

## CIVILISATION OF CRIMINAL JUSTICE

### RESTORATIVE JUSTICE AMONGST OTHER STRATEGIES

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Is criminal justice becoming more and more uncivilised and if so, how could this be explained? Could it be related to the approach of the criminal justice system as an ‘assembly line’ that should produce punishments and effective crime control in the most cost-effective way, dominated by an instrumentalist rationality, instead of viewing criminal justice as a normative system of checks and balances promoting the values of a purportedly democratic society within the rule of law? If certain tendencies towards de-civilisation can be demonstrated, to what extent and how could the implementation of restorative justice then contribute to a return to more civilised criminal justice? Could re-civilisation of criminal justice by implementing restorative justice also contribute to reducing relapse into crime? These are the questions that will be explored in this contribution, in an attempt to elaborate the intuition that restorative justice could function as a new civilisation movement for criminal justice.<sup>1</sup> But not only restorative justice: other strategies can also contribute, as several other chapters in this book argue, and these strategies seem interlinked and could well be combined.

#### 1. Criminal justice and Civilisation

It is highly plausible that the institution of criminal justice has contributed importantly to the civilisation of the populations of the European nation-states during the long process of state formation and, in this framework, the construction and consolidation of the monopoly of violence of the central state. Around 1800 all states became a ‘rechtsstaat’, ruled by law, with an important function for the ‘legality principle’ that rules the functioning of the criminal justice system, thereby normatively controlling the exercise of state (or, sociologically more correct: collective) power.

By effectively implementing this monopoly of violence an increasingly large and stable social domain came into existence during this long process, in which citizens – increasingly protected by and subjected to the law – learned (because they were able to) to take account of each other’s needs and interests, not only in their relations as ‘legal subjects’ but also in socio-economic and other, private and public relations. People learned to reckon with fellow-citizens in ever longer ‘chains of mutual dependence’, to be thoughtful of the consequences of their own behaviour for themselves and for others and to exercise self-discipline (Elias 2000:370-373). Increasingly, the individual came to live in circumstances in which he learned to think about and foresee the consequences of his own momentary actions in the future, several steps ahead in the chain of interrelated actions and events: enabled by the relatively calm and safe circumstances of life he was in. Both the ‘psychogenesis’ and the ‘sociogenesis’ of the civilised citizen are related with his development into a legal subject, secured by the monopoly of violence that was itself subdued to and controlled by the rule of law.

Importantly, Elias observed that the citizen's self-control becomes ‘dispassionate’ and models itself after the external processes of social control, which show an increasing differentiation of interrelated functions, producing a ‘dense web of interdependencies’ that seeks, guards, balances, counteracts and

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<sup>1</sup> A first concept of this contribution appeared in Dutch as: J.R. Blad (2012) ‘Herstelrecht en civilisering van de strafrechtspleging’ in Marie-Claire Foblets, Mireille Hildebrandt & Jacques Steenbergen (eds.), *Liber Amicorum René Foqué*, Gent/Den Haag: Larcier/Boom Juridische Uitgevers, 169-188.

prevents uncontrolled outbursts of (disturbing) affects. In the situation without monopoly of violence the uncertainties and the unpredictability of events in life meant that one could indulge in 'extreme cruelty' (towards others) and in 'extreme enjoyment of pleasures': if one declined those attitudes there was the option of 'extreme ascetism' (Elias 2000: 373). When these conditions of what Hobbes has termed the natural state slowly disappeared by the establishment of the monopoly of violence, the pacified war or all against all was transformed in a permanent internal struggle to control the types of passions, which would naturally resist such control (drive-satisfaction versus drive-control) (Elias 2000: 375). In his Freudian analysis Elias defines a successful individual civilisation as a pattern of conduct that on the one hand responds to the functional expectations that adults are confronted with (in the societal chains of mutual dependence), offering on the other hand sufficient personal satisfaction of needs. The civilizing processes of socialisation in which the human comes into being are however never complete, nor permanently effective, and egocentric affects can and will often be indulged in at the cost of others. When the legislator has foreseen this possibility and considered the consequences unacceptable, penal consequences can be imposed on the basis of penal law provisions. On the grounds of the legality-principle thoughtful legal subjects can foresee this and in this way the legality-principle not only limits and controls the exercise of state power (its normative function) but also potentially informs and shapes behavioural choices to be made by legal subjects. This criminal-political function provides the criminal law with a certain, although limited, instrumental value. This dual functionality (of the legality-principle) characterizes all other key principles of the classical criminal law which began to reign in Europe soon after 1800: equality before the law, personal responsibility (internal and external) publicity, proportionality and finally that of subsidiarity (*ultima ratio*). These all made criminal justice more predictable, more equal, more controlled and moderate and at the same time more functionally effective (Dupont 1979). Torture (to obtain confessions) and secret penal procedures disappeared in the context of doing justice publicly, with both more impact and more accountability to the public, but also corporal punishments and other excessive and highly dysfunctional punishments, such as the declaration of 'civil death' and the general confiscation of all possessions of the culprit – and also of his dependants – were abolished. The punishment of imprisonment began slowly to drive out the death penalty, but the general and cultural developments also brought a certain moderation in the use and execution of this custodial punishment. In penological terms there was the moderating influence of classical retributivism that focussed on administering the punishment in proportion to the degree of individual guilt and the degree of severity of the crime. Particularly in the Netherlands this moderating effect seems to have been quite strong, probably above all influenced by the catholic, and later more humanistic and existentialist views of the famous 'Utrecht School', which could explain why the Netherlands had the world record lowest (relative) prison-population in the 1970s (Van Ruller 1986). Utilitarianism brought along a predominant focus on rehabilitation and re-integration of convicts as useful and productive members of society, which contributed in its own way to moderation and avoidance of excessive severity of punishments. Influenced by developments in anthropology conditional sentencing was introduced: the conditions imply alternative types of sanctioning, which were recognized as valuable ways of avoiding the social and economic costs of imprisonment, when this punishment is not absolutely inevitable. Differentiation of penal regimes for juveniles and offenders with serious mental problems made criminal justice potentially both more humane and subtle and more effective.

One can conclude from this introduction that in the civilising social networks of interdependence, there is a high degree of differentiation of mutually dependent functions and a similar complexity of interwoven chains of reciprocal dependence. This makes it necessary to be thoughtful, prudent and careful, decisional attitudes which are facilitated by the ability to take a distant (excentric) view of these networks and chains and through awareness of one's own place and functions in them.

## 2. The incremental loss of civilisation in criminal justice today

Norbert Elias' analysis concerns a process spanning many centuries in which the developments were not permanently nor unequivocally progressive, but sometimes they were predominantly or partly regressive. Still the unplanned result in the long run was that of an enhanced level of civilisation.

If we want to suggest in this chapter that there may be a regressive tendency in the level of civilisation in actual criminal justice practices we can only search for indicators of such a development, because interpreting developments in which one is deeply immersed in one's own lifetime is much more hazardous than interpreting historical processes. One can only try to ground one's intuitive analysis on the relevant documentary evidence one can find, perhaps overlooking other processes that take place at the same time. What is presented here is however not a subjective, but at least an inter-subjective analysis, based on contemporary writings of various professionals witnessing the same tendencies. Mindful of Elias' analysis a loss of civilisation (in criminal justice) should be seen as a process of a broader, societal, socio-economic and cultural nature that is expressed and manifests itself in the contemporary uses of criminal justice. What is contended is not that there are inherent, immutable characteristics that might get lost or are endangered by internal changes in criminal justice itself (the institutions of law are no agents), but that there are wider and continuing processes which produce a certain degree of rough and toughness and induce an inclination to stress certain functions of criminal justice, such as its capacity to punish, at the cost of other functions such as offering individual suspects protection against the power of the social collective, exercised through the state. Substantively one could think of the degree in which doing criminal justice is still based in thoughtful, prudent and careful consideration, in the context of an institutionally guaranteed, distanced (and dispassionate) deliberation of all interests which are at stake when using the state's monopoly of violence. To what extent have there been developments that have changed or even undermined the *checks-and-balances* between the agencies of criminal justice (the legislator included) and to what extent has this given rise to a situation in which criminal justice can no longer be an institutional brake on spontaneous outbursts of cruelty and excessive harshness, but to the contrary a way of forcefully expressing these - more or less collective - affects?

In the Netherlands, a country that was formerly famous for its humane and lenient penal system, some developments which are alarming in this regard can be discerned. Especially giving rise to concern is the fact that in the recent decades the traditional distance between the politically responsible minister of justice and the Public Prosecution Service (PPS) – which always served well to prevent a politicisation of everyday justice – expressed in the 'doctrine of the velvet glove' has been replaced in 1999 by an explicit power of the same minister to give instructions with regard to every task and (legally mandated) power of the Public Prosecution Service (Blad and De Doelder 2008).<sup>2</sup> Since the minister himself is accountable to parliament this has enabled the traditionally feared, but now desired politicisation of doing justice, which expresses itself in unlimited meddling by politicians in any criminal event that is covered by mass-media, creating and amplifying an impression that criminal justice is massively failing to perform its purported main function, namely crime control (and that

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In the review of the Act on Judicial Organisation (Wet Rechterlijke Organisatie) of 1999, in which section 127 RO gives an unlimited competence to the minister of justice to issue both negative and positive instructions to the Public Prosecution Service. .

politicians themselves of course know better what to do). Another landslide that has happened in our criminal justice system is that the public prosecution service has been given an autonomous power to impose punishments ('penal dispositions' which may not imply custodial sanctions) (Hartmann 2008). This competence of the PPS to punish will in the near future replace most of the formerly consensual settlements between the PPS and the suspect, the so-called 'transactions', to avoid prosecution on certain agreed conditions such as compensating the victim. The initiative to address an independent court now has to be taken by the citizen who faces a punishment already imposed by the PPS: therefore he should oppose the decision by default. This new procedural arrangement has in this context two relevant consequences: the first is that the everyday sanctioning levels in a massive amount of cases can be directly steered by the minister of justice (in view of the latter's unlimited power to instruct the PPS). And the second is that the independent courts tend to be marginalised in determining what justice implies in very frequent incidences of crime, dealt with routinely by the prosecution service. The power of the PPS will be increased and that of the courts decreased further when the mandatory minimum sentences that have been proposed will become law<sup>3</sup>: the courts will then, under normal circumstances, not be able to escape the duty to impose the mandatory sentences (50% of the maximum penalty), but the PPS has the power to decide to bring a criminal charge that *does*, or *does not* imply a legal construction of the putative offence that would oblige the courts to impose a mandatory sentence upon conviction (De Doelder 2011):

The system's internal capacity to discuss and consider prudent action in doing criminal justice is undermined by these developments. In this regard it should also be mentioned that, while the limits of substantive criminal law are drawn ever wider, become more vague and sometimes even imply the liability to be punished for mere (ascribed) intentions, the criminal procedural law is to a certain degree de-formalised, leaving it to the courts e.g. to decide what should be the legal consequences of serious flaws – and even transgressions - in the preparatory investigations by police and PPS. The legal scholar Mevis has interpreted this as signs of a 'withdrawing legislator' – letting the courts down by weakening the legal sources of legitimacy of the courts' verdicts (Mevis 2008) – but it is much more appropriate to see these developments in legislation as conscious and purposive action of the legislator, facilitating political steering of criminal justice much more effectively than strict legality would.<sup>4</sup> As noticed by the legal scholar Klip (2010:588) ; by the ever increasing power to punish the necessity to make choices and set priorities in law enforcement becomes also greater and more urgent, because it is impossible to react to each and every (putative) offence, but these choices are no longer made in transparent legislation, grounded in a democratically open and public debate, but in the everyday decisions about investigation and prosecution, hidden from the public view.

### 3. Penal instrumentalism

These developments in the Netherlands can be interpreted as evidence of the increasing instrumentalisation of criminal justice since the middle of the 1980s, which has been analysed and

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The cabinet of Liberals and Christian-Democrats, supported by the PVV, that introduced the bill has fallen before it was accepted by parliament, but the pressures in this direction may stay.

<sup>4</sup> For the attentive reader of Dutch professional literature on the functioning of criminal justice the signs of political steering of legal action are many. Recently Stevens (2012) demonstrated the strong influence of 'risk-management' on decisions about the use of pre-trial detention: all legal aspects that should be weighed by judges are in daily practice overruled by one political necessity: to avoid any risk.

criticised by the legal scholars A.C. 't Hart and R. Foqué (1990a) as a fundamental problem in the context of a modern relational theory of law. In this relational approach law should provide and guard the foundations of a democratic state under the rule of law as a model for a balanced society, orientated towards the realisation of equality, equal liberty and equal opportunities for participation of all legal subjects. Quoting A.C. 't Hart (2004:210), the founding fathers of modern rule of law were searching for:

‘ a construction [meaning ‘ structure’ ,jrb] in which power would be divided between participants who acknowledge each other reciprocally and wherein law would function in the first place as the structure constituting the relations between in the participants in power. Law is then not a pure instrument of the exercise of power, but is understood as a pattern of relations (...) expressing a comprehensive structural equilibrium that allows limitation and diffusion of the exercise of power.’<sup>5</sup>(My translation, jrb)

On this view, in as far as law can be an instrument, it is an instrument only for the preservation of the comprehensive equilibrium in the long run. It does so by maintaining the ‘counter-factual’ legal, aspirational model of the democratic rule of law as expression of an ethical-political ideal, wherein the rights and liberties of each legal subject are equally protected, both in his horizontal legal relations to fellow-citizens and in his hierarchical legal relations to government and authorities. From this legally guaranteed position all legal subjects can participate freely in public debate about the fabric of society and the polity of the state.

Instrumentality of and protection by law are in this view inseparable: protection by law is instrumental. But it is a kind of instrumentality that transcends the short-term political aims, interests and practices, which should normatively be limited by legal policies geared to the long term balances.

Very different from this kind of instrumentality is the ‘penal instrumentalism’ that has become predominant in the last 25 years in criminal justice policies. Penal instrumentalism places effectivity of law in combatting crime as sole priority and inherently views provisions of legal protection of citizens against state powers as obstacles that should be removed as much as is (constitutionally) acceptable (Foqué and 't Hart 1990b: 194). The realisation of short term political aims should be smoothly facilitated with the means of criminal justice, conceived as and reorganised to be an assembly-line of the politically desired output, instead of an autonomous system of checks and balances that imposes limits on political programs and agendas.

Penal instrumentalism could be defined as ‘

*the tendency to overlook and overstep the inherent limits of penal instrumentality (that is the limited capacity to reach certain aims with the means of the penal law), which leads to an incremental weakening of the legal protection of individual citizens against oppressive tendencies in society and the powers of state authorities.*(Blad 2008:38).<sup>5</sup>

Analytically two types of limits are being overstepped. Firstly there are the functional limits inherent in the capacity to achieve certain goals by means of the penal law: as a means of influencing conduct in the direction of ‘norm-conformity’, the threat and imposition of punishment only have a very limited efficacy. This depends upon various personal and societal (educational, socio-economic,

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<sup>5</sup> One could think of the distinction that H. L. Packer (1968) made between the crime control versus the due process model, which is certainly implied, but here the intuition is that – while marginalising the due process aspects – penal instrumental does in fact not deliver more or more effective crime control.

cultural) conditions, which are not within the reach of the penal law. Moreover, there are almost always negative and even counter-productive effects of penal repression.<sup>6</sup> These limits are increasingly disregarded. The concept of inherent limits to the capacity of the penal law to achieve certain aims implies that to overstep these limits produces no positive results (no surplus value in terms of reducing crime-levels) but merely implies more costs in terms of loss of rights and liberties. The latter is caused by the transgression of the second type of inherent limitations, the ethical-normative limits which – in the relational theory of law used here - follow from the social contract as the foundation of state and civil society and of the legality-principle ruling the exercise of power: predominantly the safeguarding of privacy, personal life and human equality. The one-sided stress on combatting, not only crime but now also issues of nuisance and even mere feelings of unsafety (often without much objective reason) leads to an increasing number of invasive powers of the criminal justice agencies, foremost the police, many of which are called ‘preventative’ but are in fact of a repressive character. Examples are the so-called ‘preventative search’<sup>7</sup> and the obligation to be able to show an ID when required, which can be at any occasion in public. Other examples are invasive means of investigation and detection such as systemic electronic surveillance of private homes and communications.

While these invasive powers of the criminal justice agencies are increased and more frequently used, their use is becoming more and more selective, informed and directed by social and political discourses negatively stereotyping certain sections of the population as *the* source of our crime problems. Although the (most often marginalised) sections of the population that are under popular attack vary fashionably in time, the politically exploited repressive talk, distributed and amplified by the mass-media, prepares the population at large continuously for new invasive powers and repressive interventions in a dramatic projection of a moral battle of ‘us against them’. Groups that have been socially constructed as our enemies are various ethnic minorities (‘Antillians’, ‘Maroccan youth’, ‘Gypsies’), ‘Street-terrorists’ (which are groups of youngsters causing ((serious)) nuisance) and nowadays f.i. Polish workers and motor-cycle clubs such as, or resembling the Hells Angels.<sup>8</sup> Typical for this era is that politicians do not any more dissociate themselves from these social constructions of ‘folk devils’ or try to neutralise them – as they would have done until the 1980s – but accept them as images, feelings and desires that the population has a right to maintain (Hallsworth 2000). Penal instrumentalism is framed in and framing the development of a predominant ‘culture of safety’, that projects and seeks to protect a majority of presumably law-abiding, well-integrated citizens against less integrated and relatively more deprived groups, perceived as the source of criminal risks and danger (Van Swaaningen 1997). In result, instead of promoting a democratic society of equals this use

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6 A well-known example is the worldwide war on drugs that is correctly identified as a failure with devastating consequences by a Panel of the United Nations in 2011.

7 A search on the body, all goods carried and one’s car, which is allowed in so-called risk zones without the demand of having good reasons to suspect a person of having committed or committing an offence.

8 A.C. ‘t Hart (1983) demonstrated how this kind of language can stigmatise and degrade social groups, making them vulnerable for political manipulations which decrease their actual and equal protection by the law. Manipulations which would not have been publicly accepted without the prior dissemination of stigmatising labels.

of criminal justice merely reproduces and reinforces the structure of inequality and relative deprivation at the bottom of the socio-economic ladder (Frehsee a.o. 1997).

David Garland's analysis (1996; 2001) of the waning of 'penal welfarism' and the gradual development of a culture of penal control, indicated a.o. by the decline of the rehabilitative ideal and the political exploitation of fear of crime and a re-dramatisation of crime against which the public must at all costs be protected, was based on the USA and the UK but is very applicable to the developments in the Netherlands, even more so since 2001, the year of publication of his book. Especially the discovery of the symbolic figure of the victim as a source of legitimacy for penal control developed in the Netherlands only after 2001. Penal instrumentalism is based on populism and coupled with managerialism, leaving less and less room for professional discretion in doing justice. Not only scientific expert knowledge, but also legal professionals are politically 'denigrated', as Garland correctly observed (2001:13), and public opinion serves as the privileged, almost exclusive source of political discourse and crime policies. A prominent explanation in penal sociology for the drastic changes in the penal climate in so many western countries is the thesis that complex and interrelated technological, socio-economical and cultural changes in connection with globalisation have undermined traditional certainties and forms of (informal) social control. While situational and informal social control mechanisms have been weakened the increasing wealth and mobility has increased opportunities for criminal activity. Also in the Netherlands a strong increase in recorded (property) crime in the 1970's has produced a legitimisation-crisis for the nation state, that derives a great deal of its legitimacy from the capacity to protect its subjects against crime. Politicians and policymakers have responded by adapting the criminal justice system in order to make it a seemingly more efficient system of crime control, with an increasing emphasis on deterrence and incapacitation by longer terms of imprisonment. But what is most striking is that the criminal justice system is still made more severely punitive now, while overall registered crime levels are decreasing. Management of fear seems to be an overriding political aim here (Van de Bunt and Van Swaaningen 2004; Van Swaaningen 2009), and it seems to induce an acceptance of undue harsh punishment and control levels on offenders, which will now be discussed as an indication of de-civilisation.

#### 4. Conditions and expressions of harshness

Referring to the increasing punitiveness of criminal justice in the USA Jonathan Simon has suggested that there seems to be a growing acceptance of an '*entitlement to cruelty*'. Cruelty is defined by him as the

'trend towards penalties that are painful, vengeful, and destructive for life chances. By cruelty I also mean to foreground a feature of the public presentation of these penalties as something more than a belief in the necessity of harsh punishments to provide some crime control benefit, or even to satisfy some philosophically abstracted notion of retribution. By cruelty I mean satisfaction at the suffering implied by, or imposed by, punishment upon criminals, as well as emotions of anger and desire for vengeance taking violence' (Simon 2001: 87).

The cruel forms of punishment that Simon discusses are the death penalty (defended nowadays also as offering the victim or bereaved relatives the possibility of 'closure'), the ever increasing lengths of terms of imprisonment (even for relatively small third offences under "3-strikes" legislation) which he interprets as 'life-thrashing sentences', and the wide scale of different sanctions aimed at 'shaming', such as uniformed work in 'chain gangs'.

Tendencies towards public shaming are not very strong as yet in the Netherlands, but recently it has been suggested that offenders sentenced to a community sanction should carry out their community

work wearing brightly-colored jackets with words printed on them indicating that this work is done for punishment.<sup>9</sup> More disturbing is the tendency to impose ever longer terms of imprisonment, the unprecedented rise in life-imprisonment and the announced introduction of mandatory sentencing in cases of recidivism, involving crimes causing an infringement on the personal integrity of the victim, within a ten-year time span after a previous conviction. All institutional advisory boards in the Netherlands have rejected this proposal on grounds of professional legal and scientific critique, but the bill has been introduced anyway, with even more severe provisions. The serious and deep conflicts between the professional legal elite – most particularly judges, now announcing forms of civil and legal disobedience – and populism that have been developing in the last two decades in the Netherlands seem to culminate into a drastic fettering of the courts in their traditional power to determine sentences on the grounds of individualized considerations of the offence, the offender and the circumstances of the case.

The sociologist Boutellier (2002:111 a.f.; 2004) perceives a development towards ‘urgent criminal justice’ (as opposed to criminal justice as *ultima ratio*), predominantly geared to deterrence and selective incapacitation,<sup>9</sup> but the legal scholar Professor Klip (2010: 592) speaks more sharply of a tendency towards ‘total criminal justice’: ‘a justice system with severe punishments that have to be applied always and everywhere’, implemented by a political elite that is only interested in the punitive aspect of the justice system, but not in the legal aspects of it and that would preferably make the courts redundant. From the advanced and subtle system based on personal culpability the Dutch legislator is slowly turning back to the medieval system of offence-oriented justice in which only the abstract severity of the crime is relevant. Another legal scholar, Professor Groenhuijsen, discussing a legislative initiative taken by the very right-wing populist party (Partij Voor de Vrijheid: PVV), concludes that this initiative involves a party-political programme encompassing the ‘complete field of criminal justice’, most strikingly without any relevant substantial justification and explanation:

‘Drastic increases in maximum penalties across the board, the introduction of severe and sometimes towering minimum penalties, the corruption of the foundations of juvenile justice and the application of preventative detention in many, many categories of offences’ (Groenhuijsen 2010: my translation, jrb).

A younger academic, Claessen (2010: 100), and a group of his colleagues observe an ‘unprecedented punitive climate and austerity of penitentiary law’: The penitentiary specialist Emeritus. Professor Kelk, in an overview of developments, unreservedly notices a clear regression ‘from humane to hard-hearted’:

Jonathan Simon tries to explain the apparent change of mentality, already noticed by Garland, that expresses, promotes and accepts the need for satisfaction by cruel, vengeful punishments, in two different ways. Firstly he wonders whether the evolution from mechanical towards organic solidarity, as proposed by the famous sociologist Durkheim, could be in reverse now:

‘The bloody rituals of the scaffold reflected the characteristics of the conscience collective under mechanical solidarity. Under conditions of organic solidarity justice is increasingly reconceived as restitutive. There is less intense collective emotion and what there is valorizes



things like individuality, rationality and choice, which mitigate against cruelty' (Simon 2001:97) .

In the postmodern conditions of globalisation and de-industrialisation it appears likely to him, that the newly emerging cruelty is one of the ways to produce 'neo-mechanical solidarities'. In this regard he mentions the street-culture of various youth-groups coming from the lowest socio-economic classes, but also the fact that many of the Californian supporters of the '3-strikes' legislation were those 'who feared the breakdown of a common moral order as reflected in the family or in the demographic make-up of the state (...) (Simon 2001: 97)':

Secondly Simon attempts to find an explanation in terms of Elias' theory of civilisation. Are there signs of a certain de-civilisation, a decrease in shame and embarrassment when expressing or regarding the expression of cruelty? Elias posited a homology (an identity in form and style) between psychical order and self-control on the one hand and between social order and social control on the other, and this presupposes a close relation between individual and society. When citizens exercise self-discipline and give up satisfying 'improper' needs than this must indicate the existence of a certain solidarity with fellow-citizens and a willingness to accept the obligations associated with it: the welfare state was promoted by this and in turn the welfare state rewarded solidarity with adequate and reliable care in case of mishaps and disasters in personal life. But, says Simon:

'The larger political and economic strategies of neo-liberalism tend to place many of the burdens back on individuals. What remains of organized forms of social solidarity is further problematized by increased immigration and growing fragmentation of the society into geographically segregated class and race enclaves. These changes may be breaking down the psychical equilibrium that the civilising process presupposed' (Simon 2001:95):

Pratt, also in a reflection based on Elias, reminds us that the theoreticians of the 'risk-society' have demonstrated that the 'networks of interdependence' in that type of society have dramatically changed and have above all become more unpredictable and more fluid :

'It is as if all the road maps of everyday life which the state had previously drawn up on our behalf have been removed: in the new ones that replace them, the state only sketches in vague landmarks around which we must then undertake our own cartography' (Pratt 2005:265):

Our situation of growing uncertainties about our identity that goes together with the weakened or even dissolved networks of reciprocal dependency promotes the construction of

'common, easily identifiable enemies who seem to put us further at risk, whether these be particular types of criminal or new categories of unwanted citizens, such as refugees (...). Under these circumstances, the habitus of self-restraint begins to give way to more unrestrained outlets of emotion, as all the assurances which had allowed us to take uncertainties and vicissitudes in our stride, or to tolerate those whose conduct or character seemed undesirable, begin to unravel. Indeed, we now live in an era of road rage, hospital rage, and so on – as if, without the social solidity of the pre-1970 period, *ad hoc* outbursts of anger can now become our response to delays, frustrations, and inconveniences; and a new intolerance – zero tolerance – of those not making a contribution to social wellbeing'.

Pratt is more assertive in his conclusions than Simon:

'There is less self-restraint on the part of individuals but a simultaneous yearning for stronger and clearer responses from the state' (Pratt 2005: 265).

Political elites – and not so much the bureaucratic and professional groups working in the criminal justice system (Hallsworth 2000: 154) - have responded to this ‘yearning for stronger and clearer answers’ to a seemingly dissolving social structure and the concomitant occurrence of crime and nuisance, not with rational self-restraint but by embracing what Garland has termed a ‘criminology of the other’, which allows for an aggressive, populist criminal policy (sold under the guise of efficacy in terms of protection against crime). Garland circumscribes this criminology of the other as a:

‘criminology of the alien other which represents criminals as dangerous members of distinct racial and social groups which bear little relation to “us”. It is, moreover, a “criminology” which trades in images, archetypes and anxieties, rather than in careful analysis and research findings – more a politicised discourse of the unconscious than a detailed form of knowledge-for-power’ (Garland 1996: 461).

This type of criminology is one of the aspects of a political strategy of ‘denial’ of the increasing failure of traditional criminal justice to deal adequately with modern phenomena of crime from the centre of the national state (2001:137-138).

The observable call for punishments that are so hard that they can be called cruel, could according to Simon also be explained from the success of the civilising process itself. The features contributing to civilisation also contribute to a greater fear of violence and a stronger empathy with victims, which may induce a willingness to accept very harsh measures:

‘Because we see punishment as an instrumentally useful security device, we may not respond to it as an act of violence (...)’.

In this respect it is important that the bureaucratic and professional elites administering criminal justice have made the execution of punishment quite invisible for the public and are expected to perform their duties in a calm and dispassionate way, despite passionately punitive political rhetoric. We must and may hope that this is still to a certain degree the case with our public prosecutors and our judges, although the former are brought more directly under the political direction of the minister of justice and the latter are nowadays publicly criticised for being too lenient. The right-wing populist party PVV has even proposed abolishing the appointment of judges for life and dismissing those judges who have been punishing too leniently. This proposal will not be supported broadly, but the announced introduction of mandatory minimum sentences may also do the job of harnessing judicial discretion to mete out punishments which they consider just in the case at hand.

What has been outlined above is a sketch of the most important developments in public discourse and criminal policy in the Netherlands to show the probability of an actual decrease of the level of civilisation in Dutch criminal justice. At the very least conditions are building up for a kind of justice that no longer counteracts and checks tendencies towards cruelty but celebrates them. The degree to which legal professionals in various functions manage to mitigate these developments is an empirical question that cannot be discussed and answered here. In as far as there are ways to sidestep punitive expectations many will try to do so, when they perceive more positive forms of tailored sanctioning. It is known, f.i., that Dutch criminal courts are much less inclined to impose the measure of detention for repetitive offenders – with a minimum duration of two years - when it becomes apparent that the administration will not promote rehabilitation for the convicted offender but only aims at temporary incapacitation (Struijk 2008: 367). In reaction to the proposed introduction of mandatory minimum penalties in cases of recidivism many judges have announced that they will do all that is within their power to avoid having to impose them, just as courts have done historically at times when legal

punishments were (seen by them as) excessively harsh.<sup>10</sup> Quite correctly they insist that allowing mandatory punishments for recidivism will in the foreseeable future imply the introduction of mandatory punishments for first offenders. They fear that the predictable instrumental failures of the mandatory sentence for recidivists will be interpreted as proof that the first punishment was already inadequately low, since all functional expectations of the punishment depend on its harshness.

#### *4.1. Problematic publicity*

A last relevant factor to mention in connection with the punitive populism that dominates Dutch criminal policies is the functional role of the mass-media in amplifying fear of crime and promoting the simplistic ‘solution’ of punishment. Not only crime, but also the way the justice system functions has increasingly become ‘mediatised’. In a reconstruction of the relations between the justice system and the media in several consecutive decades, Brants and Brants demonstrate that attention has shifted from ‘serving the common public interest together’ to a battle between justice system and media based on conflicting interests. Where initially there was mutual trust and consensus about the common interest and its implications, there grew an increasing distrust in the way the criminal justice agencies supposedly served it. The loss of trust became almost total in the era 1980-1990, precisely when the criminal-political discourse sounded the alarm because of a highly increased level of recorded (property-) crime and made a drastic turn away from the traditional Dutch reticent politics - of parsimony with punishment and predominant use of social policies – to an attempt to ‘regain’ trust in criminal justice by a ‘consequent, consistent and credible’ use of repression. In the context of this new punitivism the PPS itself began actively to use the media to show the public that they were ‘now’ really fighting crime with tough measures. Paradoxically, however, this led to the opposite image of justice as failing to achieve its ends. In the post-2000 era Brants and Brants witness a spiral of highly tuned up expectations and deep disappointments. There is an interaction between the justice system and the media

‘in which the latter continually stress that the rule of law is threatened [by crime, jrb], that criminal justice has no adequate response, is incompetent, makes mistakes, covers up cases – making it unlikely that the justice system can be entrusted with the important duty of serving the common, public interest. This message however is not given in a vacuum. In political discourse there are constant promises that the more severely punitive approach, that the public anxiously asks for, indeed offers the solution. The justice system brags with new legislation, reorganisations of the Public Prosecution Service and the police, all geared to more efficient and cost-effective performance. The picture that arises from the media is however that the situation is only getting worse’ (Brants and Brants 2002:24. My translation, jrb):

Prof. A.C. ’t Hart (2001) has drawn attention to the inherent fundamental tensions between the mediating functions of law in a democratic state and the way in which news – about crime and society, criminal justice and adjudication – is constructed and presented. Whereas the (principles of) ‘internal’ and ‘external’ publicity of adjudication have both an instrumental and a legal-protective function, the

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<sup>10</sup> The editorial of the important Dutch newspaper *NRC-Handelsblad* of 14 september 2011, p. 2, reports under the heading ‘No need for judges’: ‘Judges and prosecutors will avoid unreasonable consequences. They will be the last who are still taking account of the offenders interests. When the punishment can no longer be tailored, then messing about with the charge might be the only way to do justice.’ (my translation, JRB). The editorial comment rightly states that this will have an undermining effect and will lead to a crisis of trust.

protective dimension is often totally lacking in mass-media publicity, especially in television coverage, about crime and the allegedly involved suspects and victims. Where the penal law and procedure have the obligation and capacity to make multiple interests, needs and perceptions compatible in a legal conceptualisation of problems and conflicts, and to solve the latter in terms of the law, the media tend to suggest a direct access to the 'one and only truth' of the matter, described in everyday language. Criminal justice can only perform its function of mediating various and often conflicting perceptions of truth by keeping its artificial, legal concepts as open as possible, which avoids the monopolising of the meaning of legal concepts by one or more of the conflicting parties. This leaves space for a possible recognition of other ways of viewing reality and of being human (alterity: that is the inherent right and capacity to be different). But the media powerfully ontologise (hypostasise) one image of reality: in this way they disturb and undermine the procedural, distanced and dispassionate mediation of different views on truth and reality by creating the illusion that there is such a thing as an easily knowable, obvious truth ('t Hart 2001:158). Perhaps needless to say, but important to note in the context of this contribution, is that the 'criminology of the other' – the criminalising imagery about certain social groups (most recently 'biker gangs') – is disseminated by mass media, as well as traditional imagery about innocent victims and predatory offenders, carved as it were in a culturally available dualistic frame of thinking. Not only the pluralistic nature of democracy itself, but also the capacity to live together as citizens in our (temporary) capacities as offenders and victims tend to be denied in much mass-media coverage of crime and justice.

#### 5. Restorative Justice and other strategies of civilisation

It is one thing to try to demonstrate that certain developments seem to bring about a tendency of de-civilisation, but quite another to indicate the ways in which we could try to counter such a tendency. It is evidently not just a matter of making different political decisions regarding criminal justice, but also of building public support for those other decisions and of more objective social and social-economic conditions. But we will not focus here on the ways in which change could be brought about, but only on the ideas that might convince our fellow-citizens of the desirability and even necessity of certain changes in justice policies. Hopefully, opinion-leaders will one day succeed in publicly defending an alternative view on criminal justice, reviving old valuable principles and introducing new principles appealing to emancipated and consciously democratic citizens (Lissenberg 2005). The greatest challenge here seems to be breaking through the 'instrumentalist syndrome', nowadays apparently broadly accepted, that deconstructs criminal justice in its classical, legal protective dimensions to facilitate an oiled machinery – an assembly-line - of punitive interventions. Reconfirming the classical protective functions – protective of the suspected individual in his conflict with the state that criminally charges him - through the penal procedure and based in narrowly circumscribed offences in the substantive law could and should be combined with a new set of ideas with regard to how criminal justice could achieve its other aims, besides legal protection of suspects. Amidst those other aims, general and special prevention, conflict-resolution and channeling vengeful feelings a special new aim – introducing new problems – is giving voice and recognition to the victims, who have returned to the arena of criminal justice after having been almost completely excluded for almost two centuries.

Restorative Justice not only offers foundations for a strong involvement of victims, and procedures in which they can be involved if they wish, it also is grounded in a much more modern set of ideas about responding to offences and offenders: a modern anthropology that is far removed from the utilitarian anthropology of Bentham and Beccaria, which provided the classic criminal law with its predominant functional model of influencing the general conduct of legal subjects: threatening with punishments. It is because these threats have to be credible, that punishment must always follow upon a crime, as Feuerbach argued. Only then a certain 'psychological force' can be assumed to go from the threat

itself. The concrete imposition of the promised amount of pain can then also be justified as retribution for the fact that you, suspect, have not been deterred. It is this deeply engrained belief in deterrence that causes criminal justice to be easily perverted into an inhuman system of pain-infliction. Inhuman, but also highly ineffective in view of large scale recidivism and the social reproduction of crimes and criminals through the cultural and structural organisation of the criminal justice system, with the prison as its symbol core institution (Quinney 1970; Christie 1981).

The inadequacy of continuing to reason within the classical models of deterrence and retribution is demonstrated by the discourse of Easton and Piper in their chapter in this book. Discussing the influence of past convictions on sentencing they argue that on principle, retributive (desert-) theory offers a greater hope of limiting the impact if tempered by the principle of parsimony, concurring with von Hirsch and Ashworth who state that the examples of Finland and Sweden *'demonstrate that .... adoption of desert and proportionality as guiding principles does not lead to greater severity'*. This is what has also been brought forward in The Netherlands with regard to retributive philosophy in general. Judge and scholar Otte (2002) argued for a revival of the retributive approach to punishment, complaining about the apparent boundlessness of actual, consequential sentencing. But without any noticeable effect. In one of the very few other (more or less recent) defenses of retribution, it is argued that punishment is viewed much too rational in consequentialist approaches and that there is a certain element of 'irrationality' in sentencing that can be accommodated with or expressed in retributive sentencing (Knigge 1988). But should we really escape from our theoretical and practical difficulties into an acceptance of irrationality and irrational state responses to crime? Where are the limits then?

Easton and Piper also show how in the UK past convictions have become elements to take into account when determining the punishment for the case at hand. Something which would not be in conformity with pure desert theory, that would focus attention on the case at hand, when previous offences have already been punished. But political and popular opinion seem to stress the importance of the criminal record for the determination of punishment and retributive theorists have been trying to accommodate their theories to allow for that. Perhaps with the same feeling that Easton and Piper vent:

'it would seem to us that using previous convictions to aggravate the seriousness of the offence (...) is an aspect of sentencing against which it is currently impossible to argue.' (this volume, p.....)

They go on by saying:

'Punishing persistence accords with popular ideas of justice. Its use therefore needs to be more controlled and restrained through specific guidance'. (This volume, p.....)

They are not saying which guidance they would prefer substantively, but note that providing such guidance to 'ensure consistency and restraint in the calculation of seriousness in a retributivist sentencing framework is (...) a complex and difficult issue.' Agencies in the UK such as most recently the Sentencing Council have produced ever more detailed guidance but:

' it is the mandatory aggravation of seriousness on the account of previous offending which now threatens to alter significantly these calculations and lead to disproportionate sentences.' (This volume, p.....)

Above I have mentioned that the same pressures – towards mandatory, more severe punishment in cases of recidivism<sup>11</sup> – are evident in the Netherlands and theoreticians of penal law and penological scientists seem not to be able to do much more than adapt their reasoning to allow for these pressures, deliver futile protest statements, or stay out of the public debate. As for judges, practically involved in sentencing on a daily basis, they are aware of the various theoretical legitimations of punishment and they have their preferences for f.i. retribution, deterrence, rehabilitation or even restoration. But when you examine their actual imposed sentences, these appear to have no relation to their personal beliefs: the imposed punishments cannot be explained on the grounds of the theoretical preferences of the judges with regard to legitimate punishment (De Keijser 2000). Institutional arrangements, such as the functional relation between the PPS and the courts, sentencing guidelines (PPS) and ‘punishment orientation lists’ (of the courts) and the fact that the most serious cases are decided by courts of three judges, determining the sentence together, are factors that bring about a sentencing praxis that seems to be uncontrolled rather than controlled by any actor in the system. In view of the wide discretion that is built into the system, predominant political discourse must be assumed to have a strong, if not decisive, influence.

Beliefs in deterrence seem to be decisively influencing abstract scales of just desert, through the legislative process of enhancing the threatened punishments on existing crimes and offences. Once the substantive law has been adapted to express a higher level of perceived severity of the crime, the level of retribution follows from that in each individual case. Fundamentally, what is wrong here is that a *normative dimension*, the severity of a crime, is supposed to be given expression in *factual terms*: the number of years of incarceration and such.<sup>12</sup> Since this a categorical mistake and the normative dimension really cannot be factually weighed and measured, there is no intrinsic limit to expressing the abstract severity of a crime. It could be placed on a scale (or ladder) of a number of crimes, differing with regard to their relative severity, but then the whole scale could be moved up or down in severity without any objective foundation or touchstone.<sup>13</sup> These problems seem to have become more

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With the same reason as was given in the English CJA 1993 which stated that: ‘In considering the seriousness of any offence, the court may take into account (any previous convictions of the offender or) *any failure of his to respond to previous sentences.*’ Failure to be deterred becomes itself a proof of moral degeneration.

12 Of course there are always factual consequences but also these have to be and are evaluated normatively, which can be seen when one compares the meaning of killing in various contexts. The acceptance of expressing normative evaluations in ‘numerical’ or quantitative dimensions is nothing more than a convention. The inadequacy of this convention is most strongly felt perhaps when crimes are so massive and devastating that no punitive response whatsoever could express our rejection. On the other hand, when offences have only minor consequences most of us would agree that a caution may in circumstances be an adequate response.

13 Louk Hulsman wrestled with this problem of ‘severity’ and ‘severity-scales’ without really finding a solution. See: L.H.C. Hulsman (1981), ‘Waarover beslist men eigenlijk in het strafrechtelijk systeem?’, in Beginselen. Opstellen aangeboden aan G.E. Mulder, Arnhem: Gouda Quint, pp. 107-116. Abstracted severity (as in penal law provisions) seems often misleading, for concrete severity remains contextual and contingent. Perhaps participatory justice, involving victim and offenders and significant others, does indeed offer a more reliable way of assessing severity, as Hulsman must have surmised.

serious in their consequences now that there is so much ‘surrogate participation’ of citizens (non-victims and non-offenders) in the social drama of crime, through the means of the mass-media. Criminal justice has become more ‘responsive’ but it is a responsiveness to often deeply misleading images of offenders and victims, the nature of crime, crime-causation and –prevention.

As Louk Hulsman has remarked, civil (private) law seems to function quite well in preventing and redressing serious wrongs without the use of notions such as deterrence<sup>14</sup> and retribution: so should they not be ignored in designing a better system of public (criminal) law? More participation of the victim and a different participation of the offender in procedures of criminal justice, by putting compensation (or restitution) for the victim central: these were Hulsman's suggestions for a way out, projecting a reform program implying making a default use of civil law (Hulsman 1968). Could it indeed not be so, that the most strategic decision we could make, with regard to our criminal justice system, is to make criminal justice fundamentally participatory for and dialogic with those directly or indirectly involved in and touched by (the consequences of) a criminal offence? Indeed, this is what McElrea contends when he stresses that restorative justice is above all a ‘procedural revolution’ (This volume, p.....). Hulsman claimed that we should give relatively more influence to those directly involved in deciding what should be done, than to those who are only involved as a consumer of stories of crime and punishment without any real experience or knowledge of the reality of criminal events (Hulsman 1979).

This does not imply a privatisation of the problem of crime and the response to it, but the much more difficult task of reforming public (criminal) law on well-defined grounds, with different foundational concepts and different practices, which could be defined as hybrid practices in the sense that - in the domain of criminal justice - procedures will be allowed that are predominantly of a civil law nature like forms of mediation. Gutwirth and De Hert express amazement that restorative justice protagonists devote so little attention to the civil law domain and they are right that there is a much closer link between restorative justice and civil law than with today's criminal law arrangements and theory. They would like to maintain a more reduced criminal justice system – with much less use of imprisonment, which they call a monstrosity (this volume, p.....) - and want to achieve that reduction by transferring certain categories of criminal offences to the civil law system (and by depenalisation in the sense of down-scaling penal sanctions?)<sup>15</sup>. This is an interesting strategy, but the same result (in terms of reducing the scope of penal law and punishment) could also be achieved by adapting the criminal justice system in ways that allow restorative procedures to be used in a maximum number of categories of criminal offences. This is what Walgrave proposes to do: maximise the use of restorative procedures and sanctions in criminal justice:

‘Pushing back as much as possible the punitive premise in the response to crime is the logical next phase in the civilisation process. That means less coercion and less pain-infliction in a top-down imposition of a formal legal order, but more space for voluntary, non-violent bottom-up responses.’ (This volume, p.....)

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<sup>14</sup> This is correct when one looks at civil law doctrine itself, but the idea of deterrence plays a role in legal economics, mainly in terms of monetary consequences.

<sup>15</sup> The Report on Decriminalisation of the Council of Europe speaks about depenalisation in two ways: the first is the abolition of a penalising provision as such, the second is penalisation at a lower level of punishment.

Van Stokkom's proposal implies reducing the applicability of imprisonment by a bifurcated criminal policy that allows no custodial sanctions for offenders who show themselves to be trustworthy and responsible by a recognisable degree of remorse:

‘Remorse indicates that the offender is connected with the values the law is appealing to. He is morally approachable. Genuine remorse points at a positive moral disposition, a commitment to comply, an indication that trust can be renewed.’ (This volume, p.....)<sup>16</sup>

These three strategies of reform carry differing implications of course, which need to be looked at further. But it is obvious that each implies legislative operations which need to be thoroughly discussed and consciously prepared in a democratic legislature: this need for a democratic, broad debate is not a disadvantage of some kind, but refers to the crucial social-political condition of political legitimacy – and therefore plausibility and feasibility - of legal reform.

Integrating both the foundational and the practical procedural aspects of restorative justice into the criminal justice system can be done and would bring not only more ‘civil law’-like procedures into its domain but also promote more civilised responses to criminal offending. Provided, of course, that the integration is carefully designed to leave room for classical due process of law, enabling the accused to dispute a charge that could lead to imposition of punishment, whenever that appears to be necessary. All legal subjects should keep their classic, procedural human rights, such as the right of access to an independent court, to adequate defense and to have full participation in a fair trial. When restorative procedures are allowed and followed, these should be legally framed in such way that they do not implicitly undermine procedural rights the participants would have in a criminal trial. Leaving aside the question whether De Hert and Gutwirth are not a bit too critical in their reading of Walgrave's approach, as summarized in his contribution to this book, and of Braithwaite's work, they are right in drawing attention to possible regressive implications of a specific way of integrating restorative justice into criminal justice. The challenge is to *preserve* the concepts of substantive criminal law while at the same time accepting a system in which the presumption of punishment<sup>17</sup> as the only acceptable response to a criminal offence is abolished. It should be noted that indeed, as De Hert and Gutwirth remark (this volume, p.....), the criminal justice system is not as radically punitive as restorativists often claim. A lot of responses that the criminal justice system produces (and allows) are already today not really punishments in a strict sense. And on a theoretical level punishment is still seen as acceptable only as the last resort. But one of the problems is, that the centrality of the notion of punishment in the criminal justice system has induced a legal culture in which the normative connection between ‘crime and punishment’ dominates the dogmatic, systematic ordering of all possible legal answers to criminal offending, placing all responses which are ‘not punishment’ as (allowable or not allowable) deviations from the normative answer ‘punishment’. And this legal culture seems to be changing nowadays into one that allows more easily the imposition of what is intended as punishment, but without fair trial (e.g. the penal dispositions of the PPS introduced in the Netherlands). Penal instrumentalism, as Klip (2010) remarked, loves punishment but it is not very fond of law.

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<sup>16</sup> This path has also been trodden by David Cornwell in *The Clapham Omnibus* (2009), Ch. 11, pp. 149-163.

<sup>17</sup> Punishment is here taken in its classical definition as a deliberately intended imposition of pain. An alternative way of reasoning would be to say that we should change the meaning of the word punishment. As Walgrave notes, this might be like trying to find dry water.



McElrea is undoubtedly right when he claims that restorative justice implies above all a procedural revolution: indeed conferencing as introduced in New-Zealand is a remarkable innovation, but in view of the multiple and endlessly varied situations to which the criminal justice system has to respond it is important to recognize that it should have – and has already – various kinds of procedures available<sup>18</sup> to deliver the kind of response deemed most appropriate. And the introduction of new procedural forms – even new types of participants such as victims, offenders or their relatives – must be taken to express new ways of thinking about appropriate aims and procedures and changing insights about how law can best be maintained. Besides the recognition of victims as participating stakeholders, there is also a growing belief that offenders should be approached and engaged in a different way, implying inherently different roles also for legal (and other) professionals.<sup>19</sup>

It could be that these ‘new’ insights are in fact anthropological insights that have been around longer and that are and should be rediscovered: with Reggio I think that this is the case. Penal instrumentalism should be viewed as an extreme expression of the ‘modern’ image of man as an objectified and manageable individual, a self-sufficient free-floating particle. It is this image of man as a ‘closed personality’ that Norbert Elias rejected as a consequence of the inextricable connection he discovered between ‘inner’ and ‘outer’ civilisation. His image of man is that of an ‘open personality who possesses a greater or lesser degree of relative (but never absolute and total) autonomy vis-à-vis other people and who is (...) fundamentally orientated towards and dependent on other people throughout his or her life. The network of interdependencies among people is what binds them together’ (Elias 2000: 481). This open, relational image of man has become one of the core elements of the relational theory of justice that is defended and developed in the Dutch speaking countries by A.C. ‘t Hart and R. Foqué, offering the foundations for a radical critique of penal instrumentalism. It is only this open, relational image of man that enables us to understand the importance of how symbolic interactions in (and around) law enforcement contribute to the ‘production’ of the criminal we fear or the law-abiding citizen we hope for: the importance of ‘normal smithing’ taking place and not ‘deviant smithing’ (Maruna, 2001) as is often the case.

As Reggio correctly observes (This volume, p.....), criminal justice and restorative justice may not be totally opposed or even mutually exclusive, but restorative justice’s presuppositions, normative assertions and goals are distant from those of criminal justice and are even alternatives to them, reacting to the modern understanding of law and justice. Firstly, RJ pays much attention to ‘relational textures’ while modern criminal justice is characterized by a mainly individual (and often utilitarian) anthropological model. Secondly, RJ attempts to envision an idea of legal order that is experience-based, context-sensitive and open to complexity, while the modern world-view contains an abstract, rationalistic, mathematic-geometrical, standardized conception of – all kinds of – order. In

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18 For the Netherlands one can discern procedures which (begin and) end at the level of the police, such that end at the level of the PPS and such that end at a court level, before or after trial. From the most appropriate aims we could mention cautioning, diversion, influencing conduct through specific conditions, avoiding prosecution, and the imposition of punishment.

19 The ‘problem solving courts’ in the USA and their link to the approach of ‘therapeutical jurisprudence’ and other forms of ‘Non-adversarial Justice’ could be mentioned as one of the most telling developments besides RJ: Michael King, Arie Freiberg, Becky Batagol, Ross Hyams (eds) (2009), *Non-Adversarial Justice*, Sydney: The Federation Press.

consequence the restorative approach to justice tends to conceive a 'horizontal', 'relational' and 'context-sensitive' idea of legal order, as opposed to the hierarchical conception of legal order within the context of the state as a monopolistic actor.

Assuming that indeed criminal justice and restorative justice are neither totally opposed nor mutually exclusive, the most important decision that legislators should take is when restorative justice or punitive justice should have precedence. This is on the legislative level above all a decision about the *categories* of crimes and offences in which a decision-making process between the two most involved citizens - victims and offenders – may or should have a chance to develop. And of course, what types of legal consequences could be attached to the results of such deliberations.<sup>20</sup> On the basis of these generic decisions, abstracted from specific cases, in each concrete case it will depend on the attitudes and wishes of those directly involved whether the offer to engage in a deliberative procedure leads to mediation or conferencing with certain results, to be determined together within the limits of the law. Criteria could be developed for referring cases which were selected for prosecution and punishment to a restorative procedure: for instance when victims in the particular case, despite the legislator's expressed preference for punitive justice, express a pre-dominant desire for consensual agreement and this seems to be achievable in view of the attitude and wishes of the offender(s) in case. Transfers from an initially restorative procedure to a penal process should also be possible and regulated, with special attention to safeguards for offenders and victims. At least *this* flexibility should be made possible, when it is not already there.

It is striking, that in developing 'soft', supra-national European law, this kind of reform of the criminal (and criminal procedural) law is actually asked for. The EU Framework-decision of 2001 with regard to (strengthening) the position of victims in the criminal procedure (2001, nr. 6335/01, art. 10 s. 1)<sup>21</sup>, obliges the member states to promote 'mediation in criminal cases for offences which it considers appropriate for this sort of measure'. The second section of art. 10 stipulates that each member state shall ensure that 'any agreement between the victim and the offender (...) can be taken into account.' Mediation in criminal cases is defined as 'the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of an offence (...)'<sup>22</sup>

## 6. The strategic value of agreements

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20 This decision should be categorical in order to safeguard equality in terms of the law and to avoid arbitrary allocations of restorative and punitive procedures on the basis of discriminatory prejudices with regard to individual offenders. It is also necessary to create foreseeability for victims and offenders of the consequences of engaging in a restorative procedure. In sum, for reasons of legality.

21 In the Netherlands this framework-decision has led to changes in the code of criminal procedure, in force from 1 January 2011 (Title IIIA concerning the rights of the victim). The Framework-decision will be transformed into a Directive with the same purport but with more explicit guarantees for victims who are offered a mediation procedure.

22 Article 1 sub e. This frame decision is now being transformed into a Directive, with changes relating to safeguards for victims in mediation, but these core elements are maintained.

In a strategy of reforming criminal justice to make it more restorative the importance of legal permissibility of agreements, reached by mediation and conferencing (‘extended mediation’) cannot be overestimated. For the primary parties (victim and offender) themselves, for society in general and for the criminal justice system the allowance of agreements will have many functions and effects.

The *UN Handbook on Restorative Justice Programmes* - published in 2006 – speaks of ‘restorative outcomes’, described as ‘an agreement reached as a result of a restorative process’.<sup>23</sup> It states:

‘The agreement may include referrals to programmes such as reparation, restitution and community services, “ aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender”. It may also be combined with other measures in cases involving serious offences’.(p. 7)

The combination of the agreement with ‘other measures’ allows for imposition of sanctions besides and above the obligations for the offender included in the agreement; these often imply restitution or compensation for damages, community service, obligations to address criminogenic factors etc., which could often also be imposed by a public prosecutor or court. The close connection between the ‘restorative process’ and ‘restorative outcomes’ – the participatory, direct and oral character of restorative procedure – is assumed to make the crucial difference with traditional imposition of punishments. Through this close connection, this dynamic, the ‘process goals’ of restorative procedures are served. These goals are described in the *Handbook* as follows:

1. Victims who agree to be involved in the process can do so safely and come out of it satisfied;
2. Offenders understand how their action has affected the victim and other people, assume responsibility for the consequences of their action and commit to making reparation;
3. Flexible measures are agreed upon by the parties which emphasize repairing the harm done and, wherever possible, also address the reasons for the offence;
4. Offenders live up to their commitment to repair the harm done and attempt to address factors that led to their behaviour; and,
5. The victim and the offender both understand the dynamic that led to the specific incident, gain a sense of closure and are reintegrated into the community. (p. 9)

Procedural aims 2, 3 and 4 have a direct relation with the content and the intention of the agreement and demonstrate that the obligations that can be agreed upon are to be subsumed in at least two categories: firstly restorative obligations vis-à-vis the victim and secondly obligations of the offender to address what has been going wrong in their own life and what contributed to their offending conduct. In view of the fact that restorative justice aims to be a part of the public law system, there are also interests of the society at large to be satisfied: the public will want to know that the response to the offence was adequate and that the obligations are creating conditions for better conduct in the future and a return to the norms and values of legitimate behavioural expectations. This is why promising to enter for instance a drug-rehabilitation programme is called a restorative outcome. If needed, in view of the nature and circumstances<sup>24</sup> of the offence, some restorative obligations may be

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23 A restorative process is defined as: ‘any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator’(p. 7).

24 E.g. a high level of media coverage following the event.

agreed to 'make good' with society f.i. by doing community service. When the latter type of obligations (aim no. 3) is not discussed and proposed by the parties themselves a judicial authority – public prosecutor or court – might wish to add it, broadening the scope of the agreement. It should be noted that the legal entitlement for the parties to reach an agreement, and the possibility that judicial authorities might change the agreement, preferably with the consent of the parties, implies that we are really looking at a 'three party agreement' with a mixed private-public character. And of course the civil parties cannot reach results which would imply incarceration: only equivalents of non-custodial sanctions could be proposed, since custodial sanctions can only be imposed by courts in view of the required stronger protection of human rights.

Integrating restorative justice into the criminal justice system, by allowing the use of restorative procedures in many categories of offences, would imply that – when cases are cleared up and there are no doubts about the facts – communication and deliberation between all stakeholders becomes the core dynamic of maintaining the law when the parties make use of restorative procedures. Emotional and material impact of the offence on victims, perceptions of the offending conduct from victim, offenders and others, normative and moral reasons for condemning the offending conduct and for taking account of interests and needs of fellow-citizens, thinking through how the wrong and harms can best be repaired and how a better life can be promoted: all these become objects of oral, face-to-face communication in order to discuss what should happen with the aftermath of the offence. In the stage of developing an agreement, and also later, when the resulting agreement is scrutinized by judicial authorities, the necessity to be thoughtful, prudent and considerate, to take the roles of others and to take account of all sorts of reciprocal dependence will be evident in view of the aim, to reach an agreement (and to avoid as much as possible an imposition of unhelpful sanctions). In this way integrating restorative justice may push towards a re-civilisation of criminal justice. Three specific aims could be discerned of this strategy of grounding (a part of) criminal justice in private-public agreements: 1) de-victimisation of victims, 2) de-criminalisation of offender-identities and 3) depenalisation (in the sense of downscaling) of criminal justice sanctions. These aims will be briefly discussed now.

### *6.1. De-victimisation of victims (injured parties)*

Injured parties should be enabled to liberate themselves as soon as possible from the status of being a 'victim', because experiencing this status and the social and cultural connotations of victimhood are detrimental to their own for self-image (personal identity, feelings of self-worth) and worldview. This has been demonstrated among others by the Dutch victimologist Van Dijk (2006): the label 'victim' carries conflicting social expectations. On the one hand it is expected that the '*victima*' will liberate offenders and others from their guilt by forgiveness.<sup>25</sup> On the other hand it is supposed that the victim will have an almost boundless desire for revenge, that needs to be constrained and controlled by the criminal trial, keeping the victim sidelined and sublimating damaging emotions as much as possible. Legal scholar Verrijn Stuart (1994) has drawn attention to the circumstance, that when victims remain victims too long and become predominantly perceived as victims by others, they risk to become

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25 Van Dijk contends that the archetype of the Christian *victima* (sacrifice) is Jezus Christ, who would turn the other cheek.

socially isolated and excluded from their social networks (as being a problematic person, hard to cope with):

Victims should be taken seriously and be approached in their strength, not in their weakness: on the grounds of an assumption of competence to stand up for themselves, not of helplessness and need of care. After the Austrian case of Natasha Kampusch – the girl who was incarcerated for years in the cellar of her kidnapper's house - Groenhuijsen and Van Dijk (leaders of the Tilburg International Institute for Victimology) claimed that Kampusch made very clear in her conduct after liberating herself: victimhood is no disease.<sup>26</sup> A Dutch report on the needs of victims (Ten Boom and Kuijpers 2008) placed these needs in a hierarchical order, making use of Maslow's scale. At the bottom there are physiological needs which are generally not endangered after surviving victimisation. The second level is that of primary needs for immediate safety and the need to prevent repetition, and the emotional needs for shelter and support, coping with and closure of the shocking event. On the third level there are the needs for love, belonging and positive relations to others, sometimes including the offender. The highest-placed needs are those of self-realisation and autonomy.

The experience of victimisation is a source of existential uncertainty, of doubting personal competence, doubting others and a shaken belief in the inherent justice and predictability of the social world. One often cannot understand how and why one has become a victim and has a need to understand the situation and to be understood by others. Against this background the psychologist Mooren described the potential functions of a successful mediation between offenders and victims of violence, for the victims, as follows:

‘Voluntarily confronting the offender means that the victim again takes his own life in hand. Facing his own fear, without letting this fear dominate, strengthens the experience of competence. The situation of violence may have caused an acute loss of control. Meeting the offender in a situation where he (the offender) is no longer in control and in which he needs something from the victim contributes to the recovery of the victim from the experience: the balance of power is now fundamentally different from that during the violent offence. The fact that the victim can confront the offender with what he has brought about, against the background of a hardly defined but definitely existing moral right, shifts the balance of power to the advantage of the victim (Mooren 2001:32. My translation, jrb).’

The process of mediation in criminal matters is fundamentally about re-vindication – with the support of the judicial authorities - of the right to be free from criminal intrusions in personal life and the recognition – in various forms – of injustice done to the victim and the need to restore justice. Walgrave (2008: 140-155), following Braithwaite and Pettit (1990), speaks of the restoration of the ‘dominion’ (autonomy) that law should guarantee for all.

### *6.2. Decriminalising offenders' identity*

Just like it is an existential shock to become a victim of a crime it is also a shock to have become the perpetrator of one, causing many moral, psychological and social questions and problems. Even though a person might have contemplated committing an offence before the act, the various consequences of actually doing so are highly unclear and largely unpredictable. Often offenders realise

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<sup>26</sup> *NRC-Handelsblad* 13 september 2006: ‘Kampusch doet normaal, wij niet.’ (‘Kampusch acts normally, we do not’)

only after the fact what they have actually done and how it may impact personal life perspectives and chances. Also for offenders the most urgent questions will relate to how to cope with the offence and its consequences and how the social relations to 'the other' in general will be in the future. The Dutch legal scholar and judge Pompe (1954), discovering symbolic interactionism in the early 1950s, observed that the first condition for becoming a 'criminal' was to commit a crime. But the second and more important condition is the development of an intimate bond between offence and offender, defining his identity and keeping his personal life organized around the fact of his crime. The fully developed 'criminal' will not think of himself as having committed a theft, but will say he is a thief. The (partial) status of criminal offender becomes a dominant status.

A striking result of a recent evaluation of so-called 'victim-offender-conversations' is that many requests for such conversations came from offenders, although the talks were explicitly stated to have no impact upon the penal process whatsoever (and sometimes are requested after the offender has been sentenced). So also without any hope for diminished punishment many offenders feel the desire to explain their actions to their victims and to apologise (one of the stated aims of the talks) (Van Garsse 2012).

Restorative procedures in general have as a pre-condition that the offenders who are addressed in the intake-stage acknowledge the basic facts of the criminal offence and are willing to take responsibility for the harmful consequences of their wrongful act. In this way a situation is created in which the offender can do two things at the same time (Duff 2001; 2002) : he can accept ownership and responsibility and at the same time he can dis-own his conduct and declare that this type of conduct is not typical for him: 'I am sorry I stole from you and I am not a thief.' In this way and by proposing and accepting several obligation to 'morally repair' the wrong and 'factually restore' the harm as well as possible, he can limit the damaging impact of his wrong act on his personal identity, which is in fact in the interest of the common good (Blad 2011).

Fundamental in the restorative philosophy and practice is to avoid defining the person of the offender by his offence. It is the harmful act that is morally rejected, not the person of the offender. This arrangement makes it possible to avoid the attribution of a criminal identity to the person of the offender or to weaken this identity if it was already formed or in the process of formation: the offender can demonstrate how he relates now to his offence, that becomes an objectified historical life-event, the implications of which can be discussed with others. The offender is not made responsible in a passive way – by making him suffer the pain of punishment - but actively responsible for restoring the harmful consequences to the best of his abilities.

The moral censure that is implicitly and explicitly communicated in restorative procedures, in combination with restorative obligations laid down in a consensual agreement, mean that restorative procedures are inherently sanctioning wrongful behavior, while avoiding the ascription of a criminal identity. This avoidance is in the common interest, since fully formed criminal identities are expected and will allow themselves to keep on committing crimes, as is clearly demonstrated in 'desistance'-studies.

It should be noted that opening up and offering restorative procedures (in many categories of criminal offences) is necessary to achieve the type of bifurcated criminal justice that Van Stokkom proposes in this volume. For the choice of the type of penalty and to '(...) assess the offender's amenability to rehabilitation we require information about his degree of self-control, his empathy to the victim, his willingness to undergo rehabilitation, and many other subjective factors.' (This volume, p.....)

Van Stokkom agrees with Steven Tudor who claims that we need to respect the offender's moral autonomy and dignity, and that it is precisely this respect that requires us to pay attention to the moral attitudes of wrongdoers:

‘To ignore a person’s remorse can be to shun a fundamentally important aspect of his moral self, and can manifest a fundamental disrespect.’ (this volume, p.....)

Responsible and remorseful offenders deserve to receive only non-custodial sanctions, but for a reliable intersubjective evaluation of the offender's attitude towards his offence we need to follow voluntary restorative procedures (Blad 2011).

This line of reasoning shows another important implication of integrating restorative justice into the criminal justice system: the categories of offences the legislator pre-selects for restorative procedures will be those that can in general be sanctioned sufficiently with only non-custodial sanctions.<sup>27</sup> This is not to say that we should decide this question based on our actual patterns of imposing prison sentences: reconsidering when incarceration is in general absolutely inevitable is implied in designing an integrated system.

### *6.3. Depenalisation of criminal justice*

As Walgrave argues, the satisfaction offered by the offender to the victim can be interpreted as a moral form of ‘inversed retribution’: the offender ‘pays back’ his ‘just dues’ to the victim.<sup>28</sup> When this goal of the restorative procedure is achieved judicial authorities should be obliged to take account of this in their formal decisions about the case. Should this not be so, the moral and functional merits of the restorative procedure would be annulled. The ‘contractual’ obligations included in the agreement can easily be recognised and accepted as equivalents of the non-custodial sanctions that are widely available nowadays for both public prosecutors and courts. The important change that is brought about by following restorative procedure is that, when agreed obligations are proposed to the judicial authorities, the legitimacy of approving these proposals will be almost complete, especially when and because the victim in case is one of the parties proposing to take the agreement as sufficient sanction. Importantly, voices in the media of ‘surrogate victims’ demanding firm punishments can then be contradicted by the expressed opinions of the real victim in case and the authority can show itself to be really responsive on the grounds of the detailed agreement by the parties involved. Additionally imposing the condition that the offender fully complies with the agreement will in most cases be sufficient. All this amounts to an opportunity to ‘depenalise’ – in the meaning of de-escalation of punishment (Council of Europe 1980) – an important part of criminal justice.

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<sup>27</sup> By preference those proposed by the parties as a result of a restorative meeting, if necessary imposed, as proposed by Walgrave, with restorative aims.

<sup>28</sup> But it could maybe better be argued, on historical grounds, that making apology and compensating for damages is retribution, and that the states monopoly a violence is a surrogate form of retribution: often defended because in history sometimes ‘compositions’ and restitutive agreements did not follow or were not complied with, leading to revenge and sometimes to feuds. How often this happened, and under which specific conditions, might be worthwhile to research.

That the greater good can be served by a successful and officially sanctioned restorative procedure seems evident: the restorative procedure is inherently communicating censure and the offender works consciously towards a future without relapse and new victimisations. Succeeding in this the offender will receive rewards facilitating the development of a (more) positive self-image and social re-integration. The legally facilitated and supported restorative procedures can in this way become the workshops for 'smithing' (Maruna 2001) the 'normal' law-abiding citizen we would like to see as our neighbour, avoiding the most destructive sanction of imprisonment.

#### 7. Civilised justice and functionality

Van Stokkom, Walgrave and Reggio all claim that it is an ethical choice and even a duty to install a restorative kind of criminal justice. The latter does so explicitly referring to the 'open and relational' image of man, which Elias deduced from his civilisation study, and the need for a permanent communication between humans in search for truth which means that 'each person is responsible for searching for those contents that, given a certain context, provide the best reasons.' This attitude to knowledge supports a 'relational concept of humanity', because the search for truth is then not solipsistic but structurally open to dialogue. This has important ethical implications:

'In the search for truth, no human being is superfluous; no human being can be silenced or set free from asking and providing reasons; and no one, in fact, is provided with definitive reasons or arguments for claiming that another human life is meaningless and therefore able to be treated as though it was an 'object'. Indigence requires from each person a constant attitude to dialogue and it means that all human beings are reciprocal to each other and mutually involved as subjects entitled to ask questions and offer answers. Denying this dialogical principle embodies both a contradiction (denying the condition of indigence) and an act of violence.' (This volume, p.....)

Applied to the questions concerning crime and punishment the 'dialogical principle' means that crime can be viewed as a serious form of denial of the same principle:

'It represents (...) a violent act through which someone states his/her own will as absolute, and imposes (violently or with fraud) upon someone else undesired consequences (without considering each other's reasons in a dialogical way).' (This volume, p.....)

Crime embodies both a personal and an inter-personal violation. It is therefore inappropriate to view crime entirely in terms of a specific legal violation that is sanctioned with a form of punishment regulated by penal law. The criminal conduct is non-legitimate not only because it infringes a certain legal order: it is intrinsically wrong because (and only if) it becomes anti-dialogical as a result. It requires a response not just because it is illegal, but because acquiescence to crime assumes the unacceptable ethical meaning of validating violence. This principle means that the reaction to crime cannot assume forms which themselves violate the dialogical principle. It should avoid the self-absolutism of the crime and also avoid imitating the violent act itself.

The first element that the reaction to crime should incorporate is the attempt to rebalance the violation of mutual respect and dialogical reciprocity that the crime created: this includes the necessity to re-empower the victim and to ask the offender to give reasons for his behaviour. This means that indeed the reaction to crime ought to be participatory and designed to allow a dialogue between the various stakeholders.



The second element is to respect and treat the offender as a responsible and relational being including the dialogical dimension. A reparative approach to the reaction to crime then appears to be the most suitable reaction, because it neither seeks to imitate violence through retaliation, nor aims in some way at ‘transforming’ the offender in ways that supposedly respond to the need for recreating a certain social order. In the process of responding to a crime the situation of dialogue and mutuality should be restored to repair the damages caused, but also in order to ameliorate the social situation(s) that generated the offence(s).

The ethical merits of this approach, I hope, will easily be recognized. But it should be noticed that there are strong indications in research that restorative practices, performed well, can have remarkable effects in preventing recidivism. The ethical choice is, in other words, also a functional one.

The general picture rising from the empirical evaluations of effects is that there is less recidivism, that the time between the restorative intervention and the relapse is comparatively longer and that offenders relapse, when they do, into less serious forms of criminal offending (Morris and Maxwell 2001; Sherman and Strang 2007; Shapland et al 2008). Of course this type of research is full of methodological problems and pitfalls but one can hardly escape from the impression that treating and approaching people humanely and decently<sup>29</sup> increases the likelihood of future norm-respecting conduct. Morris and Maxwell concluded with regard to juvenile offenders (in New Zealand) that family group conferences contribute to the lessening of future reoffending (even when other important intervening variables are taken into account) when young people ‘are having a conference that is memorable, not being made to feel a bad person, feeling involved in the conference decision-making, agreeing with the conference outcome, completing the tasks agreed to, feeling sorry for what they had done, meeting the victim and apologising to him/her, and feeling that they had repaired the damage.’ (Morris and Maxwell 2001:261). Strikingly, more or less the same conclusion was drawn with regard to adult offenders in the UK, by Shapland et al.: ‘

The way in which the offender had experienced the conference did relate to decreased subsequent offending. In particular, the extent to which the offenders felt the conference had made them realise the harm done; whether the offender wanted to meet the victim; the extent to which the offender was observed to be actively involved in the conference; and how useful offenders felt the conference had been, were all significantly and positively related to decreased subsequent reconviction.’

A possible theoretical interpretation is also given for this phenomenon:

‘(...) the value of restorative justice conferences in promoting desistance in adult offenders: where offenders have decided to try and stop offending, a conference can increase motivation to desist (because of what victims and supporters said) and provide the support offenders may need to help tackle problems to their offending.’ (Shapland et al 2008: iv)

In their research synthesis of police-led conferencing Sherman and Strang (2007) mentioned three examples of conferencing projects that appeared to deliver counterproductive results. The three

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<sup>29</sup> Decency implies here above all the avoidance of a merely instrumental approach that does not see nor value the equal human being in the offender, an equal with legitimate desires and wishes. The Dutch legal scholar Pompe (1928) warned in this respect that the personality (of the offender like every other) is full of secrets, ‘one can only guess about, with very little chance of guessing right and much danger of arbitrariness’. See W.P.I. Pompe (1928), *De persoon des daders in het strafrecht*, Nijmegen, Dekker & Van de Vegt, Utrecht/Nijmegen, p. 3. My translation, jrb.

examples all are characterized by a (context of) communication of disrespect, not only for offences, but more importantly, for offenders (Sherman and Strang 2007: 74 a.f.).

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