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APPENDIX C

# The Origin of Criminal Law in the Status of the Unfree*

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Primitive German history shows three precursors to public criminal law. They appear in the Germania of Tacitus as follows:

1. In the foreground we have the system of feuds and fines. More serious violations of law establish a right, and indeed a moral duty (necesse est), for the clan of the injured person to a feud against the perpetrator and his clan. But the feud can be averted or ended by the payment of a fine. This fine consists of a certain number of horses, oxen or small livestock and is transferred from one clan to the other (c. 21). For lesser delicts the feud had already been excluded by the time of Tacitus, and there was only a right to a fine [*Buße*] (c. 12). The right to a fine can be claimed by the land assembly [*Landsgemeinde*]. In this case, part of the fine goes to the king or the people (c. 12).

2. Set against this intergentile regime is the discipline for misdeeds [*Missetaten*] by one clan member against another member of the same clan, exercised by the head of the family over women, children and serfs. Tacitus describes the ignominious [*schimpfliche*] chastisement of an adulteress by her husband (c. 19) and the treatment of offending [*straffälliger*] serfs (c. 25): beating, chaining and compulsory labor were permissible but not frequent, and killing was immune from punishment, but more often an outbreak of sudden anger than a purposeful punishment. The intragentile discipline remains in a pre-legal condition, determined by mood and custom [*Laune und Sitte*] and not yet by the legal order.

3. Finally the first signs of a supragentile, public criminal law are also to be found in Tacitus as a more recent layer of criminal law development. Three comprehensive community structures [*Gemeinschaftsgebilde*] begin to rise above the clans: the land assembly, the war army [*Kriegsheer*] and the cult community [*Kultgemeinschaft*]. In these three areas the first signs of a public criminal law are at work. Tacitus initially mentions five cases of war criminal law [*Kriegsstafrecht*]:[1] war treason [*Kriegsverrat*], defection to the enemy, cowardice in the field or failing to report for military service (ignavi et imbelles) and pederasty (corpore infames) (c. 12). As the other four cases are war crimes [*Kriegsverbrechen*], the fifth and last must also be understood as a war crime: pederasty in the army camp. For war treason and defection—and thus for disloyalty [*Treulosigkeit*]—the death penalty by hanging applies, and for cowardice, failure to report for service and pederasty—and thus for unmanliness [*Unmännlichkeit*]—smothering in marsh and swamp, tamquam scelera (wicked acts) ostendi oporteat, dum puniuntur, flagitia (disgraceful acts) abscondi. Besides this, there is, as a punishment for the man who returns from battle without his shield, ignominious exclusion from the land and cult community [*Lands- und Kultgemeinde*] (c. 6). Tacitus identifies it with the word the Romans used for their religious law: fas. The entire war criminal law of the Germans appears to have had a religious character: punishments in the war army—execution, chaining, flogging—are not imposed in the name of the army commander, but in the name of the god of war—deo

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[1] On the following *Conrad* in 56 ZStW pp. 709ff (1937).

imperante, quem adesse bellantibus credunt (c. 7). They are therefore executed by the priest. The priest who in the land assembly demands peace by his command of silence has for the protection of the assembly peace [*Dingfriede*] the power to punish those who disturb it (c. 11). In light of this strong priestly share in the administration of Germanic criminal law [*Strafrechtspflege*] it may be assumed that there was a criminal law of the priests in their particular religious sphere: for cult crimes. Beginnings of public criminal law can thus be established in the Germanic period for war crimes, cult crimes and violations of assembly peace.

All further claims about Germanic criminal law are hypotheses. It is a hypothesis that the system of revenge and fines as well as the beginnings of a public criminal law are based on the legal concept of peacelessness [*Friedlosigkeit*] (Brunner). It is also a hypothesis that, over and above the capital crimes to which Tacitus testifies, other crimes had been threatened in the primitive Germanic period [*germanische Urzeit*] with a public death penalty, principally murder, qualified theft [*qualifizierter Diebstahl*] and rape, "the three things that draw toward death" (Amira). Finally it is a hypothesis that public punishments for these crimes would have had not merely a religious tint but the specific character of human sacrifices (Amira).[2] Entirely unsubstantiated is Amira's degeneration theory [*Entartungstheorie*], according to which public punishments in the Germanic period would have arisen from the impulse to keep the race pure,[3] and the taboo theory according to which punishment was originally to facilitate the delivery of the person taken by the deity to the higher taboo to which he has fallen a victim.[4]

From which of these three roots did the public criminal law arise? There was an attempt to derive the development of public punishments from revenge, and to regard revenge as a primitive punishment, and punishment as a refined revenge.[5] But while punishment is a phenomenon within the community that it serves, revenge is an intergentile occurrence, an event between the most comprehensive community structures at that time, not primitive criminal law but primitive international law [*Völkerrecht*]—the path of development from it into the present leads to war between states, not to punishment within the state. Punishment has no conceptual relationship to revenge—and also no causal connection: that later on public punishment also gratified the desire for revenge of the individual, who could no longer seek to satisfy it, proves nothing as to its origin. This is because as the state power [*die Staatsgewalt*] began to intervene in disputes between clans, it did not further develop revenge in any way, but on the contrary suppressed it. The germs of later criminal law do not lie in revenge, but rather in fines [*der Buße*]. From the state share contained in it, the peace money—and besides this from the *Bannbusse* [fine for disobedience of sovereign command] this "rapidly rising wild plant of criminal law development"—sprang the monetary punishment [*Geldstrafe*] as the "first punishment due to the community, and thus public punishment."[6]

The people's revenge [*Volksrache*]—the lynch law [*Lynchjustiz*] of agitated crowds in the case of misdeeds that harmed and outraged all and every individual—can with more justice than the clan's revenge [*Sippenrache*] be regarded as the origin of public punishments. When the state power took revenge out of the hand of the people and replaced its instinctiveness [*Triebmäßigkeit*] with a rationally ordered administration [*rational geregelte Ausübung*], public punishments developed. At least in proceedings for someone caught in the act the background of the old people's revenge is still clearly recognizable.[7]

But how far have these early public capital punishments (possibly) arising from the people's revenge for war and cult crimes been fruitful for the further development of criminal law? As punishments with a sacral tint, in the way they were presented to us in Tacitus, especially as human

[2] Sceptical as to all these hypotheses, *v. Hippel,* Deutsches Strafrecht I 1925, pp. 104 f. note 7, 106, 108 note 1. Compare also *Eberhard Schmidt,* Einführung in die Geschichte des deutschen Strafrechts 1947, pp. 24 f.

[3] Contra *Pappenheim* in 50 Zeitschrift für deutsche Philologie pp. 450 ff. (1926).

[4] *Gerland,* Die Entstehung der Strafe, 1925, pp. 20 ff.

[5] On the following *Vlavianos,* Zur Lehre von der Blutrache, Munich diss, 1924.

[6] *Binding,* Die Entstehung der öffentlichen Strafe, 1909, pp. 45, 32.

[7] People's revenge as the origin of public punishment: *R. Schmidt,* Aufgaben der deutschen Strafrechtspflege, 1895, pp. 147 ff., Grundriss des Strafrechts, 2d ed., 1931, pp. 7 ff.

sacrifices, after Christianization they were bound to meet the resistance of the church, which could use the law of asylum [*Asylrecht*] in particular to frustrate them. "The clergy pursued the salvation of criminals condemned to death as a kind of sport. It is evident from numerous legends of the saints that nothing brought the aroma of holiness more easily than when a pious man saved a criminal with or without a miracle from death on the gallows, which he deserved several times over."[8] In fact in the Merovingian period the death penalty noticeably receded into the background, to reemerge only under the Carolingians—but, as will be shown, from a new root.[9] The sacral death penalty could not bear fruit in the ensuing period, even if memories of the old sacrifice ritual attached to the capital punishments newly arisen from another root.

There was another attempt also to derive the later corporal punishments, those involving mutilation, like those to skin and hair [*an Haut und Haar*], from the sacral capital punishments of the primitive Germanic period, as fragmented parts [*abgespaltene Teile*] of the sacrifice ritual.[10] In fact slitting of ears and emasculation appear as preparation of the victim in that famous provision of the Lex Frisionum (tit. XI of the additio sapientium) on the sacrifice of temple desecrators. But precisely this sacral character of certain mutilations resulted in the disappearance of these types of mutilation after Christianization; thus at least emasculation completely recedes in medieval criminal law.[11] On the other hand the corporal punishments have been interpreted as "fragments of peacelessness" (Brunner and already Wilda)—but why laboriously distilling these punishments from other kinds of punishment when they already existed elsewhere in the legal order: in serf criminal law [*Knechtsstrafrecht*].

By this means we at last meet with a fertile area for the further development of criminal law: types of punishment that had formerly been only applied to serfs later invaded the general criminal law. Principally mutilation punishments: previously almost exclusively imposed on the unfree, in the Carolingian period they are applied more and more against the free "and especially in relation to offences which reveal a base and serfish mind [*niedrigen, knechtischen Sinn*]."[12] Likewise the punishments against skin and hair were until near the end of the Carolingian period predominantly serf punishments.[13] Even the capital punishments appears as serf punishments[14] (and in this respect are certainly not "fragments of peacelessness," as serfs have no share in the people's peace [*Volksfrieden*]); the new upswing in capital punishment during the Carolingian period could connect itself to these capital punishments for serfs after the disappearance of the sacral capital punishments. In particular the qualified capital punishments [*qualifizierten Todesstrafen*], these combinations of punishments against life and limb [*Leibes- und Lebensstrafen*], might ultimately be rooted in serf criminal law. Thus, for instance, the Lex Frisionum recognizes (XX 3) a "tormentis interficere" for serfs. The whole of the later system of punishments against life and limb thus was already prefigured in serf criminal law.

Three writers so far have more or less emphatically pronounced in favor of the descent of public criminal law from serf punishments: Köstlin, v. Bar and Jastrow.[15] *Köstlin* in his posthumous History

[8] *Brunner,* Abspaltungen der Friedlosigkeit, Forschungen zur Geschichte des deutschen und französischen Rechts, 1894, p. 455; *Heinerth,* Die Heiligen und das Recht, 1939, pp. 52 ff.

[9] On the other hand *H. Mitteis,* along with others, sees even in the renewal of capital punishment at a significantly later time "a new foundation on the old stratum of people's law [*volksrechtliche*] institutions that had been concealed but not destroyed"; *Mitteis,* Politische Prozesse des frühen Mittelalters, in Sitzungsberichte der Heidelberger Akademie, 1926-7, Abh. 3, p. 33.

[10] *Brunner-Schwerin,* Deutsche Rechtsgeschichte II, 2d ed., 1928, pp. 763 f. note 1, 786.

[11] Compare *His,* Strafrecht des deutschen Mittelalters I, 1920, p. 520; *Fehr,* Savigny-Zeitschrift, Germanistische Abteilung, vol. 35, 1914, pp. 149 f.; *Grimm,* Deutsche Rechtsaltertümer, 1828, pp. 709 f.

[12] *His,* loc. cit. p. 510, *His,* Geschichte des Strafrechts bis zur Carolina, 1928, pp. 85 ff.

[13] *His,* Strafrecht des deutschen Mittelalters I, pp. 528 f., Geschichte des Strafrechts bis zur Carolina, p. 70.

[14] *Amira,* Die germanischen Todesstrafen, 1922, p. 27.

[15] *Köstlin,* Geschichte des deutschen Strafrechts, 1859, *v. Bar*, Handbuch des deutschen Strafrechts I, 1882, *Jastrow,* 50 Schweizerische Zeitschrift für Strafrecht pp. 33 ff. (1936), Weltgeschichte 1932, p. 146. (Jastrow's article was prompted by an article by *Radbruch* in 49 Schweizerische Zeitschrift für Strafrecht pp. 17 ff. (1935)). Unsubstantiated remarks to the same effect already in *Henke,* Entwicklungsgeschichte des Strafrechts, 1 Neues Archiv des Criminalrechts, pp. 256 ff. (1817).

of German Criminal Law, which is still well worth reading, finds in the generalization of serf punishments the first indication of "the rise of the concept of punishment" (p 81). This concept includes "the idea of an absolutely higher right [*absolut höheren Rechts*] as against the culpable person." This is realized neither in the anarchic law of feuds and fines [*anarchischen Fehde- und Bußrechts*] nor in the (alleged) basic concept of occasional public punishments in the Germanic period: peacelessness. This is because this "negative concept of peacelessness," which merely permits but does not prescribe the destruction of the peaceless, contains in itself "a lack of positive, self-confident power of the community over its member." Only in the relationship between masters and serfs can "the first appearance, admittedly still very crude and imperfect, of that concept" be found. It can be seen that the Hegelian Köstlin lacks neither the mode of expression nor the way of thinking of his master. But he also does not lack sound historical-sociological insight; he explains again and again very insistently that the "at least partial development (of criminal law) from the master's right of chastisement [*herrschaftliches Züchtigungsrecht*]" (113) is based on the "decline of landless [*unbegütert*] freemen in their political and legal significance" (81), and on the "convergence of the law of free and unfree villeins by subordination under *one* judicial master [*Gerichtsherrn*]" (100). Also *v. Bar* explains that "the application of punishments against life and limb against the unfree…later, as the number of the completely free…diminished so severely, had to be of great importance for the conception of criminal law in general" (68 f), but not of the nature and scale that the change of status relationships is often imagined to have (88). This limitation is intended to mean that v. Bar only sees it as a factual, and not as a juristic difference, that the free man without means [*unvermögend*] undergoes, along with the unfree, the punishment against life and limb which the free man with means [*vermögend*] escapes. *Jastrow* expresses himself with great decisiveness in a delightful article, the basic idea of which he had conceived back in his days as a student in the seminar of K. W. Nitzsch, but did not publish until the evening of his life when he was more than eighty years old. His article bears the title that the present work has borrowed from him: The origin of criminal law from the status of the unfree, and concludes with the confident words: "Punishment not merely *has* arisen in this way, it *can*not have arisen in any other way." Jastrow, however, adds to his thesis certain explanations and limitations (p 36 note 1): Criminal law, which he seeks to trace back to serf punishments, is only to be understood as public criminal law and still more especially as the system of punishments against life and limb; by contrast, the system of fines to the injured party and to the state, as well as the exceptional killing of criminals, whether because of treason in war or to pacify the anger of the gods, is independent of serf punishments—limitations also adopted in the present article. An essential and new trend in Jastrow's discussion is the reference to the important role that attaches to the God and Land Peace movement in the process of generalization of serf punishments, and thereby to the Emperor Henry IV [1050-1106] who set himself at its head, and thereby won the reputation of a protector of the lower classes of the people and their peaceful activity.[16] "These, emerging from a state of slavery, were still subject to the punishments against life and limb that the master could impose on them; with them, besides the old Germanic wergeld, a system of public punishment came into German legal practice [*das deutsche Rechtsleben*]…Through the Land Peace the reign of Henry marks the beginning of a public criminal law" (World History, p. 146).

The need had then long existed for a more effective [*schärfer durchgreifendes*] criminal law. The law of feuds and fines at the heart of pre-criminal law institutions was a law between equals and the equally wealthy, a law only for those capable of giving satisfaction and making payment. It had increasingly to break down as there grew under the feet of this upper class capable of providing satisfaction and payment a class of the people too lowly for a feud and too poor for a fine.[17] Such a class structure arose in the Frankish period.[18] Crime thereby also had also to assume a new character: it

[16] In the same vein regarding Henry IV, *H. Mitteis,* loc. cit., pp. 31 ff.

[17] *Richard Schmidt* has emphasised most emphatically what he calls the "gradual development of the proletariat" as a factor in the history of criminal law. Aufgaben der deutschen Strafrechtspflege, 1895, pp. 174 ff.

[18] The view advocated here is however independent of the disputed question of whether in the Germanic period a broad stratum of free peasants was present or whether already then the majority of peasants consisted of unfree serfs and half-free bondmen dependent on large manors (v. Dopsch); compare Adel und

was now no longer an individually determined occurrence within a community [*Gemeinschaft*] of approximately equally situated members of the people [*Volksgenossen*], but an increasingly socially determined mass phenomenon in a society [*Gesellschaft*] stratified by class. The role that robbers, the earliest of professional criminals, now obtain in continually recurring statutory provisions [*Kapitularien*] is characteristic! In Caesar's times raids had still been war operations: latrocinia nullam habent infamiam (BG, VI, 23)—it testifies to the growing strengthening of state power that robbery now begins to become a common crime. Only now the "common crime" arises—common in the sense of its origin from the common people as well as in the sense of its assessment as dishonorable, the crime of another stratum, not understood and held in contempt [*geringgeschätzt*]. Only from this time onward, when crime begins to become a social mass phenomenon, "is it possible in a real sense to speak of legislative policy [*Legislativpolitik*] in the area of criminal law."[19] Only now does punishment turn from being an instinctive act into a socially purposeful act. Its purpose however is unambiguously expressed in a statute of Childebert II of 596: Disciplina in populum modis omnibus observetur—to maintain by all means discipline over the (low) people. As a means to this end the punishments that had always applied to the lowest stratum naturally suggested themselves: serf punishments.

Before serf punishments could enter general criminal law, it was necessary that they themselves should obtain the character of law.[20] The treatment of slaves was the exercise of the right of ownership over them, but "the boundary of the right accruing to the master is not drawn up by the abstract concept of ownership and property, but by good custom."[21] Such limits of custom, which church influence consolidated and strengthened, gradually became limits of law. In a society of slave owners it is in the common interest not to treat serfs so strictly as to raise the prospect of despair and rebellion, nor so softly as to nourish their insolence [*Übermut*]. It is no coincidence that the people's law [*Volksrecht*] demands the killing of the slave for killing the master or sexual intercourse with the daughter of the house;[22] because it was precisely here that considerations of shared guilt or sympathy were conceivable, which could prevent survivors or relatives from implementing punishment.

The slave came completely under the dominion [*Herrschaft*] of state criminal law if his misdeed was directed against members of another clan. Here the master could deliver the wrongdoer to the injured party in order to exclude or limit his own responsibility. Although the injured party originally could punish the person who was delivered to him as he pleased, the punishments later were regulated by the state and at that time already resembled punishment by the public power [*öffentliche Gewalt*], as they had to be executed openly by the injured party. Finally the state power itself assumed punishment of serfs and demanded their delivery to the public authorities. The system of public punishment of serfs was thereby complete: the people's laws [*Volksrechte*] mention the death penalty, cutting off hands, putting out eyes, flogging and initially even emasculation, which later only seldom arises.

These serf punishments were then applied more and more to the free as well. At least the appearance of an application to the free arose. If a wrongdoer, because he was not able to pay the fine, fell under the victim's [*des Verletzten*] debt servitude [*Schuldknechtschaft*] and was subjected to a serf's punishment by him, someone without a juristically practiced eye might overlook the previous subjection to servitude [*Verknechtung*] and imagine he saw before him a serf's punishment executed against a freeman. Far more important for serf punishments' intrusion into general criminal law than the sinking of individuals into servitude was the lapsing of whole strata of people

Bauern im deutschen Staat des Mittelalters, edited by *Theodor Mayer,* 1943, especially the article by *Bader, pp.* 109 ff. What matters is only that at some point in time the relationship of the free and the unfree evolved, royal officials became free, even noble, the free became bondmen and so former serf punishments came to be doubly applied to the free.

[19] *R. Schmidt,* loc. cit., p. 150.

[20] On the following *Jastrow,* Zur strafrechtlichen Stellung der Sklaven bei Deutschen und Angelsachsen, Untersuchungen zur deutschen Staats- und Rechtsgeschichte, issue 2, 1878, *Georg Meyer,* Gerichtsbarkeit über Unfreie, Savigny-Zeitschrift, Germanistische Abteilung, vol. 2, 1881, pp. 83 ff.

[21] Thus in the words of *Mommsen, Brunner,* Forschungen, p. 475.

[22] *Brunner,* loc. cit., p. 456.

[*Volksschichten*] into social dependence, the great restructuring of status [*der Stände*] that occurred throughout the Middle Ages. Freemen fell into dependence, for instance, by commendatio [*Kommendation*]; conversely unfree men came to honor, for instance, royal officials [*Ministerialen*] to knighthood [*Ritterwürde*]. On the one hand the manors and on the other hand the cities operated, each in the opposite direction, as a great crucible in the sense of the assimilation of the free and the unfree: here they said "air makes you free" [*Luft macht frei*] but there it could be said "air makes you unfree." Thus on the one hand the free villeins of the landlord fell under serf criminal law and on the other hand the rising unfree, knights as well as city dwellers, took the criminal law of their former status up with them to their raised status and gradually forced it also on their new status fellows [*Standesgenossen*]. This development extended over centuries, beginning in the Merovingian period, reaching a first high point under the Carolingians and coming to a conclusion and to legal recognition (having until then been of an essentially factual nature) in the God and Land Peaces.

The God and Land Peaces[23] initially still distinguished between punishments for the free and punishments for the unfree: for the former outlawry [*die Acht*], and for the latter capital punishment, mutilation and flogging—so, for example in the Mainz God Peace of Henry IV of 1085. Subsequently they absorb increasingly numerous crimes and therefore serve to expand the system of punishments against life and limb. They eventually extend this system of former serf punishments to freemen: in the 1152 Constitutio de pace tenenda of Frederic I every difference between the free and unfree has disappeared.[24] The last Land Peace that still contains penal [*peinliche*] punishments is the Treuga Henrici of 1224: since then they have passed into the common law and the general legal consciousness.[25] A development that had lasted for centuries thereby has reached its end, the system of punishments against life and limb was complete, serf criminal law became common criminal law, and the distinction in criminal law between the free and unfree was overcome.[26]

To the present day criminal law bears the features of its derivation from serf punishments. Punishment since that time signifies a capitis deminutio [degraded status] because it assumes the capitis deminutio of the one for whom it was originally intended. To be punished now means to be treated as a serf. That was symbolically emphasized when for instance in earlier times corporal punishment was accompanied by a shaving of the head, for shorn hair is serf custom. Occasionally, for instance in the Lex Visigothorum, flogging appears literally in association with enserfment.[27] But the serfish treatment meant in that age not only a social but at the same time a moral [*moralisch*]

[23] On the following *Schnellbögl,* Die innere Entwicklung der bayerischen Landfrieden des 13. Jahrhunderts, Deutsch-rechtliche Beiträge, vol. 13, issue 2, pp. 209 ff., especially pp. 217–219 note; *Hans Hirsch,* Die hohe Gerichtsbarkeit im deutschen Mittelalter, 1922, pp. 150 ff.; *Eberhardt Schmidt,* Einführung, pp. 38 ff., 44 ff.

[24] *Jastrow* in his article in Schweizerische Zeitschrift für Strafrecht, pp. 43 ff. shows that in the peace agreements as well as in the invocation of land peace statutes and in city laws [*Stadtrechte*] the concept of the "chosen" law is expressed, according to which the free man subjects himself to new law (and thus also to new criminal law) by a free determination of his will.

[25] That the differentiation in status is replaced by a differentiation of classes, and that insofar as punishments against life and limb are redeemable the rich can pay while the poor must bleed, a state of the law to which only the Carolina put an end by the irredeemable application of the penal [*peinlich*] punishment: all this lies beyond the scope of this article. Compare on this the vivid description of *Richard Schmidt,* Aufgaben der deutschen Strafrechtspflege, 1895, pp. 156 ff.

[26] Agreeing in principle *Eberhard Schmidt,* Maximilianische Halsgerichtsordnung, 1949, p. 41 ff., Einführung in die Geschichte der deutschen Strafrechtspflege, 1947, p. 22; *Gwinner,* Einfluss des Standes im gemeinen Strafrecht, 1934, pp. 1 f., 22–28, also 31 Monatsschrift für Kriminalbiologie p. 256 (1940); partially in agreement (maiming punishments) *Wohlhaupter,* 34 Archiv für Rechts- und Sozialphilosophie pp. 187 ff. (1940/41). Compare also *Hans Hirsch,* Die hohe Gerichtsbarkeit im deutschen Mittelalter, 1922, pp. 125 ff. For *Roman* law, the origin of criminal law derives from domestic discipline *Th. Mommsen,* Römisches Strafrecht, 1899, pp. 16–26, 898 f. For *Italian* developments agreeing with the above view is *Dahm,* Untersuchungen zur Verfassungs- und Strafrechtsgeschichte der italienischen Stadt, 1941, p. 49. "Also applying to *Russian* circumstances" according to *Hans v. Eckardt*, Ivan der Grausame, 1941, p. 401.

[27] Although not enserfment as a result of the flogging, as *Grimm,* Rechtsaltertümer, 1828, p. 704 assumed, but flogging on the occasion of enserfment: *Wilda,* Strafrecht der Germanen, 1842, p. 514.

degradation. "Baseness" [*Niedrigkeit*] was at that time simultaneously and inseparably a social, ethical [*sittlich*] and even aesthetic value judgment. The common man [*der gemeine Mann*] is at the same time the "mean churl" [*gemeine Kerl*] and the "vulgar" man [*ordinäre Mensch*]. Vilain (villain) is in French as in English the unfree peasant as well as the rogue [*Schurke*]; in German, the villager [*Dörfler*] became the "Tölpel" [dolt]. The pictorial manuscripts of the Sachsenspiegel give simple folk [*einfache Leute*] conspicuously coarse and ugly facial features.[28] The diminution in honor associated with punishment to this day is rooted not least in its origin in serf punishments. Nietzsche already recognized this connection intuitively:[29] "Punishment only acquired its insulting character because certain sanctions [*Bußen*] were attached to contemptible people (slaves, for example). Those who were most punished were contemptible people and ultimately there was something insulting present in punishment."

[28] *v. Künssberg,* Sachsenspiegel (Inselbücherei 347), p. 14.
[29] Wille zur Macht [Will to Power], aphorism 471.