996, no. 96-81.647.

<sup>16</sup> Crim. 1 Feb. 2017, no. 15-85.199, no. 15-84.511 and no. 15-83.984; Constitutional Council, Decision no. 2017-694 DC of 2 March 2018.

Despite the limited number of published decisions, an examination of legal databases revealed more than 450 decisions, mostly handed down after 2005, that include the terms “remorse,” “regret,” and less frequently “repent” or “repentance.” These decisions are primarily from courts of appeal and the Court of Cassation, which leaves us in the dark with regards to the great mass of those made by first instance trial courts, especially at the post-sentencing phase.<sup>17</sup> Nonetheless, empirical research conducted with colleagues over the past ten years<sup>18</sup> has shed light on the repercussions that regret, remorse, shame, guilt and empathy for the victim have at all stages of criminal procedure, from arrest to serving the sentence. Even though these feelings are not cited as a criterion in assessments and decisions, they are a source of interest and interrogation not only for judges, but also for police officers, officials responsible for investigations into social background, probation officers, psychiatric experts, psychologists and even some therapists who have offenders as patients.

Although we were unable to do this for the writings of all these professionals, nor for the available case law, we tried to provide more objective evidence of this influence by (re)using case-file material. This had been collected in the course of two recent quantitative and qualitative research projects focusing on how the courts handle cases that involve psychopathological problems or problems perceived as such, including by ordering treatment. While that research might at first glance seem irrelevant here, the fact is that French treatment programs are shaped by a penal and moral requirement to reflect upon the factors that have led to the commission of the crime.

Our first exploratory research project (2014-2016) consisted of a review of the files of probation officers with respect to 99 offenders subject

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<sup>17</sup> After an offender is convicted, a specialized judge called the “juge de l’application des peines” (sentence implementation judge) is charged with determining how the sentence will be carried out – in custody or not. This judge has the power to adjust sentences handed down by the court and decide on the obligations that will accompany a grant of probation.

<sup>18</sup> In addition to the two research projects relied on specifically for this article and discussed below, there was an initial quantitative and qualitative investigation into how the French courts handle middle-ranking offences (2008-2012), based on a representative sample of 7,562 case files and sixty interviews. Danet, J (dir), (2013) *La réponse pénale. Dix ans de traitement des délits* (Rennes, PUR).

to socio-judicial monitoring (SJM), which is a supplementary punishment that includes monitoring, surveillance and treatment measures that begin when the offenders (mainly sex offenders) are released.<sup>19</sup> The files included the initial judgment, the decisions of the “juges de l’application des peines” (sentence-implementation judges), probation officers’ reports, expert assessments completed before and after conviction and reports by the coordinating physicians.<sup>20</sup> We made a systematic inventory of the references in all these files to shame, remorse, regret, feelings of guilt and empathy specifically for the victim (rather than in general).

We then reproduced this process in a second research project (which is still ongoing; 2016-2021), for which we compiled a sample of 2698 cases that include alternatives to prosecution (warning, mediation, etc.) determined by the prosecutor’s office (651), middle-ranking offences (*délits*) (1344) and serious offences (*crimes*) (703).<sup>21</sup> We focused our inventory on the psychiatric and psychological assessments contained in 889 of the files in the hope of being able to measure, all other things being equal, how the feelings described influenced the courts’ decisions. These assessments, which are not systematic except in criminal cases, were required to be carried out on sex offenders (53%) and perpetrators of homicides and fatal blows (*coups mortels*) (22.8%), as well as with respect to criminal damage to property (14.2%) and, less frequently, domestic violence (2.1%), violations of drugs laws (2.8%) and other offences (5.1%).

Taking an approach based on interpretive sociology and further influenced by the recommendations and methods of sociologists of professional documents,<sup>22</sup> we also examined the professionals’ cognitive frameworks, perception structures, methods of categorisation, and practical reasoning. Studying the written methods for institutionally supervising

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<sup>19</sup> Gautron, V, (2017) (*Se soigner sous la contrainte: une étude du dispositif de l’injonction de soin* (Paris, Mission de Recherche Droit et Justice).

<sup>20</sup> A coordinating physician is a psychiatrist responsible for making sure orders for the post-release treatment of offenders are properly carried out and for reporting to the “juge de l’application des peines” through yearly or half-yearly reports.

<sup>21</sup> For a presentation of the research in English: <https://repeso.hypotheses.org/>

<sup>22</sup> Coton, C and Proteau, L (eds, 2012) *Les paradoxes de l’écriture. Sociologie des écrits professionnels dans les institutions d’encadrement* (Rennes, Presses Universitaires de Rennes).

individuals makes it possible to understand the administrative code that consists of “translating profane judgments into professional judgments.”<sup>23</sup> To determine whether and, where applicable, how these feelings help professionals categorise the situations they must deal with and serve as grounds for their assessments and decisions, we also conducted nearly one hundred semi-structured interviews with 127 professionals. These included 33 judges and prosecutors, 31 probation and social integration officers, and 57 psychologists and psychiatrists acting as experts, coordinating physicians and therapists treating patients who are in custody or on probation. None of the questions we asked or reminders we sent in the two research projects mentioned above explicitly targeted the subject of the feelings felt or expressed by the suspects or the accused. However, open questions were asked about assessment and/or decision-making criteria. These questions were followed by a single reminder concerning the subject of concern to us here, but that reminder was purposely much more neutral and focused on the influence of admitting the crime. This gave the respondents the opportunity to discuss (or not) the affective components of a confession.

With the help of these materials, this contribution aims to highlight what is still a major assessment and decision-making criterion in the French criminal justice system. It will first clarify the extent and the nature of the methods for detecting the feelings associated with committing a crime (1), then show that even though these feelings are hidden by the rules governing the judicial process, they exert a certain amount of influence on sentencing practices (2).

## **I. A Continuing Examination of the Feelings Associated with the Commission of the Offence**

In France, as elsewhere, suspects are required to show respect at trial, to express regret, acknowledge the victim’s suffering, and promise to reform. These expectations are not limited to judges but are often shared by all the professionals advising them and whose functions include detecting potential emotional deviance (Part 1.1), using relatively similar indicators (Part 1.2).

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<sup>23</sup> Serre, D (2008) ‘Une écriture sous surveillance: les assistantes sociales et la rédaction du signalement d’enfant en danger’ 4 *Langage et Société* 39.

## **A. Paying Attention to Emotions Throughout the Criminal Procedure**

Reflecting the “emotional burden the observer feels almost physically,”<sup>24</sup> especially during a trial before the French *Cour d’Assises*,<sup>25</sup> the courtroom has its own “emotional ecosystem.”<sup>26</sup> A recent 2008-2012 ethnographic study carried out in France shows that jurors at the trials for the most serious offences share the judges’ reasoning and are “attentive observers who say they do not lose a scrap of the discussions to discern something through emotions, . . . on the lookout for whatever they can grasp from a furtive or fleeting look that might betray a feeling.”<sup>27</sup> In addition to the many trials we have attended over the past twenty years, the hastily scrawled trial notes of judges found in the files reveal the extent to which they are interested in what suspects say about the alleged offences and their relationship to the victims: “I regret what I did, I ask for her forgiveness”, “I’m ashamed and disgusted with myself and I regret doing it.”

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<sup>24</sup> Besnier, C, (2017) *La vérité. Une ethnologue aux assises* (Paris, La découverte), 35.

<sup>25</sup> The Cour d’Assises in France deals with only the most serious offences and judgement is rendered by a mixed panel of jurors and professional magistrates. For further analysis, see in this volume: Field, S ‘The enactment of political cultures in criminal court process: remorse, responsibility and the unique individual before the French *cours d’assises* in Field S and Tata C (eds), *Criminal Justice and The Ideal Defendant in the Making of Remorse and Responsibility* (Oxford, Hart)

<sup>26</sup> Bandes, S, (2016) ‘Share Your Grief But Not your Anger: Victims and the Expression of Emotion in Criminal Justice’ in Smith, J and Abell, C (eds), *Emotional Expression: Philosophical, Psychological, and Legal Perspectives* (Cambridge, Cambridge University Press).

<sup>27</sup> Above n 23, at 79; See also Gissinger-Bosse, C, (2018) ‘L’instruction des émotions. Le jury populaire dans l’institution judiciaire’, in Blondiaux, L (ed), *La démocratie des émotions. Dispositifs participatifs et gouvernabilité des affects* (Paris, Presses de Sciences Po), 119-144.



Lawyers play a large role in this courtroom drama. Whether representing the civil party<sup>28</sup> or the accused, they try to influence the court when they plead by acting as spokespersons for their clients' feelings. Prosecutors do the same when they argue for punishment, regularly justifying it by referring to the degree of contrition and realization that the offence is serious. We detected the same thing when reading the 450 decisions identified in the legal databases, even though these feelings appear essentially in descriptive form with no indication of why they are mentioned or how they influenced the decision. The judges limit themselves to noting that the accused or the convicted offender apologised, expressed regret at trial, sometimes through their lawyer, thereby asking the court for leniency. In the post-sentencing phase, especially in cases of sexual violence or other serious violent offences, many "*juges de l'application des peines*" (JAPs) still hope that the offender will show "clear signs that they assume responsibility and are relatively contrite."<sup>29</sup>

Beyond the judges and prosecutors, police reports, investigations into defendants' social background, expert assessments, and probation officers' reports regularly contain passages devoted to what Paul Ricoeur called the emotional component of "confessional language."<sup>30</sup> Police officers are very often the first to start this moral construction. In almost routine fashion, especially when the suspect is a minor, their reports end with open questions similar to an "invitation . . . to begin a self-critique with respect to what they did, and to show remorse."<sup>31</sup> These questions are regularly followed by the transcription of statements such as: "I realise that it was unacceptable and I regret it", "I am sorry for [the victim]." While the police officers' comments are generally informative and factual and do not offer an account or interpretation, investigators occasionally add more personal interpretations:

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<sup>28</sup> In French criminal process, victims can join themselves as civil parties to criminal proceedings to seek compensation. In the process they acquire participation rights which go far beyond the role of the victim in Anglo-American courts (including the right to legal representation, to put questions and to make representations to the court).

<sup>29</sup> Herzog-Evans, M (2012) 'Exécution des peines, délinquance sexuelle et positionnement quant aux faits: enjeux juridiques et criminologiques' 12 *AJ pénal*, 632.

<sup>30</sup> Above n 9, at 170.

<sup>31</sup> Cicourel, A, (2017 [1968]) *La justice des mineurs au quotidien de ses services* (Geneva, IES/HETS, trans S Bordreuil), 256.

The investigators thought they saw the offenders taking a certain delight in relating the details of what they did, coldly and without the appearance of remorse. (Summary report of the national police, F201)

Before the judgment, but after prosecution has begun, social background reports frequently include similar assessments, even though these investigators theoretically play no role in establishing the truth about the crime: their task is to reconstruct the suspects' personal, family, social and employment histories:

Concerning the crime of which he is accused, Mr. X has progressed on his responsibility and thinking about the commission of the crime. In the beginning, he described having given "just a little slap," minimising the violence. . . He has progressively called himself into question and was able to discuss this issue more freely. 'I regret everything. I didn't want things to happen that way. It was a mistake. I was stupid.' (Rapid social investigation, socio-judicial association, F1353)

In our sample of 99 files of offenders sentenced to socio-judicial monitoring, most of the probation officers, coordinating physicians, and experts expressed opinions on the degree to which the offenders acknowledged having committed the acts of which they were accused. They did so in a form that is at first glance devoid of any subjective assessment, without the slightest emotional colouring, but which distinguishes three degrees of admission: denial, full confession, or partial admission. In addition, many of them probed the offenders' souls to see if there were any feelings of guilt (mentioned by at least one professional in 68.7 per cent of the files), empathy for the victim (69.7 per cent), shame (43.4 per cent), regret (48.5 per cent) and more rarely, remorse (16.2 per cent).

**Table 1 – Frequency with which feelings associated with committing the crime appear (n=99)**

	Psychiatric or psychological assessments	Probation officers' half yearly reports	Coordinating physicians' reports	<b>All files</b>
Regret	40.6%	12.1%	7.9%	<b>48.5%</b>
Remorse	13.5%	4%	1.3%	<b>16.2%</b>
Feeling of guilt	63.5%	17.2%	21.1%	<b>68.7%</b>
Shame	31.3%	10.1%	13.2%	<b>43.4%</b>
Empathy for the victim	64.6%	24.2%	19.7%	<b>69.7%</b>

While one may infer from these figures that experts are more sensitive than probation officers or coordinating physicians, these differences must not be over-interpreted. On average, an expert assessment by psychologists or psychiatrists contains four or five pages, while the reports of probation officers and coordinating physicians are much

shorter (one or two pages). The vocabulary and reasoning are therefore developed to a greater or lesser extent depending on the length of the document. Moreover, in almost all cases the expert assessment is made before the offender is released, whereas the reports of probation officers and coordinating physicians concern supervision while on parole. These professionals may therefore pay much less attention to this aspect because, although offenders initially denied or only partially admitted committing the crimes, the vast majority of them ended up confessing.

With respect to pre-sentence expert assessments alone, our second survey reveals that feelings are mentioned less frequently, but with regard to much more diverse offences, some of which are significantly less serious. But an analysis confined to the 105 files of offenders sentenced to SJM reveals that our two samples converge, confirming heightened interest among experts when particularly serious violent offences have been committed.

**Table 2 – Frequency with which feelings associated with committing the crime appear**

	Files containing at least one psychiatric or psychological assessment		Offenders sentenced to SJM	
	Number	Frequency	Number	Frequency
Regret	144	16.2%	23	21.9%
Remorse	55	6.2%	11	10.5%
Feeling of guilt	257	28.9%	44	41.9%
Shame	65	7.3%	21	20%
Empathy for the victim	200	22.5%	49	46.7%
Repentance	3	0.3%	1	1%
Total	889		105	

These feelings appear as alternatives or together, without it being generally possible to determine the precise meaning the professionals are giving to each of them; especially since they often consider “regret,” “remorse” and “guilt” to be synonymous. Other than brief comments, the narrative is often purely descriptive. These writings also blend the writer’s narrative with the suspect’s quoted language, which makes analysis more difficult. Some professionals take a neutral stance, limiting themselves to quoting the suspects without interjecting the slightest personal opinion as to whether the emotions being displayed are genuine. Others leave things to the interpretation, if not imagination, of the reader, who is occasionally puzzled by mere insinuations. Their doubts about whether the suspect’s or the offender’s statements are genuine are expressed through adverbs and adjectives expressing levels of intensity (“some remorse,” “vague regrets” or “a certain feeling of guilt”). Sometimes, small adjustments in written expression, particularly the type of punctuation used, may “transform” the meaning of what is written; for example where ellipses are used by the author to suggest doubt without explaining why, “through an effect of

presumed closeness with the reader."<sup>32</sup> All of these professional documents, which add to each other, but also regularly refer to each other, will be linked by the judges and prosecutors when they read the file, both to assess the objective characteristics of how the crime was committed and "the moral and social seriousness" of the person being judged.<sup>33</sup> The emphasis on such expressions of emotion in these documents may seem surprising, because our interviews reveal consistent scepticism regarding offenders' expressions of contrition. Like confessions, the emotions suspects or convicted offenders display or claim to be feeling are therefore "put to the test"<sup>34</sup>.

## **B. Process of Objectifying Emotional States**

Many practitioners underscore the trouble they have deciphering the meaning of offenders' discourse, whether it be through verbal or physical expression of their inner turmoil, and say they approach this highly subjective task with caution. They believe that some suspects and offenders are aware of the influence the expert assessments and reports of probation officers and coordinating doctors have on their journey through the penal system. They are therefore tempted to structure their statements so as to feign repentance and provide evidence of real improvement.<sup>35</sup> Confronted by professionals who say they are not "fool[s] because [they], too, know very well what it is better to say (F59)," suspects and offenders use language designed to meet, point by point, the "expectations of the person they're talking to (F92)." They seek to build an "accumulation of evidence in [their] favour (F18)," with the help of arguments that are "highly moralizing [while] not necessarily reflecting [their] feelings and underlying

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<sup>32</sup> Sallée, N and Chantraine, G (2014) 'Observer, consigner, tracer. Les usages d'un cahier électronique controversé en établissement pénitentiaire pour mineurs' 56(1) *Sociologie du travail* 64, para 13.

<sup>33</sup> Vanhamme, F and Beyens, K (2007) 'La recherche en sentencing: un survol contextualisé' 31(2) *Déviante et Société* 199, 204.

<sup>34</sup> Macchi, O (2001) 'Le fait d'avouer comme récit et comme évènement dans l'enquête criminelle', in Dulong, R (eds), *L'aveu. Histoire, sociologie, Philosophie, Paris*, PUF, 184.

<sup>35</sup> We were not able to examine this particular hypothesis due to a lack of interviews with or comments from suspects or offenders. Only the professionals' opinions are reported here.

emotional experiences (F59).” They are then accused of merely “putting on a show” of remorse in the hope of obtaining leniency:

There’s the accused’s prepared statement but we don’t believe it, there. Afterward, it’s the lawyer who comes and says ‘don’t forget to say this.’ It’s clear to us when the sentence comes at the end and is totally insincere. Especially since there are 5 of them and they all say the same thing, using the same words (trial judge, I73).

More understanding than suspicious, the professionals also report on those who completely and continually deny having committed the crime for reasons related primarily to their desire to protect their self-esteem, to not lose face in front of their family or close friends, for fear of being rejected by them. Despite these reservations and at the risk of essentializing emotions,<sup>36</sup> we note that the expert assessments, judgments and probation officers’ reports we read show that many of these professionals try to find objective evidence of offenders’ emotions before validating them or refuting their genuineness. Given the consistency we observed, the social conventions that characterise this evaluation process seem largely shared by these different professional groups. Like practices elsewhere, the nature of the feelings expressed and the extent to which they are genuine is assessed according to the main expressive modes identified by Proeve and Tudor: first, the language, secondly, the behaviour and attitudes associated with that language and finally the actions that express or are motivated by remorse.<sup>37</sup>

As the first and principal source of information, professionals examine the defendant’s discourse, but they also consider the conditions under which discourse arises, paying attention not only to the words used, but also to the ease and spontaneity with which the suspects or offenders agree to talk about the crimes of which they are accused. They criticise those who are “not very talkative,” “reserved,” “terse,” “unclear,” “ambiguous,” “elusive” or “evasive” and “spontaneous” conversation is regarded as a much better sign, as a proof of genuineness which counts in the speaker’s favour. But variations in their statements and any disagreement between the official version of the events and the evidence that has been gathered are deemed

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<sup>36</sup> Karstedt, S (2002) ‘Emotions and criminal justice’ 6(3) *Theoretical Criminology* 299;

Rossmannith, K (2015) ‘Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse’ 21(2) *Body & Society* 167.

<sup>37</sup> Proeve, M and Tudor, S (2010) *Remorse: Psychological and Jurisprudential Perspectives* (Farnham, Ashgate Publishing).

signs of feigned remorse. Therefore, the professionals test the interviewees' ability to maintain similar, consistent explanations throughout the interview or throughout all of their interviews with professionals, using arguments that must match the information in the criminal file on all points:

In fabricated remorse, there is always a little sentence that comes and negates what was said. I've noticed that, because it's very surprising: everything holds together and then there is something that slips out and makes it . . . (Expert, psychologist, I116).

Moreover, they must not simply give purely factual information, but must take a critical approach and show that they are really examining themselves. This requirement of self-reflection is risky for them. Suspects and offenders are expected to talk about the crimes they committed and their reasons for committing them, but every explanation they offer may be interpreted as an attempt to escape responsibility through "specious arguments with pseudo-psychological overtones"<sup>38</sup> while the professionals transcribe every sign of "minimization," "banalization," "rationalization" and "shirking responsibility."<sup>39</sup> As Weisman<sup>40</sup> and Ward<sup>41</sup> noted, their affects must not be self-centred, but related directly to the victims' harm rather than, primarily, the consequences for the offender and their family. Shame plays a special role in this regard, which distinguishes it clearly from other emotions. Feelings of dishonour, humiliation or indignation are regularly criticised for being self-centred, such that before they can be viewed positively, they must be combined with and even surpassed by other emotions focused on the victim.

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<sup>38</sup> Excerpt from an expert assessment, F16.

<sup>39</sup> See also Tata, C, (2020), *Sentencing: a Social Process* (London: Palgrave MacMillan), especially 104-107 ; van Oorschot, I, et al., 'Remorse in Context(s): A Qualitative Exploration of the Negotiation of Remorse and Its Consequences', *Social & Legal Studies*, 2017, 26(3), 359-377

<sup>40</sup> Weisman, R, (2014) *Showing remorse: Law and the social control of emotion* (Farnham, Ashgate Publishing).

<sup>41</sup> Ward, BH, (2006) 'Sentencing without remorse', 38 *Loyola University Chicago Law Journal*, 131.

Spoken statements alone are insufficient when individuals face “the judicial economy of suspicion.”<sup>42</sup> To clarify the meaning of information given orally, the professionals check whether the form and the content of the message are consistent by comparing it with the non-verbal communication the offender “exudes.”<sup>43</sup> On the lookout for paralinguistic clues, they scrutinise facial expressions, posture, what people do with their hands, their intonation, eye contact, crying and other signs of emotion.

In one interview, a psychiatric expert encouraged us to “beware of people who give you what you expect. Personally, I prefer a voice that is suddenly hoarse, a fleeting emotion. It is much more important than the guy who comes and says, ‘oh, I was a real bastard.’ (I71).” In another, a judge told us that:

Sometimes there are facial expressions that say the opposite of the words. . . It’s true that personally, I have developed a habit of having my clerk take notes on how the scene has been staged, writing things down, so that the way the situation has been acted out is noted somewhere. Because it really says a lot, in fact (I73).

In short, all these non-verbal signs colour the speech, “thus offering contextual interpretation keys to those who perceive them,” based on typification and a “common-sense understanding of how to behave, express oneself, laugh or cry”<sup>44</sup>:

The events are related with emotion, the subject often being on the edge of tears, holding his head between his hands, or his hands trembling uncontrollably. He is feeling guilt, guilt that is in fact clearly more evident with respect to his last victim. The feeling of guilt, the regret and remorse he verbalises seem sincere and genuine, but they arise only after the fact. (Expert assessment, F92)

The documents examined show how a laugh, sarcasm or signs of nonchalance or arrogance are enough to refute any feelings of guilt, despite a confession. For example, some experts mention when an offender

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<sup>42</sup> Fernandez, F and Gariépy, S (2018), ‘Les failles affectives. Ethnographie politique de l’enquête sur remise en liberté’ 23 *Tsantsa* 43, 47.

<sup>43</sup> Ogien, A, (2012) *Sociologie de la déviance* (Paris, PUF), 251.

<sup>44</sup> Colemans, J (2015) ‘Ce que les émotions font faire aux professionnels du droit: Jalons pour une approche praxéologique des expressions émotionnelles dans la sphère judiciaire’ 54(4) *Social Science Information* 525, 530.

expresses regret but “stretches out nonchalantly on the chair, yawning (F83),” or “accompanies his words with large hand gestures while his gaze is shifty and he never looks at the person he’s speaking to (F52).” As is the case in other jurisdictions,<sup>45</sup> lack of visible emotion is often interpreted as a lack of any emotion at all. Many professionals downgrade the significance of the words when the narration of the events “is generally devoid of affect (F16),” “without apparent emotion (F49),” “droning (F26)” or “in an utterly impassive and emotionless tone (F87).”

As for actions that are likely to constitute indirect, external evidence of the inner experience, the experts, probation officers and coordinating physicians are sensitive to actions that have some compensatory dimension, including sending a letter to the victim as well as apologising at trial. Compensating the civil parties is still, however, the most tangible sign and can even indicate implicit acceptance that the facts are true, despite a denial:

Because we find that it’s a sign, someone who says he is innocent but agrees to pay the civil parties. We wonder. Is it to please the judge, or might it mean that he’s saying, “this is my way of saying I’m responsible, but I won’t tell you that I’m responsible.” (Probation officer, I122)

For judges and prosecutors, these actions do in fact constitute “perhaps the most valuable evidence of offender remorse,” because “due to the somewhat pragmatic nature of the legal world . . . , actions very often speak louder than words.”<sup>46</sup> In addition to French standards for writing judgments, which encourage brevity and thus limit access to judges’ criteria for determining whether offenders genuinely feel remorse, for evidentiary reasons judges generally avoid setting out their reasoning with regards to subjective criteria such as body language. With rare exceptions, they favour more consequential factors based on the suspect’s actions and behaviour, such as turning themselves in to the police immediately, quickly admitting to the crime in custody, and repeating that admission to each judge they encounter as the criminal procedure progresses. The more time that passes between the commission of the crime and the adoption of a contrite

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<sup>45</sup> Bandes, S (2016) ‘Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition’ in R Hunter, P Roberts, D Young and D Dixon (eds), *The Integrity of the Criminal Process* (Oxford, Hart Publishing).

<sup>46</sup> Above n 36, at 96.



attitude, the more the judges tend to doubt the suspect's sincerity: "delayed remorse" cannot "mitigate the seriousness of the crime."<sup>47</sup>

Like experts and probation officers, judges hunt for inconsistencies in what has been said to each of the various professionals. "Regrets expressed in court" can thus be "totally negated by statements made to the psychiatrist."<sup>48</sup> Moreover, on the day of the hearing, suspects are still expected to accept and take part in the "degradation ceremony"<sup>49</sup> that awaits them, such that failure to appear becomes proof of a lack of remorse. When offenders challenge certain points on appeal, judges also weigh the failure to contest the provisions related to compensating the victim. On the other hand, challenging the reality of a victim's financial loss, including "marginally," is "somewhat inappropriate and indecent coming from an individual . . . whose financial reasoning evidences little empathy for their victims."<sup>50</sup> Whether they are affirmed or discredited by the various professionals, these affects are a major indicator (albeit not the only one) of a person's morality and dangerousness and have non-negligible effects on the judicial decisions concerning suspects.

## **II. The Criminal Process: Responding to Emotional Deviance**

Once we identified the frequency with which various emotions appeared in our two samples, we analysed the professionals' cognitive and perceptual frameworks, methods of categorisation and practical reasoning. We note that they draw conclusions about a suspect's or an accused's emotional state from medical, criminological and moral inferences (Part 2.1). These are not without effect on practical decision-making of judges and prosecutors: our results show clearly the punishment of emotional deviance (Part 2.2).

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<sup>47</sup> Crim., 26 November 2014, no. 13-87.899.

<sup>48</sup> Crim., 3 November 2016, no. 15-87.245.

<sup>49</sup> Garfinkel, H (1956) 'Conditions of Successful Degradation Ceremonies', in 61 *American Journal of Sociology* 420.

<sup>50</sup> Crim., 8 November 2016, no. 15-83.225.

## A. Overlapping Medical, Criminological and Moral Inferences

The assessment of expressed emotions is a key semiological criterion for the experts that shapes diagnosis more or less directly, whether the emotions are expressed at the moment of the offence itself or later during the course of the criminal process. One naturally thinks of psychopathy or antisocial personality disorders because lack of remorse is a symptom of both according to international disease classifications. However, the expert reports in our samples reveal that emotional deviance is being used to justify diagnoses of perversion, psychosis or schizoid personality disorder, cognitive distortions or more broadly what may be seen as constituting evidence of character flaws. To varying degrees, the professionals associate these different disorders with an increased risk of recidivism. Beyond that, and even though they do not all agree on this issue, many experts believe that, like not feeling guilt or empathy, denying accusations is in itself an indication of future dangerousness.

The sociometric analyses we conducted of the 889 files in our sample that include expert reports confirm the influence, all other things being equal,<sup>51</sup> of the extent to which a suspect recognises the facts and the emotions associated with committing the offence. When an expert writes that there is no shame, regret, remorse, guilt and/or empathy for the victim, the probability of a negative prognosis is 2.6 times higher, which is statistically very significant.

**Table 3 – Estimation of the probability of an expert prognosis of dangerousness or of risks of recidivism (other than low risk)**

Modality to be explained		Signif.	Odds ratio	95% Confidence Intervals	
Independent Variables				Lower limit	Upper Limit
Prognosis of dangerousness or of risks of recidivism (other than low) according to the expert [n=866]					
Little to no guilt, shame, regret, remorse, and/or empathy for the victim					
No			1		
Yes		0,000	***	2,598	1,852 3,645

Moreover, the attention they pay to variations in what the offender says is not intended simply to detect any artifice or manipulation when conducting a medico-psychological or predictive analysis. Although closely related to these two types of analyses, the analysis of how the narrative evolves has a broader, procedural dimension, as it is designed to measure the extent of the offender's moral transformation over the course of their sentence and, indirectly, the effectiveness of the respective professionals'

<sup>51</sup> The explanatory variables in our statistical regressions include the year of the judgment, the type of offence, number of victims, prior convictions and the suspect's or accused's sex, age, nationality and employment status.

interventions. Hence the regular use, in the professionals' writings and during our interviews, of the words "evolution," "change," "movement" and "progression" in connection with the offender's perception of the alleged offences.

In this regard, the degree to which the offender realises the seriousness of the crime and accepts the punishment is another major indicator. This realization, and the willingness to make amends by being punished, are perceived as a sign of submission to the authority of the law and the justice system, and that the penal "lesson" has been learned.<sup>52</sup> Associated with remorse and regret, they are deemed to show the offender's "moral awakening"<sup>53</sup>: an inclination to take part in their own readjustment through an active, genuine commitment to the rehabilitation process,<sup>54</sup> which supposedly improves their tendency to conform to social norms and criteria for moral rationality in the future. They are therefore seen as constituting a guarantee of readjustment, desistance and future social integration, and even, in the words of a probation officer we interviewed (I112), a sign of the offender's "healing". These medical, criminological and moral inferences then influence the harshness of the sentence, with a lack of remorse increasing the judges' severity.

## **B. Punishing Emotional Deviance**

While we cannot include all prior research results in this chapter, our most recent quantitative research revealed that the position suspects take with respect to the facts influences decision-making at every stage of the criminal process. For example, the extent to which they recognise the facts of the offence affects the decisions of prosecutors who, depending on the seriousness of the offence, are more likely in the case of a full confession to opt for an alternative to prosecution such as a caution (*rappel à la loi*) followed by a dismissal. In a previous collective research project,<sup>55</sup>

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<sup>52</sup> Vanhamme, F and Beyens, K (2007) 'La recherche en sentencing: un survol contextualisé' 31(2) *Déviante et Société* 199.

<sup>53</sup> Lu, H and Miethe, TD (2003) 'Confessions and Criminal Case Disposition in China' 37 *Law and Society Review* 551.

<sup>54</sup> Medwed, DS (2008) 'The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings' 93 *Iowa Law Review* 491.

<sup>55</sup> Above n 17.

prosecutors also indicated that they take suspects' behaviour at arrest into account, in the light of the emotions they expect of them at that time:

While acting as duty prosecutor [by telephone], I get [the police officers] to tell me, I always ask how he has behaved since the arrest. . . . When you're caught red-handed, you generally stay humble, discreet or sheepish. (Prosecutor, I25)

The extent to which the suspect recognises the facts also affects the decision to place them in pre-trial custody, which occurs much more frequently when there is only a partial admission and, for some offences, in the case of denial. In the sentencing phase, the relevance of remorse flows from the combined weight of all philosophies of punishment, whether backward or forward-looking.<sup>56</sup> Beyond the inferences judges draw in terms of dangerousness, suspects' feelings are also taken into consideration for retributive purposes, in defining their perceived degree of moral culpability. Case law provides frequent examples of this. In our corpus of decisions, we identified 67 judgments and decisions in which the degree of contrition appears explicitly among the criteria underlying the sentence. These decisions generally concern cases involving violent offences that impact upon the victims' body and their sense of intimacy and sexuality. As our materials contain essentially information drawn from appellate decisions, these references are regularly used when the appellate court upholds the sentence pronounced at first instance (16 decisions), to justify either leniency when the suspect has perfectly followed the "emotional conventions" or "feeling rules" that prevail within the courtroom, or harshness when the court attributes blame on the basis of emotional deviance.<sup>57</sup> Emotional deviance may also lead to a harsher sentence on first instance, i.e., a custodial sentence or a longer sentence. Conversely, if remorse or regret is found to be genuine, the court may deny the prosecutor's appeal seeking a more severe application of the law, may suspend a custodial sentence or may apply the criminal law generously<sup>58</sup> by reducing the length of a custodial sentence or even ordering simply a "punishment of principle or a warning,"<sup>59</sup> such as exemption from

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<sup>56</sup> Bennett, CD (2016) 'The Role of Remorse in Criminal Justice' in M Tonry (ed), *Oxford Handbook Online in Criminology and Criminal Justice* (Oxford, Oxford University Press).

<sup>57</sup> Hochschild, RA , (1983) *The Managed Heart: Commercialization of Human Feeling* (Berkeley, University of California Press).

<sup>58</sup> Court of Appeal of Chambéry, 30 September 2009, no. 09/00269.

<sup>59</sup> Court of Appeal of Caen, 6 September 2010, no. 09/01088.

punishment or a simple fine. While mentioning emotional deviance is not enough by itself to justify a sentence,<sup>60</sup> the Court of Cassation has regularly upheld this type of argument,<sup>61</sup> including when defence lawyers argue that their clients could not express remorse because they denied committing the crimes, and so taking emotional deviance into account represented a violation of the law against self-incrimination.<sup>62</sup>

The multivariate empirical analyses we conducted confirm, all other things being equal,<sup>63</sup> the influence of both the extent to which the facts are recognised and the feelings mentioned by the experts. Other than in cases of acquittal, relative to a full confession, partial admission increases by 2.1 and denial by 2.3 the probability of a custodial sentence. In the files that include expert reports, we also see very significant differences with respect to the sentences handed down, depending on whether or not the experts note feelings of guilt, empathy for the victim, etc. or a lack thereof. All else being equal, the mention of emotional deviance in an expert assessment also doubles the incidence of custodial sentences, and increases by 1.5 the probability of being sentenced to a prison term of at least 10 years in serious offences (*crimes*) cases. These results must be viewed with caution, however, because we did not have access to what the suspects said or how they behaved during the hearing, which may have differed markedly from what the experts reported before trial.

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<sup>60</sup> Crim., 27 September 2011, no. 10-81.848; 23 February 2011, no. 10-83.461; 11 July 2017, no. 16-83.311.

<sup>61</sup> Crim., 2 April 1997, no. 96-82.528; 6 October 1999, no. 98-86.975; 3 March 2004, no. 03-82.843; 1 March 2017, no. 15-87.069; 5 January 2017, no. 15-81.079.

<sup>62</sup> Crim., 4 March 2003, no. 02-85.678; 23 May 2012, no. 11-85933; 4 November 2015, no. 14-84.009; 9 September 2015, no. 14-86.423; 3 November 2016, 15-87.245.

<sup>63</sup> Once again, the explanatory variables are: the year of the judgement, the type of offence, number of victims, prior convictions and the suspect's or accused's sex, age, nationality and employment status.

**Table 4 – Estimations of the probability of receiving an unsuspended custodial sentence**

Modalities to be explained	Independent Variables	Signif.		Odds Ratio	95% Confidence Intervals	
					Lower Limit	Upper Limit
Unsuspended custodial sentences – All prosecuted cases, excluding acquittals [N=1711]						
	Full confession			1		
	Partial admission	0,000	***	2,100	1,556	2,835
	Denial	0,000	***	2,354	1,669	3,321
Unsuspended custodial sentences – Prosecuted cases that include expert assessments, excluding acquittals [N=805]						
	Little to no feelings of guilt, shame, regret, remorse, and/or empathy for the victim					
	No			1		
	Yes	0,002	***	2,073	1,326	3,239
Prison sentences greater than or equal to 10 years – Criminal cases that include expert assessments, excluding acquittals [N=621]						
	Little to no feelings of guilt, shame, regret, remorse, and/or empathy for the victim					
	No			1		
	Yes	0,038	**	1,500	1,018	2,209

Moreover, in the post-sentencing phase, the rare published decisions handed down by the *“juges de l’application des peines”*—10 in our entire corpus—reveal that some judges take these emotional states into account when granting or denying sentence adjustments, as well as other types of privileges. For example, these judges have explicitly denied temporary leave from prison due to, among other reasons, the refusal to admit the crime by an offender “little moved by remorse,”<sup>64</sup> or to others who admitted the crimes but “[did] not seem to really realise how serious they were” or “[made] statements devoid of remorse.”<sup>65</sup> The same was true for an offender who continued to “minimise his participation,” acceding only “with difficulty to feelings of remorse and guilt” and who did not exhibit “eagerness to compensate the victims, thus confirming a lack of empathy.”<sup>66</sup> Other decisions concern the refusal to reduce a sentence or to limit the reduction of a sentence.<sup>67</sup> As it has done at the sentencing stage, the Court of Cassation has upheld such reasoning, especially the need for the offender to “realise the consequences his actions [may have had] on the victim.”<sup>68</sup>

While a few judgments of the criminal chamber seemed to have signalled a reversal in judicial reasoning in the late 2000s,<sup>69</sup> this impression

<sup>64</sup> Court of Appeal of Rouen, 12 June 2006, no. 85/02006.

<sup>65</sup> Court of Appeal of Rouen, 24 March 2011, no. 11/00406.

<sup>66</sup> Court of Appeal of Rouen, 20 July 2006, no. 111/2006.

<sup>67</sup> Court of Appeal of Rouen, 26 August 2010, no. 10/01083.

<sup>68</sup> Crim. 4 April 2002, no. 01-87.416.

<sup>69</sup> Crim. 25 November. 2009, no. 09-82.971; Crim. 3 February 2010, no. 09-84.850.

was short lived. Even though suspending a sentence for medical reasons has both medical and humanitarian foundations, in 2011 the chamber upheld a decision to deny such a suspension based on the fact that the expert had noted “an inability to self-critique and underscored that the regrets, like the guilt, were superficial,” the offender’s dangerousness being partially linked to the fact that he “only very superficially criticised his actions.”<sup>70</sup> In 2018, it also upheld the denial of conditional release for an offender serving a life sentence that was based on the report of the prison’s social integration and probation department, which said that the offender claimed that “his trial was purely conducted with a view to incrimination and that he is ‘as innocent as Christ,’ showing no empathy for the victim.”<sup>71</sup> After listing the reasons given by the lower courts, the Court found that those reasons were “wholly adequate” and within the courts’ discretion.

Some authors tend to downplay the influence such criteria have in the post-sentencing phase, at least as concerns denial.<sup>72</sup> However, our sample of 99 socio-judicial monitoring files reveals that in 20 cases, the JAPs mentioned or explicitly relied on the extent of the recognition of the facts and the varying emotional forms that that recognition might take.<sup>73</sup> It is hard to determine the specific influence of these criteria, however, because they never appear alone but are always combined with other factors likely to weigh in the assessment of dangerousness and the potential for reinsertion (employment, housing, family support, etc.). While the small size of our sample does not allow us to make any conclusive claims in this regard, sentence adjustments were granted slightly more often to those who had made a full confession (54.1 per cent, versus 20 per cent of those who denied the accusations) or who exhibited remorse or regret (66.7 per cent, versus 57.9 per cent in cases where such emotions were invalidated) or showed feelings of guilt (57.1 versus 45.7 per cent), shame (57.7 versus 38.5 per cent) or empathy for the victim (61.5 versus 42.9 per cent).

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<sup>70</sup> Crim., 2 March 2011, no. 10-81.070; See also Crim., 9 April 2014, no. 13-84.290.

<sup>71</sup> Crim., 31 October 2018, no. 17-86.660; 21 October 2015, no. 14-86.990; 7 September 2016, no. 15-81.679.

<sup>72</sup> Above n 12, at 100.

<sup>73</sup> Note, however, that only 45 files contain orders in which the reasons for granting sentence adjustments or temporary release are cited.

## Conclusion

Despite the fact that contrition has progressively been eliminated as a requirement under French law, the materials reviewed in this chapter show that the expectation of contrition is far from having disappeared from the criminal justice scene. Like judges, police officers, social background investigators, psychiatric and psychological experts and probation officers all watch for signs of emotional deviance. They all look for them, not only in the suspects' words – always deemed unreliable – but also in their demeanor and non-verbal clues. They then draw inferences about personality, the psychological profile of the offender and dangerousness. The confirmation of emotional deviance by multiple professionals at each stage of the criminal process results in multiple penalties, from the procedural choices made by prosecutors and placement in preventive custody to the sentences handed down and the terms on which they are carried out.

These are not the only manifestations of the influence of emotional deviance. As suggested in the introduction, there should be equal emphasis on the issue of “penal healthcare,” which is one of the aspects of our ongoing collective research into the combination of healthcare and criminal justice. The vast majority of experts, judges and probation officers see therapy as a means to examine the commission of the crime and to treat emotional deviance, such that treatment is becoming a “backup for legal mechanisms.”<sup>74</sup> The primary risk is that therapy will become a medicalised version of the old moral treatment.<sup>75</sup> The difference between the legal mechanism of conviction and treatment is that conviction concerns individuals only superficially. It requires formal actions such as compensating victims and serving sentences, but cannot force offenders to feel “certain emotions, change their inner relationship to such and such an act.” Treatment, however, involves “techniques that are supposed to bring about real, deep-down change in the subject’s relationship to their crime, their guilt, the victim and their punishment.”<sup>76</sup> This perspective is not so far removed from the reasoning behind punishment if, like Nietzsche, one believes that “its value” is that it “awakens a feeling of wrongdoing in the

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<sup>74</sup> Doron, CO (2010) ‘La volonté de soigner. D’un singulier désir de soin dans les politiques pénales’ in L Benaroyo, C Lefève, JC Mino and F Worms (eds), *La philosophie du soin* (Paris, PUF), 287.

<sup>75</sup> Above n 18.

<sup>76</sup> Above n 73, at 287.



guilty person [and] views it as a genuine instrument [for triggering] the psychological reaction called 'bad conscience,' 'remorse.'"<sup>77</sup>

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<sup>77</sup> Nietzsche, F, (1996 [1887]) *Généalogie de la morale*, II-14 (Paris, Flammarion), 93.