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What Role for Legal Certainty in Criminal Law Within the Area of Freedom, Security and Justice in the EU?

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1 Introduction

This article analyses the current position of legal certainty (*Rechtssicherheit*)[1] within the area of freedom, security and justice (AFSJ), and more specifically in EU criminal law. Legal certainty as a concept is ambiguous even in a national legal order, in relation to criminal law, but it is considered of utter importance, also within EU criminal law. How does legal certainty get expressed within the area of freedom, security and justice, and what does it consist of? These are the questions this article seeks to answer.

The area of freedom, security and justice and its present status are analysed in this article, as is the concept of legal certainty within this area. EU criminal law is focused on, and the characteristics of it are analysed especially in relation to the nature of the European criminal justice system. This is done to exemplify legal certainty more specifically. Four examples from EU criminal law are chosen for this. These are firstly mutual recognition in relation to human rights, which especially in relation to the European arrest warrants show possible lacunas, secondly minimum procedural rights, which the EU is currently focusing on, thirdly the position of the victim, which quite recently has been added to the EU criminal law field, and fourthly the possible European public prosecutor's office. These examples will show the diversity of EU criminal law and some of the

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1 See Radbruch, *Rechtsphilosophie* (Studienausgabe, 2. Auflage C.F. Müller Verlag 2003) pp. 73-77 on Rechtssicherheit. In German, the term Rechtssicherheit is used, as is rättssäkerhet in Swedish. Legal certainty is perhaps not the best term for this, as it is used differently in different contexts and it is in this article not used in the sense of only *res judicata* (Rechtskraft, rättskraft), but in a broader meaning. See chapter 4 below for a definition and Paunio, *Law, Language and Communication: Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Ashgate Publishing Group, 2013) pp. 54-60 on legal certainty and the rule of law.

challenges this poses for legal certainty. Finally, some concluding remarks will be made to sum up the situation.

2 The current legal basis

The Lisbon Treaty stipulates the competences for EU criminal law.[2] The introductory article 3(2) of the Treaty on the European Union (TEU) [3] states that '[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. Article 67(1) of the Treaty on the Functioning of the European Union (TFEU)[4] continues by stating that '[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'. Ensuring a high level of security through preventing and combatting crime is laid down as one of the main aims of the EU in article 67(3) TFEU.

The relevant provisions on EU criminal law are then found under chapter V, entitled area of freedom, security and justice. Article 82 TFEU regulates cooperation in criminal matters, article 83 TFEU regulates substantive criminal law and articles 85-86 regulate cooperation through Eurojust, and the possibility of a European Public Prosecutor's Office. If we look at institutional cooperation firstly, Eurojust's mission is to support and strengthen coordination and cooperation between national investigative and prosecution authorities (art. 85(1) TFEU). The initiation of a prosecution is however carried out by competent national authorities (art. 85(2) TFEU). Therefore, Eurojust's competence does not have a supranational character as such. It builds on national competences.[5]

The competences on cooperation in criminal matters are based on the principle of mutual recognition. Realisation of this cornerstone includes harmonisation of relevant areas, such as establishing rules for union wide recognition of judicial decisions (art. 82(1) TFEU). Furthermore can minimum rules be established, concerning evidence admissibility, the rights of individuals in criminal procedure and the rights of victims of

2 On the former third pillar and the competences, see Denza, *The intergovernmental pillars of the European Union* (Oxford University Press 2002), pp. 63–84. There are further rules on the legislative process and possibilities for Member States to oppose to instruments, but for the sake of this article, these are not focused on. For a more comprehensive analysis of these, see Herlin-Karnell, The Lisbon Treaty and the Area of Criminal Law and Justice, *SIEPS European policy analysis* 3/2008 pp. 6-7, available at http://www.sieps.se/sites/default/files/421-20083epa.pdf (last visited 7.3.2014) and Herlin-Karnell, EU competence in criminal law after Lisbon, in Biondi *et al.* (eds.) *EU law after Lisbon* (Oxford University Press 2012) pp. 331-346.

3 Consolidated version of the Treaty on European Union, OJ C 326/13, 26.10.2012.

4 Consolidated version of the Treaty on the functioning of the European Union, OJ C 326/47. 26.10.2012.

5 For more information on Eurojust, see Satzger, *International and European criminal law* (C.H. Beck, Hart, Nomos 2012) pp. 112-113 and Suominen, Eurojust, the past, the present and the future, 15 *MJ* 2 (2008) pp. 217-234.

crime. This is to be done in the extent necessary for the realisation of mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension. (art. 82(2) TFEU).[6] Harmonisation of substantive criminal law may be done in order to establish minimum rules concerning the definition of criminal offences and sanctions. This applies in the areas of 'particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. These crimes are listed and are: terrorism, trafficking of human beings and sexual exploitation of women and children, illicit drug and arms trafficking, corruption, money laundering, organised crime, counterfeiting of means of payment and computer crime (art. 83(1) TFEU). There is a further annex-competence which regulates harmonisation of criminal law that can be done for the effective implementation of a Union policy, in an area which is subject to harmonisation measures (art. 83(2) TFEU).[7]

3 The area of freedom, security and justice

The area of freedom, security and justice was launched at the Tampere conclusions and established with the Amsterdam Treaty.[8] This area was created to ensure the free movement of persons and to offer a high level of protection to European citizens. It covers policy areas from the management of the EU's external borders to judicial cooperation in civil and criminal matters, and it also includes asylum and immigration policies and police cooperation.[9] For the purpose of this article, criminal matters are focused on. The criminal law area entails a high level of security for its citizens through Member States cooperating in criminal matters. This security is considered of utmost importance for an efficient criminal justice system throughout the Union. The national criminal law systems of the Member States together form the area of freedom, security and justice, which then is to function as one system, where law enforcement, in a similar way as the perpetrator, is not prohibited by Member State borders.

The goal, which can foremost be considered the area itself, is to be achieved by pre-

6 For more information on mutual recognition, see Kinzler, *Das Prinzip gegenseitiger Anerkennung im europäisierten Strafverfahren am Beispiel von Auslieferung und Beweismitteltransfer* (Verlag Dr. Kovač 2010) and Suominen: *The principle of mutual recognition in cooperation in criminal matters - A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States* (Intersentia, 2011). See also Gless and Vervaele, Law should govern: aspiring general principles for transnational criminal justice, *Utrecht Law Review* vol. 9, 4/2013 p. 3, where they note that mutual recognition applies a state-oriented approach where the individual's interests are not adequately taken into account. See also Asp, Mutual recognition qua legal principle, in *Festschrift für Helmut Fuchs* (Verlag Österreich 2014) pp. 1-17.

7 For more information on harmonisation, see Asp, *The substantive criminal law competence of the EU* (Stiftelsen skrifter utgivna av juridiska fakulteten vid Stockholms Universitet 2012).

8 Conclusions of the Tampere European Council 15–16 October 1999, 33–37 (available on www.europarl.europa.eu/summits/tam_en.htm) and Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, OJ C 340/1, 10.11.1997.

9 The relevant articles are found under title V in the TFEU.

venting and combating crime. This is to be achieved through three different forms of cooperation. Mirroring the presentation on the competences in chapter 2 above, firstly, institutional cooperation, such as Eurojust increases cooperation between the relevant institutions of the Member States and assists in relation to problems connected to cross-border crimes. Secondly, cooperation in procedural criminal law, usually expressed with the principle of mutual recognition, is itself dedicated to increasing effectiveness of cooperation between the Member States. The idea is that judgments and judicial decisions move freely within the area of freedom, security and justice. Thirdly, harmonisation of substantive criminal law is essential for achieving an area of freedom, security and justice. There should not be too much diversity between the criminal laws of the Member States in relation to those crimes, of which a common focus is on. Some harmonisation is therefore necessary. These three forms of cooperation are together intended to prevent and combat crime and to securing that no perpetrator goes unpunished, only because he has crossed a border to another Member State.[10]

The area of freedom, security and justice can to some extent be considered a reflection of the internal market of the EU.[11] Applying ideas similar to those that apply within the internal market, especially for the principle of mutual recognition, to the area of criminal law was considered necessary due to the free movement of persons that the EU, and Schengen cooperation in particular enables. Within this area of freedom, security and justice, judicial decisions and judgments are to move freely and the idea is that recognition should prevail, regardless of whether the decision or judgment is a national one or one from another Member State. The area of freedom, security and justice is a European area where the effectiveness of cooperation is not to be hampered by actors belonging to different Member States. Due to the close connection between criminal law and state sovereignty, deprivation of liberty and fundamental rights, the application of mutual recognition and enforcement in general has not been problem-free within this area.[12]

[10] This is the current focus for example in the Commission, see http://ec.europa.eu/justice/criminal/criminal-law-policy (last visited 7.3.2014). On these three parts and their roles see Suominen, EU criminal law cooperation before and after the Lisbon Treaty - aspects and comments especially in relation to the Norwegian position, *JFT* 6/2012 pp. 573-604.

[11] Similarly Nuotio, Eurooppalaisen integraation uusi painopiste: vapauden, turvallisuuden ja oikeuden Eurooppa, in *Vapauden, turvallisuuden ja oikeuden Eurooppa,* eds. Nuotio and Malkki (Forum Iuris 2010) pp. 1-3, also Klip *European Criminal Law* (2nd edition, Intersentia 2012) pp. 20-22.

[12] Especially the European Arrest Warrant, which is the most frequently applied mutual recognition instrument in criminal law, has had its problems. See the judgments of the German constitutional court, BverfG 1 BvL 14/76 (on the sentence of a life-long duration without a possibility of review and its contradiction with fundamental rights) and BverfG 2 BvR 2236/04 (on the surrender of own nationals and constitutionality of the EAW), the judgment from the Polish constitutional tribunal of 27.5.2005 in case P1/05 (on the surrender of own nationals and constitutionality of the EAW) and the judgment of the Supreme Court of Cyprus of 7.11.2005 in case 294/2005 (on the surrender of own nationals and the constitutionality of the EAW). See further Smith, Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of freedom, security and justice. *NJECL* Vol. 4, 1-2/ 2013 pp. 82-98, Mitsilegas, The constitutional implica-

This area has been further developed over the last fifteen years to include more and more legal instruments. Effective crime combating can be considered its main goal, which is seen in the instruments agreed of within the area. These include instruments on serious crimes with a cross-border dimension such as terrorism and human trafficking and crimes typically of an interest to protect for the EU such as financial crimes against the EU. Further instruments regulate cross-border cooperation such as mutual recognition of decisions on surrender (extradition), evidence gathering and execution of financial penalties.[13] Effectiveness of cooperation, in all its forms, has become a leading ideal in EU criminal law. This applies especially in relation to institutional and procedural cooperation, as effectiveness in some way can be measured here and especially increased effectiveness is visible. This is in contrast to harmonisation of substantive law, where the increase of effectiveness and what it entails is more difficult to decipher.[14] Simultaneously, harmonisation of substantive criminal law is important, if not crucial, for the functioning of an area of freedom, security and justice.

A component relevant for the area and particularly for cooperation is mutual trust between the Member States. This is inevitable for the area of freedom, security and justice. The Member States are considered to trust each other in terms of respecting human rights and applying national legislation according to these.[15] This trust does not as such resolve any problems related to legal certainty, but with increasing legal certainty and imposing higher standards for procedural rights, the level of a common legal certainty can be improved. Increased knowledge will increase the level of mutual trust, and lifting up legal certainty problems can also have a positive development.

The Commission has for instance in its communication on the area of freedom, security and justice pointed out that the rights of the defence have to be strengthened to uphold mutual trust and the public confidence in the EU and that the common minimum

tions of mutual recognition in criminal matters in the EU. *CMLRev* 43:2006 p. 1281, Mitsilegas, The limits of mutual trust in Europe's area of freedom, security and justice: from automatic inter-state cooperation to the slow emergence of the individual. *Yearbook of European Law*, Vol. 31, No. 1, 2010 pp. 320-328, Klip 2012 pp. 15-22. See also Asp 2012 pp. 76-78 on why criminal law is a special in relation to other areas of law. On the difference between mutual recognition in criminal law versus the internal market, see Janssens, *The principle of mutual recognition in EU law* (Oxford University Press 2013) and Suominen 2011 pp. 62-64.

13 As can be seen, the offences legislation concerns fall under the scope of art. 83 TFEU (and its predecessors). It is not possible here to include all relevant instruments. See Miettinen, *Criminal law and policy in the European Union* (Routledge 2013), Klip 2012 and Suominen 2012 pp. 587-590, 593-596 and 599-601 for an overview.

14 See Herlin-Karnell, *The constitutional dimension of European criminal law* (Hart Publishing 2012) pp. 42-61, Nicolaides and Geilmann, What is effective implementation of EU law? 19 *MJ* 3 (2012) pp. 383-399 and SOU 2003:74 Ökad effektivitet och rättssäkerhet i brottsbekämpning pp. 13-26 (official reports from the Swedish Government).

15 On trust within the area of freedom, security and justice, see Mitsilegas 2010 pp. 319-372. See further what is mentioned in chapter 6.2. below on mutual trust in mutual recognition cooperation.

guarantees should be extended.[16] This is a good example of legal certainty matters being focused more within the area.[17]

The area is often characterised by a tension between security on one hand and freedom and justice on the other. Security is prevailingly considered as crime combating and securing the European citizens against crime. Freedom and justice are prevailingly considered as protection of the individual and legal certainty.[18] Effective crime-combatting has seemingly been considered as the most important by the EU legislator, and most of the instruments on EU criminal law have an efficiency idea and crime combatting emphasis. Focus has therefore been on security issues whereas other aspects of the area, freedom and justice, have not been given as much legislative attention.[19] Legal certainty is usually connected with justice, implying that the criminal justice system is just. This is however not always very clearly defined. We will therefore have a look at how legal certainty can be understood within the area of freedom, security and justice.

4 Legal certainty

4.1 The national perspective

In a national setting, legal certainty is understood as entailing a state having legislation and a legal system that protects the individual against arbitrary measures from the state itself. Such measures include not being prosecuted or sentenced without sufficient evidence, not being sentenced without legal support and that all individuals are considered and treated equally regardless of their social status or origin. Furthermore is legal certainty considered including legal rules being applied efficiently and predictably, and these are associated with a democratic state subscribing to the rule of law. Legal certainty can be divided into formal and substantive forms. Formal legal certainty is the traditional legal certainty where fairness resulting from predictability is considered important. Punishment, coercive measures, prosecution and sentencing of criminals should be predictable and be applied uniformly and in a systematic order. This entails that criminal law cannot be applied retroactively. Substantive legal certainty includes that judicial practice is ethi-

16 Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM(2009) 262 final, 10.6.2009 at point 4.2.2.

17 See also the new Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of regions, The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, 11.3.2014, which emphasises trust.

18 Similarly Thunberg-Schunke, *Internationell rättslig hjälp i brottmål inom EU, effektivitet v. rättssäkerhet* (Iustus förlag 2004) p. 264. See further Hudson, Who needs justice? Who need security? pp. 17-18 and Gröning, Security, justice and the criminal justice system: remarks on EU criminal law pp. 136-139, both in *Justice and Security in the 21st Century,* eds. Hudson, Ugelvik (Routledge 2012).

19 Asp 2012 p. 73.

cally and morally good.[20]

Legal certainty can be considered denoting *res judicata*, the legal force of judgments and judicial decisions, meaning the finality of the decision when there is no possibility to appeal it. This is however not what is the subject of study here. In relation to the area of freedom, security and justice, legal certainty can be considered encompassing more than the legal force of judicial decisions and consisting of more aspects than *res judicata*.[21]

4.2 The ECHR

Certain rights guaranteed by the European Convention on Human Rights (ECHR)[22] can be considered exemplifying legal certainty. Articles 5, 6 and 7 and in some respects 8, as well as article 4 of protocol 7 are all relevant to legal certainty in a European perspective. The right to liberty and security is included in legal certainty. As article 5 ECHR states, no one is to be deprived of his liberty unless in certain specified cases and as prescribed by law. Such cases include situations of lawful detention after a conviction, lawful arrest or detention for not complying with a lawful order, or lawful arrest or detention with the purpose of bringing the person before a competent legal authority based on reasonable suspicion.[23] The right to a fair trial prescribed in article 6 ECHR is included in legal certainty and comprises the right to a fair, public hearing within a reasonable time and before an independent and impartial court established by law. The individual is to be presumed innocent until proven guilty and he should be granted certain minimum rights, such as being informed in detail and in a language he understands of the nature and cause of the accusation, enough time to prepare his defence, and a possibility to defend himself, possibly through legal assistance, the right to examine and have witnesses examined on his behalf as well as the possibility to have an interpreter, if necessary.[24]

The legality principle *nulla poena sina lege* is naturally included in legal certainty. Pursuant to article 7 ECHR, no one shall be found guilty of an offence or omission that did not constitute an offence under national or international law at the time committed. The legality principle is relevant in many connections with legal certainty, and these two concepts can be considered somewhat intertwined. In addition to *res judicata*, the legality principle is one of the most typical aspects of legal certainty, which is often analysed and considered expressing legal certainty. In this article, the legality principle is considered

20 See Peczenik, *On law and reason* (Springer 2009) p. 24-27, also Ehrenkrona, Rättssäkerhetsbegreppet och Europakonventionen, *SvJT* 2007 pp. 38-49.

21 See further Trechsel, *Human rights in criminal proceedings* (Oxford University Press 2005) p. 115.

22 The European Convention on Human Rights, Rome 4 November 1950.

23 See Trechsel 2005 pp. 405 ff, especially chapters 18 and 19 for a detailed presentation of these rights.

24 See Trechsel 2005 pp. 45 ff, especially chapters 3 to 6 on the right to a fair trial, also Gless, Transnational cooperation in criminal matters and the guarantee of a fair trial: approaches to a general principle, Utrecht Law Review, vol. 9, 4/2013 pp. 91-101 especially on equality of arms in a EU setting.

part of legal certainty, but only constituting one part of it.[25] The *ne bis in idem* principle enshrined in article 4 of protocol nr. 7 is furthermore a part of legal certainty. This principle entails that a person can be tried and punished only once for the same criminal offence.[26] The right of private life in article 8 ECHR can furthermore be included in the concept of legal certainty. This right entails everyone's right to private and family life, unless otherwise prescribed by law and deemed necessary in a democratic society.

4.3 EU law and EU criminal law

In EU law generally, legal certainty is usually associated with protection of legitimate expectations, which is often connected to enforcement and effectiveness of EU law.[27] Legal certainty is a general principle of EU law and is considered to include several sub-principles.[28] These include full enforcement of Union law, unity and coherence of the Union legal order, procedural exclusivity and non-retroactivity in relation to legitimate expectations as well as acquired rights, legitimate expectations and *res judicata*.[29] The prohibition of retroactivity is in respect to criminal law absolute.[30] Law, and also EU law requires a certain degree of predictability, so that the actors can foresee the legal consequences of their actions.[31] Legal certainty can be divided into formal and material legal certainty, which denote predictability and acceptability.[32] Legal certainty has been considered to apply 'as a directly applicable principle used in judicial decision-making as well as an interpretive principle influencing decision-making at the Court'.[33]

In EU criminal law, legal certainty is usually connected to the legality principle. Legal certainty could encompass only the legality principle, but within the area of freedom, security and justice it seems to be a broader concept of which the legality principle is a part,

25 Unfortunately this paper does not allow for further deliberations on the legality principle, but see Murphy, The Principle of Legality in Criminal Law under the ECHR, *European Human Rights Law Review*, Vol. 2, 2010 pp. 192-210, on the legality principle in EU law Besselink et al. (eds.) *The eclipse on the legality principle in the European Union* (Wolters Kluwer 2011), Asp 2012 pp. 168-178 and in national criminal law Frände, *Den straffrättsliga legalitetsprincipen* (Juridiska föreningens i Finland publikationsserie N:o 52 1989).

26 See Trechsel 2005 pp. 382-402 as well as Rui, *Forbudet mot gjentatt straffeforfølgning (ne bis in idem)* (Universitetsforlaget 2009).

27 Paunio 2013 pp. 68 ff. and already in 1995 connected to the effectiveness, Ward: Effective sanctions in EC law: a moving boundary in the division of competence, *European Law Journal*, Vol. 1, 2/1995 pp. 214-215.

28 See CJEU joined cases C-42/59 and C-49/59 SNUPAT v High Authority, case C-63/93 Duff, C-107/97 Max Rombi and C-126/97 Eco Swiss as well as C-224/01 Köbler, C-318/10 SIAT and C-284/11 EMS-Bulgaria Transport OOD.

29 Paunio 2013 p. 65 and Tridimas, *The general principles of EU law* (2nd edition, Oxford 2006) pp. 242 ff.

30 Tridimas 2006 p. 253.

31 Paunio 2013 p. 51.

32 Paunio 2013 p. 52 including references.

33 Paunio 2013 p. 64, see furthermore pp. 64-99 for a comprehensive analysis.

and legal certainty and the legality principle are intrinsically linked.[34] From the case law of the Court of Justice of the European Union (CJEU) in criminal cases, legal certainty is used as a term covering procedural rights in European cooperation situations,[35] and here *ne bis in idem* is relevant,[36] or the fact that the legal certainty motivates using the urgent procedure (PPU).[37] Moreover, legal certainty is used in relation to the prohibition of *contra legem* interpretation,[38] conform interpretation of EU law[39] or the legality principle.[40]

In relation to general principles of transnational criminal law, Gless has considered legal certainty comprising the principle of legality, the principle of personal guilt as a prerequisite for criminal responsibility, fair trial rights and procedural safeguards, an internationalised *ne bis in idem* principle and judicial control of transnational law enforcement and criminal prosecution. She continues, stating that legal certainty 'forms part of all the national legal European systems as well as the case law of the European court of human rights and the European Union body of law'.[41] As the EU does not have competence in relation to the general part of criminal law (such as defining the guilt principle, although it can, in its instruments, regulate that intent is to be criminalised, it is up to the Member States to further regulate how this is defined), the principle of personal guilt cannot be considered part of legal certainty as such in the context of the area of freedom, security and justice, although this is naturally present in the Member States legal orders.[42] Gless's definition is otherwise well-suited for the area.

34 CJEU cases C-201/88 Plantanol GmbH & Co. KG para. 36, joined cases C-74/95 and C-129/95, Criminal proceedings against X para. 25 and Klip 2012 pp. 179-190 on the legality principle.

35 Cases C-192/12 West PPU, C-296/08 PPU Santesteban Coicoechea, C-105/03 Pupino, T-348/07 Al-Aqsa, opinions of advocate general in cases C-399/11 Melloni, C-297/07 Bourquain, C-467/05 Dell'Orto, C-354/04 P Gestoras pro amnistia and others.

36 Cases C-228/05 Kretzinger, C-150/05 van Straaten, and opinions of advocate general in cases C-261/09 Mantello, C-463/04 van Esbroek and joined cases C-187/01 and C-385/01 Gözütok and Brügge.

37 Case C-192/12 PPU West. The urgent preliminary ruling is an expedited procedure for references for a preliminary ruling relating to the area of freedom, security and justice, see art. 23a of the Protocol (no 3) on the statute of the Court of Justice of the European Union, OJ C 83/210, 30.3.2010.

38 Opinion of the general advocate in case C-79/11 Maurizio Giovanardi and others.

39 Case C-188/10 Melki.

40 Cases C-303/05 Advocaten voor de Wereld, joined cases C-74/95 and C-129/95 criminal proceedings against x, C-384/02 Grøngaard and Bang, opinion of advocate general in case C-457/02 Antonio Niselli. It is interesting further to notice that the CJEU applies the term legal certainty in these cases, and does not seem to distinguish further between different terminological aspects.

41 Gless, General principles of transnational criminal law - a European perspective on the principle of legal certainty. A paper presented at the Globalization of crime: criminal justice responses conference August 7-11, 2011 Ottawa, Canada p. 2, quote p. 4. Paper available at http://www.icclr.law.ubc.ca/files/2012/july/Sabine%20 Gless %20Principles%20Transnational%20Law.pdf (Gless 2011a) See further Gless, A new test for mens rea? Safeguarding legal certainty in a European area of freedom, security and justice, *EuCLR* vol 1, 2011/2 pp. 114-122 (Gless 2011b), where she applies a slightly more restricted concept, which seems to resemble the legality principle.

42 For more information see Blomsma, *Mens rea and defences in European criminal law* (Intersentia 2012).

4.4 A working definition

Gless's definition of legal certainty is applied in this article, but without the principle of personal guilt. Legal certainty, within the area of freedom, security and justice, is therefore in the context of this article to be construed of the principle of legality, safeguarding procedural rights connected to the requirement of a fair trial, including victims' rights. Furthermore are the *ne bis in idem* principle and judicial control of transnational law enforcement and criminal prosecution considered part of this concept. Although there is today no European court with a punitive competence (to rule on criminal law responsibility), the actors in the cooperation in criminal matters are the authorities of the Member States, which are subjected to national judicial review. The general competence of the CJEU is relevant as far as preliminary rulings are concerned; all national courts can and courts of last resort (national Supreme Courts) shall request a preliminary ruling, if necessary for the judgment.[43]

All these parts of legal certainty are found in the constitutional traditions of the Member States, the ECHR, EU instruments, such as the Charter of fundamental rights of the EU (CFREU)[44] and other relevant documents, in addition to the case law of the European Court of Human Rights (ECtHR) and CJEU.[45]

5 The 'system' of an area of freedom, security and justice and its focus on legal certainty

5.1 Introduction

To begin with, it can be noted that several Member States have breached legal certainty as defined in the ECtHR, showing that adding the EU into the cooperation is not the only problematic aspect. Examples of such breaches are different violations of the right to a fair trial, which include the lack of opportunity to cross-examine witnesses, which had not effectively been counterbalanced in the proceedings, the fairness and length of the trial, the legality principle in relation to applying the more lenient criminal law, the procedure prescribed by law relating to deprivation of liberty and refusal of access to documents in case file material relating to lawfulness of detention.[46]

43 Articles 267 TFEU and 258-260 TFEU. There is a possibility pursuant to article 257 TFEU to establish specialised courts. It is possible to establish a specialised criminal court, but such a court would not have a punitive competence of its own, as this competence lies at the national level.

44 Charter of fundamental rights of the European Union, OJ C 326/391, 26.10.2012.

45 See correspondingly the Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11.3.2014, which will be briefly dealt with in chapter 7.

46 See on art. 6 e.g. *Al-Khawaja and Tahery v. UK* appl. nos. 26766/05 and 22228/06 (2011), *Zielinski and Pradal and Gonzales and others v. France* appl. nos. 24846/94 and 34165/96 to 34173/96 (2009), on art. 7,

5.2 A European criminal justice 'system'?

The criminal justice 'system' of the EU is different, as a legal system, when compared to the national criminal justice systems. The area of freedom, security and justice is an area comprising the Member States, where different criminal law systems coexist. These criminal justice systems are different and diverse priorities and understandings arise. This is especially true in relation to legal certainty. The area of freedom, security and justice does not as such unify the national legislations in it. Cooperation and harmonisation are focused on within this area. There is however not only one system of criminal and criminal procedural law, in the sense we usually tend to understand a criminal law system.[47]

EU criminal law usually focuses on effective crime combatting within the EU and is often criticised for its focus on effectiveness and repressive measures of criminal law.[48] Although it seems difficult to say why there is a (over-) reliance on criminal law as an effective means to regulate unwanted behaviour, most such reliance seems to exist without much basis in empirical studies.[49] At the same time, focus on effectiveness in EU criminal law can lead to the decrease of focus on legal certainty aspects. One can think of legislative initiatives where new forms for cooperation are invented, but not taking into account the possible problems and lacunas for the suspected or accused person at the same time, or raising the level of minimum penalties very high, in an area which is not necessarily problematic in all Member States and therefore creating an imbalance in the national systems. Having effectiveness as a main focus does not automatically lead to less legal certainty, but one should have the complete criminal justice system in mind when legislating and issuing new measures.[50] Although the area of freedom, security and justice is not, as such, a criminal justice system, it tries to adhere to one in relation to mutual recognition, other measures striving for free movement of judicial decisions and judgments and in relation to harmonisation of substantive criminal laws.[51]

The question is perhaps whether the EU should, and can strive for a similar balanced

Scoppola v. Italy (No. 2) appl. no. 10249/03 (2009), and on art. 5, *Medvedyev and others v. France* appl. no. 3394/03 (2010) and *Mooren v. Germany* appl. no. 11364/03 (2009).

47 Another question is naturally if there even is such a need at all. This question cannot be further elaborated on in this context.

48 Similarly Wieczorek, A needed balance between security, liberty and justice. Positive signals arrive from the field of victims' rights, *EuCLR* vo. 2, 2012/2 p. 142. See also Asp 2012 pp. 71-73.

49 Elholm, Does the EU cooperation necessarily mean increased repression in the Nordic countries? *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 17, 3/2009 pp. 220 and 222 and de Bondt, Evidence Based EU Criminal Policy Making: In Search of Matching Data, *European Journal on Criminal Policy and Research* vol. 1, 1/2014 pp. 23-49.

50 See Asp *et al.* A Manifesto on European Criminal Policy, *ZIS* (*Zeitschrift für Internationale Strafrechtsdogmatik* – www.zis-online.com) 12/2009 pp. 707-716.

51 See further Klip 2012 pp. 469-484, especially pp. 479-481 and Gröning, A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law, *European Journal of Crime, Criminal Law and Criminal Justice* 18 2/2010 pp. 115–137.

system, as the national criminal law ones. If this is the objective, focus should be more on a comprehensive approach than on the ad hoc approach that perhaps characterises today's EU criminal law. The legal instruments enacted represent somewhat a patchwork of instruments, where problems hindering effective cooperation are focused on, but not in a very systematic or coherent way. EU measures on criminal law centre on effective crime combatting, and police-, prosecutor- and court-cooperation is made more effective without giving the same attention to defence rights or other individual rights, which exemplify legal certainty.

5.3 Current focus on legal certainty

Of course this is not to say that legal certainty is not given any attention at all. Some measures to safeguard legal certainty have been implemented, such as the charter on fundamental rights, the roadmap for minimum procedural rights and the Stockholm programme.[52]

The charter confirms the human rights position of the EU, and is not intended to further amend the Member States' obligations as prescribed under the ECHR, nor to extend the competences of the EU.[53] The charter applies when the Member States act within the scope of application of EU law. This has been considered encompassing implementing, enforcing or interpreting EU legislation at the national level.[54] The charter confirms the rights of individuals in the EU, based on the ECHR, the case law of the CJEU and other relevant principles or rights from EU law. The provisions regulating justice matters in the charter are naturally relevant for legal certainty. These are the provisions entailing the right to an effective remedy and to a fair trial (art. 47), the presumption of innocence (art. 48), the principles of legality and proportionality of criminal offences and penalties (art. 49) and the *ne bis in idem* principle (art. 50). The protection of human rights in the event of removal, expulsion or extradition (art. 19(2)) can further be considered relevant. These rights are mainly postulated as they are found in the ECHR and in the ECtHR case law, and the proportionality of penalties is based on the common constitutional traditions of the Member States and the case law of the CJEU.[55]

The roadmap includes six different measures which are to be focused on. These are translation and interpretation, information on rights and charges, legal advice and legal aid, communication with relatives, employees and consular authorities, special safeguards

52 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009/C 295/01 and The Stockholm programme - an open and secure Europe serving and protecting citizens, OJ 2010/C 115/1.

53 Gless 2013 p. 92 and for more information see Franklin, The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon, 15 (2011) 2 *Tilburg Law Review* pp. 137-162.

54 Franklin 2011 pp. 152-153.

55 On proportionality and penalties in relation to the ECHR, see Aall, Prosessuelle garantier og forholdsmessighet i straffeprosessen. *Jussens Venner* vol. 48, 4/2013 pp. 253-256.

for vulnerable suspected or accused persons and the green paper on pre-trial detention. For the two first measures, there are directives adopted and there is a proposal for a directive on the access to a lawyer and a green paper on pre-trial detention.[56] The step-by-step approach chosen for legislating on each different measure, in an instrument on its own is based on the reluctance of the Member States to agree on a previous proposal on a framework decision on certain procedural rights.[57] Although perhaps systematically it might be preferable to include such rights in one instrument, this was not possible and has led to this patchwork of procedural rights legislation within the EU today. The roadmap will be analysed in more detail under chapter 6.3.

The Stockholm programme, an agenda setting out the priorities of the EU for the area of freedom, security and justice for 2010-2014 emphasises the importance of the roadmap.[58] The programme includes aspects such as increasing access to justice, further developed cooperation in criminal matters between the Member States, more harmonisation and increasing of mutual trust. Procedural minimum rights, relevant for legal certainty, are also mentioned, but the Stockholm programme does not explicitly refer to legal certainty further.[59] A need for EU measures emphasising legal certainty is therefore present within the area of freedom, security and justice. This has evidently been noted by the EU, as it has taken many relevant initiatives, and legal certainty is in focus today.

Some studies have shown that legal certainty, especially safeguarding the suspected or accused persons' rights, is not always easy to ensure in a European setting. This is naturally problematic, if the nature of the procedure, being European, leads to legal certainty not being properly realised. In some cases this depends, in addition to the effectiveness of the prosecutorial side, on the defence not being familiar enough with the (national) remedies and rights available in cross-border proceedings.[60] This is hugely problematic and shows

56 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010/L 280/1, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012/L 142/1, Proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final (latest resolution by the EP 10.09.2013) and Green paper on strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final. On the replies to the Green paper, see http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm (last visited 25.2.2014).

57 Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, 28.4.2004 COM(2004) 328 final presented by the Commission. The reluctance may of course have been motivated by the lack of a legislative ground for the proposal under then current Treaties.

58 The programme covers the whole area of freedom, security and justice, but only the criminal law aspects are focused on here.

59 For more information on the Stockholm programme and its implementation, see the Presidency note on the Stockholm Programme mid-term review, 15921/12, 13.11. 2012.

60 Fair trials international, Defence rights in the EU, 2012 p. 46-52.

that application of EU criminal law needs to focus more closely on these aspects. That the criminal proceedings crosses borders should not lead to legal certainty being weakened. Further measures and training on defence rights and rights of the individual are necessary for a balanced criminal justice system. The Stockholm programme mentioned training of legal professionals, but unfortunately does not mention defence in this respect.[61]

5.4 Lastly

A last question can be raised in this context. Is if the EU the right actor in relation to legal certainty? Worth noting is that neither the ECHR nor the CFREU regulate cross-border situations, but state-internal rights.[62] A possibility would be that the Member States are responsible for the developments and safeguarding of legal certainty. These are after all the primary actors within the area of freedom, security and justice, since police, prosecutors, judges, courts and correctional services etc. are national. Having in mind that the EU enables and, more importantly, demands Member States to harmonise criminal law and to cooperate more effectively, it seems logical that the EU should focus also on legal certainty aspects. If a lacuna, such as a suspected or accused person not being able to use all national safeguards in a European procedure, results directly from EU instruments making cooperation more effective, it is imperative that the EU takes responsibility and repairs the situation.[63] In terms of a balanced and rational criminal justice system, the EU should make sure such gaps do not occur. Enacting legislation for the detriment of the suspected or accused person and not focusing on the overall balance will affect legal certainty. This has previously been noted by *Fair trial international*, which demand more effectiveness in relation to procedural rights within the EU and point out that these need to be prioritised.[64]

6 Examples from EU criminal law

6.1 Introduction

As mentioned above, the area of freedom, security and justice is construed of many different parts and is somewhat difficult to grasp in a more concise and coherent way. For illustrating more concretely the position of legal certainty within the area of freedom, security and justice today, four examples from EU criminal law are presented here. It

61 Stockholm programme p. 6.

62 See Gless 2013 pp. 93 ff. However, as ECtHR case law indicates, this is not completely clear cut, see *Soering v. The United Kingdom,* appl. no. 140388/88, 7.7.1989 para. 113 and *Stojkovic v. France and Belgium*, appl. no. 25303/08, 27.10.2011 paras. 51-57.

63 Thunberg-Shunke, En kodifiering av tillräckliga rättssäkerhetsgarantier för misstänkta och tilltalade - krav för ett fortsatt samarbete i brottmål inom EU? In *Festskrift för Suzanne Wennberg* (Nordstedts Juridik 2009) pp. 373-381 demanded (already in 2009) modern solutions for the current problems within the EU.

64 Defence rights in the EU, 2012 p. 41.

is very difficult to cover the whole aspect of criminal law within the area of freedom, security and justice. The four examples are chosen due to their actuality today and as they represent different parts of EU criminal law and grasp the width of relevant legal certainty questions.

Mutual recognition as the cornerstone of cooperation in criminal matters opens up many possible detriments for the suspected or accused. The most important ones, namely human rights grounds for refusal, are analysed here from a legal certainty point of view. Minimum procedural rights are a given example in respect to legal certainty, as these embody the core of it. The rights of the victims are perhaps not as given, but taken into account the possibilities of overlapping jurisdictions, cooperation in criminal matters and diversities in the Member States' legislation on the rights of victims, these are also an important part of legal certainty today. Lastly, the proposal for the EPPO is looked upon to exemplify the possible problems of legal certainty, when focus is so heavily on effectiveness of prosecution. With these four examples of different aspects currently focused on within the EU, the complexity of a concept such as legal certainty within the area of freedom, security and justice is demonstrated.

6.2 Mutual recognition and human rights

Mutual recognition is one of the main principles within the area of freedom, security and justice. Applying this principle has its main focus on effectiveness and recognition of foreign judicial decisions as national ones, which again impacts legal certainty. There are several different aspects that could be analysed here, as effectiveness can pose several problems for legal certainty, but only three are focused on here.

Firstly, being the cornerstone for cooperation in criminal matters, the idea from the EU's perspective is that cooperation should be as efficient as possible and that judicial decisions should be recognised as far as possible. There are certain grounds for refusal in the instruments, which regulate situations where recognition should or may be refused, such as if the matter has already been solved in the executing state (*ne bis in idem*), or if the person sought is under the age of criminal responsibility in the executing state. There are however no grounds for refusal based on human rights concerns. This means that if the execution of a judicial decision would contravene with human rights, the instruments do not as such have a ground for refusal for this. This is based on the presumption that all Member States are considered to protect these rights sufficiently. No human rights issues should exist, where recognition can or may be refused between the Member States.[65] This is expressed in the recitals and introductory articles of the instruments, where it is stated that the instruments respect human rights and that nothing in the instrument is to be considered amending the Member States' obligation to respect fundamental rights. These are however not grounds for refusal, but mainly declamatory statements.

[65] Further on these, see Suominen 2011 pp. 197-205.

The common respect of human rights in addition to a mutual trust between the Member States lead to no need for such grounds for refusal. The Member States are considered to trust each other in terms of respecting human rights, and this applies also for applying all national legislation according to common European human rights standards. No instruments applying mutual recognition in the different forms of cooperation therefore have human rights grounds for refusal.[66] The newly adopted European investigation order is an exception to this, and is a positive development as regards human rights grounds for

[66] Framework decisions today in addition to the EAW concern confiscation orders, financial penalties, freezing orders, evidence, taking convictions into account, custodial sentences, suspended and alternative sentencing and the European supervision order. These are the Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ/2002 L 190/1, as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27.3.2009, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders,

refusal.[67] The CJEU has in its case law on the European Arrest Warrant (EAW) concluded that Member States can only refuse cooperation based on a mutual recognition instrument when there is a ground for refusal found in the EU instrument.[68] Therefore, if there is concern in relation to human rights, the recognition should not be refused, if there is no such possibility according to the instrument.

Although the EU considers such grounds for refusal unnecessary, several Member States have included human rights as grounds for refusal in their national implementing legislation, as previous studies have shown.[69] In addition to this, there are several cases where Member States have been found breaching different human rights under the ECHR by the ECtHR. The presumption that human rights are always respected and that cooperation can be based on this presumption has come close to being rebuttable.[70] This does not lessen the fact that the instruments should already at the EU level include a possibility to refuse recognition in case of human rights concerns.

This means that legal certainty within the area of freedom, security and justice is not as highly protected when it comes to human rights aspects in mutual recognition cooperation, as it should be. Although the Member States take their responsibility and several of

OJ L 328/59, 24/11/2006, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16, 22/03/2005, Council framework decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L196/45, 2.8.2003, Council framework decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72, 30.12.2008, Council framework decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceeding and custodial sentences, OJ L 220/32, 15.8.2008, Council framework decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5.12.2008 and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/201, 16/12/2008 and Council framework decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009).

67 Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters Brussels, of 7.3.2014, PE-CONS 122/13. Its art. 11f) states that the recognition and execution of an EIO may be refused if 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

68 CJEU case C-388/08 PPU *Leymann and Pustovarov* para. 51, also cases C-261/09 *Mantello* para. 37 and C-396/11 *Radu*, para. 43 (although in this particular case it is not hard to agree with the CJEU) and C-399/11 *Melloni* para. 63.

69 Suominen 2011 pp. 197-200 and 205-222.

70 See further Suominen, Grundläggande rättigheter i straffrättsligt samarbete, *JFT* 1-2/2014 pp. 44-51 also on such case law.

these have inserted such grounds for refusal, the situation is not optimal.[71] This is a rather serious deficit in the European cooperation in criminal matters. Hopefully this deficit will be given more attention also in the light of the new instruments on mutual recognition, and also those regulating minimum procedural rights (see chapter 6.3).

Secondly, there are some discrepancies in the current arrest warrant system. In some situations a person can be subjected to the same arrest warrant several times, although the recognition of the arrest warrant has already been refused. If the recognition is refused based on a legitimate ground for refusal, this refusal is not recognised within the area of freedom, security and justice. As the arrest warrant is sometimes left in the Schengen Information System (SIS or SIS II),[72] the person, when travelling to another Member State, can be apprehended based on the same arrest warrant and subjected to the same procedure, as he already has been, where a ground for refusal was applied and recognition refused. This connects to a larger discussion on a European dimension of legal force.[73] Without going further into this, it can be noted that in some cases, the refusal not having a European legal force can be motivated. This applies for refusals based on national aspects, such as ongoing prosecution of the same person for other offences in the executing state. In situations where the refusal is based on an aspect having a European dimension, such as *ne bis in idem* or human rights as argued above, the refusal having no effect within the area of freedom, security and justice seems illogical.

The fact that a person within this area can be subjected several times to the same arrest warrant, which has already been refused, does not seem promising for legal certainty nor effectiveness. If a refusal is based on a ground having relevance within the whole area, there should at least be some form of recognition of such a refusal. When the EU legislator has legislated instruments for effective cooperation, it should make sure that no loopholes or problematic situations occur when applying those instruments. Making it possible for Member States to issue or keep the arrest warrant in the information system, when the recognition has been refused should be addressed, or should at least be acknowledged as a practical problem for the individual, which may hamper his right of free movement within the EU.

This links to the third aspect where mutual recognition affects legal certainty. When focus lies heavily on the effective cooperation, this sometimes has a detrimental effect on the suspected or accused person. In several cases a more lenient measure could be used, but such measures do not yet exist at the EU level, or applying such an instrument is too cumbersome. For example arrest warrants are used in many cases, where other forms of

71 On the problems when applying such a ground in Finnish and Swedish legislation, see Suominen 2014 pp. 32-43, and more generally Asp 2014 pp. 8-9.

72 Council decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJL 2007/205/63.

73 See Gless 2011a pp. 3-5 and Öberg, EU criminal law, democratic legitimacy and judicial review of Union criminal law legislation in the wake of the Lisbon Treaty, *Tilburg Law Review* 16 (2011) p. 63.

mutual legal assistance could be used, or pre-trial detention is used in many arrest warrant cases after the person is surrendered to the issuing state, where alternatives could have a similar effect.[74] Today the arrest warrant is very effective and easy to use in situations where hearing the person initially through video-link or other alternatives might be enough. Similarly, in most cross-border cases, pre-trial detention is considered necessary as the suspected or accused person may be foreign, and therefore more prone to be at flight risk. Other alternatives to pre-trial detention are perhaps not always suitable for cross-border situations, which may also to some extent impact the use of pre-trial detention as in addition to being effective it is the easy solution.[75]

Not all aspects of EU criminal law cooperation are addressed at the EU level, and certain instruments have proven more effective than others. This is related to the imperfect EU criminal justice system in which all parts are not yet developed, and which can result in the 'misuse' of current instruments. This will become better in the future, with some new instruments which enable more forms of cooperation, and EU criminal law becoming more encompassing and including more aspects of cooperation in criminal matters improving this. Already today, if we look at the three framework decisions concerning transfer of prisoners, probation and alternative sanctions and the European supervision order (mentioned above), this can be seen as improved. These instruments address different aspects of cooperation, where improvements and alternatives come into play. These instruments should together with the EAW lead to more functional cooperation legislation within the area of freedom, security and justice where more options are available. These instruments have however not yet been properly implemented by all Member States, and the practical use of them is therefore yet to be seen.[76]

It is nevertheless important that relevant instruments are used for their purpose, and that certain instruments are not overused due to their effectiveness. As regards the use of pre-trial detention, the answer is not simple.[77] In addition to the question on whether the EU has competence to legislate on the matter (is this included under article 82(2) TFEU,

74 Statistics on pre-trial detention is somewhat problematic, as the situation can change from day to day, see further chapter 6.3. This is partly also true for the EAW cases. See Maior, The principle of proportionality: alternative measures to the European arrest warrant, in Keijzer and can Sliedregt (eds), *The European arrest warrant in practic*e (Asser Press 2009) pp. 214-216.

75 See further the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM(2014) 57 final, 5.2.2014.

76 *Ibid*. on the implementation status.

77 The Green paper has already been mentioned, and it is of course very interesting. It does however not solve all relevant questions, and for more information on it, see Report Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention, October 2011 (available on http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf, last visited 19.2.2014).

and is this related to mutual recognition?), the question is what form of instrument best would address the problems here. Alternatives to pre-trial detention, harmonisation of the conditions, more monitoring of such, or making sure that the suspect or accused person being foreign not automatically leads to the use of pre-trial detention and focus on rehabilitation are only a few examples of possibilities.[78]

There should be an option to assess the arrest warrant to avoid using it in situations where more lenient measures could be used, but the arrest warrant is chosen due to its effectiveness. It should be possible to apply arrest warrants respecting legal certainty, including after the person has been surrendered, and the balance of the system within the area of freedom, security and justice should be preserved. The whole system of overuse of efficient crime combatting instruments when strictly not necessary should be more balanced overall within the area of freedom, security and justice. Regardless of how the mutual recognition system is construed, it should in any case not result in no Member State's taking responsibility for human rights or other aspects of legal certainty in these cross-border cooperation situations.[79]

6.3 Minimum procedural rights

The minimum procedural rights for the suspect or the accused are another good example of current EU criminal law focus. Minimum standards for suspects' or accused persons' procedural rights are considered essential for compensating for the possible disadvantages resulting from cross border criminal proceedings, such as not understanding the language of the court proceedings, the different rules on coercive measures or the mere reality of standing in court in another Member State, with all its disadvantages. One might consider the minimum rights guaranteed by the ECHR as being somewhat standard minimum rights within Europe. The EU has nevertheless considered that cooperation in criminal matters between the Member States goes further than under the Council of Europe, and due to the possibly problematic situations the suspects can encounter, common minimum standards are necessary. This seems logical also when taking mutual recognition into account, as it imposes rather far-reaching cooperation duties on the judicial authorities of the Member States as well as the ECHR and the CFREU not *per se* regulating fundamental rights in cross-border situations.

78 It is not possible to further elaborate on these matters in this context, but see these publications based on IRCP studies, Vermeulen *et al. Cross-border Execution of Judgements Involving Deprivation of Liberty in the EU: Overcoming Legal and Practical Problems Through Flanking Measures* (IRCP Series, Vol. 40 Maklu Publishers 2011) and Vermeulen *et al. Material Detention Conditions, Execution of Custodial Sentences and Prisoner Transfer in the EU Member States* (IRCP Series, Vol. 41 Maklu Publishers 2011).

79 See CJEU case C-396/11 Radu, and slightly differently case C-399/11 Melloni although the latter was on the specific issue of judgments in absentia, also Thunberg-Schunke, *Whose responsibility? A study of transnational defence rights and mutual recognition of judicial decisions within the EU* (Intersentia 2013) pp. 5-6 and 123-134 and Marguery, European Union fundamental rights and Member States action in EU criminal law, 20 *MJ* 2 (2013) p. 298.

As mentioned above, the roadmap presents some procedural rights that the EU is focusing on. Some of these are already regulated through directives, and these concern translation and interpretation and information on rights and charges. There is furthermore a proposal for a directive on the access to a lawyer and a green paper on pre-trial detention. The directives adopted (although not yet implemented), are positive improvements for the suspect, but perhaps do not solve all nor the bigger problems in relation to deficits in European criminal proceedings.[80]

Despite these being positive examples of current EU legislation, there are some drawbacks as well. For example, in the directive on the right to information in criminal proceedings, it is clear that the list of rights to which the suspected person is entitled in article 3(1) is incomplete, since the right to be heard and the right to effective defence, among others, are not included. Although the article regulates which procedural rights at least should be guaranteed, there is no logical explanation for why some are left out of the list. The fact that article 4(2) of the directive adds some additional rights does not succour this, as these rights are not listed here either. It is unclear if the ambition has been to include all relevant rights (based on the ECHR), and if so, why some have been left out. Furthermore is the time limit in article 6 of the same directive not optimal with regard to the person being informed of the charges. Although the fairness of the proceedings, effective defence and that the information is to be given promptly is focused on in the article, this article does not further specify when the information is to be given, but states that this should take place 'at the latest on submission of the merits of the accusation to a court' (article 6(3)). This might be too late for an effective defence.

In the directive on the right to interpretation, again the right to interpretation and translation in article 1 is not optimally regulated, as it actualises when the person is made aware that he is suspected or accused, and this in some cases can be too late in relation to having an effective defence. The list of essential documents that the person has a right to have translated, seems somewhat arbitrary in article 3 (1-4) as these are not further specified, but all 'documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings' are included. There are further restrictions, which do not seem very logical, and in article 3(7), there is an option to give an oral translation or summary in some circumstances. The fact that the conditions under which this is possible are not predefined can be problematic because there is no indication of how extensive such an oral translation or summary should be. It is difficult to see how an oral translation, or a summary could be beneficial for the suspected, or in which cases such a translation could be sufficient.

On a more general level, it can be questioned whether it is reasonable for the EU legis-

[80] Critically on the roadmap, see Smith, Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of freedom, security and justice, *NJECL*, vol. 4 1-2/2013 pp. 91-95, and pp. 95-98 on pre-trial detention, which cannot unfortunately be focused on more here. See also the new Communication COM(2014) 144 final, 11.3.2014 pp. 3 and 6-7.

lator to legislate minimum procedural rights with a one-by-one approach, and if so, what the scope of such instruments should be. According to the above-mentioned roadmap, the one-by-one approach is the prevailing, and the current directives are usually narrow in scope.[81] The added value compared with the ECHR is not very visible as such, as the minimum rights guaranteed usually are not much higher than the already existing level of protection. Although the symbolic nature of such instruments might add something, it seems bizarre that the EU cannot agree on a higher protection than the ECHR. The directives seem to guarantee a low protection for the individual, which might lead to a 'race to the bottom', entailing that cooperation is 'easier' when all Member States apply the same low standards for minimum procedural rights. This is in no way a desirable development. Legislating on minimum procedural rights should not lessen the impact of legal certainty within the area of freedom, security and justice, but quite the contrary.

There are, of course, positive examples to be found in the directives as well. First of all both directives, in the respective provisions under article 1, explicitly refer to the EAW, which is positive, as it has been noted that the EAW creates some lacunas and that EU action for this is necessary. It is imperative that legal certainty be enhanced in relation to the even more efficient use of mutual recognition in EAWs. The right to judicial review on a decision concerning refusal of access to some material in the directive on the right to information, article 7(4) is furthermore a positive example in relation to legal certainty.

Another positive note is that the Commission recently issued a communication on making progress on procedural safeguards for suspected and accused persons and strengthening the foundation of the European area of criminal justice.[82] Here the Commission states that it wants more procedural rights for citizens in criminal proceedings and in relation to this presented five proposals.[83] The proposals, which are from late 2013, consist of three proposals for directives concern the presumption of innocence and to be present at trial,[84] special safeguards for children when suspected or accused of a crime[85]

81 The EU is aware of this and is currently considering codifying these, see Communication COM(2014) 144, final, 11.3.2014 p. 8.

82 Communication from the Commission to the European Parliament, the Council the European economic and social committee and the committee of the regions. Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice, COM(2013) 820 final, Brussels 27.11.2013.

83 See the press release of 27.11.2013 at http://europa.eu/rapid/press-release_IP-13-1157_en.htm (last visited 11.03.2014).

84 Proposal for a directive of the European Parliament and the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 final, Brussels, 27.11.2013, 2013/0407 (COD). There is an impact assessment accompanying the proposal, SWD(2013) 478 final, 27.11.2013.

85 Proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, Brussels, 27.11.2013, 2013/0408 (COD). Also accompanied by an impact assessment, SWD(2013) 480 final, 27.11.2013.

and legal aid.[86] These are complemented by two recommendations, which concern procedural rights for vulnerable people[87] and the right to legal aid.[88]

The proposals concern important aspects of legal certainty and are positive initiatives towards a more balanced area of freedom, security and justice. Legal certainty is prioritised and the current deficits in the balance of EU criminal law are focused on. Especially the presumption of innocence is a fundamental principle of the Member States' criminal law systems, which the Stockholm programme mentioned as a tool to promote cooperation.[89] The presumption of innocence can further be considered important for mutual trust between the Member States, as it a fundamental principle also enshrined in the case law of the ECtHR.[90]

6.4 The rights of the victim

The rights of the victim in cross-border criminal proceedings have been actively discussed in the EU, concerning amongst other how the victim should be protected, which rights and role he should have and how far these should be extended, especially in a European proceeding.[91] What makes this especially interesting within the area of freedom, security and justice is the addition of the victim into the equation of the state and the suspected or accused person as actors. This raises additional fundamental questions on how the criminal procedure should be and what its ultimate aim is.[92] Depending on how legal certainty is defined, the rights of the victim can be either included in this, or excluded. Taking into account that within the area of freedom, security and justice, the EU shall guarantee the rights of the victim, these rights are here considered as part of legal certainty.

86 Proposal for a directive of the European Parliament and of the Council, on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 final, Brussels, 27.11.2013, 2013/0409 (COD). Also accompanied by an impact assessment, SWD(2013) 476 final, 27.11.2013.

87 Commission recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02).

88 Commission recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03).

89 Stockholm programme p. 10.

90 On the case law of the ECtHR see e.g. cases *Allen v. The United Kingdom*, appl. nr. 25424/09, 12.7.2013, *Yassar Hussain v. The United Kingdom*, appl. nr. 8866/04, 7.6.2006, *Minelli v. Switzerland*, appl. nr. 8660/79, 25.3.1983 and *Ringvold v. Norway*, appl. nr. 34964/97, 11.2.2003. For more information on the presumption of innocence, see Duff, Who must be presume whom to be innocent of what? *Netherlands Journal of Legal Philosophy* 2013 (42) 3 pp. 170-192, Ulväng, Presumption of innocence versus a principle of fairness, *Netherlands Journal of Legal Philosophy* 2013 (42) 3 pp. 205-224 and Frände, The presumption of innocence and the Finnish Law of Evidence, *Festschrift für Helmut Fuchs* (Verlag Österreich 2014) pp. 163-169.

91 See also Letschert and Rijken, Rights of victims of crime: tension between an integrated approach and a limited legal basis for harmonisation, *NJECL* vol. 4, 3/2013 pp. 227-233.

92 Similarly Mitsilegas, Security versus justice The individualisation of security and the erosion of citizenship and fundamental rights, in Hudson, Ugelvik 2012 pp. 206-207.

Wieczorek has, based on victimology and the categories in the Commission proposal, listed six needs of victims. These are the need of respect and recognition, the need for participation, the need for information, the need for protection, the need of support and the need of reparation.[93] She points out that the needs are not fully reconcilable with each other, and that these are challenging especially in a cross-border criminal proceeding. Cross-border victims have special needs, and these are not necessarily similar to the needs of national victims, such as the need for interpretation and translation, and plans for avoiding the risk of secondary victimisation.[94] This shows that protecting the victim within the area of freedom, security and justice is not a simple task and specific attention should be given to this. As European proceedings based on mutual recognition might lead to the victim's rights not being recognised or them not having any rights in cross-border situations, it is positive that the EU is addressing this matter.

This was noted already in 2001, as there is a framework decision on the rights of the victims from that year, but this framework decision never gained much practical use between the Member States.[95] The Stockholm programme emphasised the rights of victims of crime and in article 82(2) TFEU, the rights of the victim are mentioned as one relevant area for EU legislation, as long as measures only concern minimum harmonisation and these are necessary for facilitating mutual recognition.[96] The position of the victim in a European setting has politically risen, as can be seen by the Council resolution on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings.[97] As the framework decision was not successful, it is being replaced by a directive on minimum standards on the rights, support and protection of victims of crime.[98]

The directive on minimum rights has as its main purpose to 'ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings'.[99] It is divided into three main parts, including a part on information and support, a part on participation in criminal proceedings and a part on

93 Wieczorek 2012 pp. 144-145.

94 Ibid. p. 147.

95 Council framework decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1, 22.3.2001 and implementation reports Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings COM(2004)54 final/2, 16.02.2004 and Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) COM(2009) 166 final, 20.4.2009.

96 See further Letschert and Rijken 2013 pp. 234-235 on this competence.

97 Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceeding, OJ C 187/1, 28.6.2011.

98 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14.11.2012.

99 Art. 1(1) of the directive.

protection of the victims. The directive includes many of the rights that were included in the framework decision, such as the right to be heard and to give evidence,[100] the reimbursement of expenses,[101] the right to receive information[102] and the right to legal aid.[103] The directive introduces certain improvements, which the framework decision did not cover. These are the right to translation and interpretation,[104] the right to be informed of available procedures for making a complaint, if their rights are not respected,[105] the right to receive written acknowledgment when making a complaint[106] and the possibility to demand a review of a decision not to prosecute.[107] There is further a provision regarding vulnerable victims, for those in need of specific protection.[108]

Taking into account that the rights regulated are not always automatic in cross-border situations, the directive is a welcome improvement for the rights of victims. Its focus can be characterised as ensuring victims broad participation rights and that the protection of victims is focused on.[109]

Another example increasing legal certainty for victims is the European protection order.[110] As a starting point, national protection orders only apply within the national jurisdiction. This instrument applies mutual recognition to protection orders, which are decisions imposing prohibitions or restrictions on persons representing a danger to other persons (these can be considered a form of restraining order). The idea is free movement of decisions concerning protection measures for victims of crime between the Member States. The recognition of the protection order applies throughout the area of freedom, security and justice and extending mutual recognition to this aspect of criminal procedure is welcome, as previously decisions on protective measures have not had a Union wide effect. Applying protection orders only nationally can be problematic when Union citizens use their right of free movement.[111]

A European protection order can only be issued based on protection order in the issuing state, and can impose one of the three alternatives on a person causing danger: '(a) a prohibition from entering certain localities, places or defined areas where the protect-

100 Art. 10 of the directive and art. 3 of the preceding framework decision.

101 Art. 14 of the directive and art. 7 of the preceding framework decision.

102 Art. 4 of the directive and art. 4 of the preceding framework decision.

103 Art. 13 of the directive and art. 4(1)(f)(iii) of the preceding framework decision.

104 Art. 7 of the directive.

105 Art. 4(1)(h) of the directive.

106 Art. 5 of the directive.

107 Art. 11 of the directive.

108 Art. 22 of the directive.

109 Similarly Wieczorek 2012 pp. 154-156, see also Letschert and Rijken 2013 pp. 245-247.

110 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338/2, 21.12.2011.

111 Also pointed out in recital 5 of the preamble of the directive.

ed person resides or visits; (b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.'[112] A European protection order is to be used when the protected person decides to reside or stay in another Member State, or already resides or stays there.[113] There are, as in all mutual recognition instruments, certain grounds for refusal, which include the requirement of double criminality, statute-barred offences, *ne bis in idem*, immunity or amnesty and jurisdictional issues.[114] The European protection order further contains rules on the discontinuance of measures based on an order, such as the maximum duration of the measure expiring, or the person no longer residing or staying in the other Member State.[115] The protection order resembles many of the other mutual recognition instruments and can be considered a positive measure enhancing the protection of victims of crime, and through this, legal certainty within the Union.

Focus on the rights of the victims has previously not been such an essential part of the area of freedom, security and justice. The improvements in this field are positive. Both directives, the one on the victims' rights in criminal proceedings and the one on the European protection order are adopted, but not yet implemented (the deadline is late 2015). It will be interesting to see how these will function in practice. If the provisions are followed correctly in the national setting, the legal certainty as regards victims' rights is increased.

6.5 The possible EPPO

A proposal for a European public prosecutor's office (EPPO) is reality today. The Commission has, again, proposed that the EPPO be set up for the effective protection of the financial interest of the EU.[116] Based on a fairly long road resulting in the proposal main-

112 Art. 5 of the directive.

113 Art. 6 of the directive.

114 Art. 10 of the directive. For a more general overview of grounds for refusal in mutual recognition instrument, see Suominen 2011 pp. 111-277.

115 Art. 14 of the directive.

116 Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17.7.2013. For the previous attempts, see the Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001) 715 final, 11.12.2001, Delmas-Marty (ed.) *Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union*, (Economica 1997), Delmas-Marty and Vervaele (eds.) The *Implementation of the Corpus Juris in the Member States: Penal Provisions for the Protection of European Finances, 4 Volumes* (Intersentia 2000), and the Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on the protection of the financial interests of the European Union by criminal law and by administrative investigation, COM(2011) 293 final, 26.5.2011. OLAF (European Anti-Fraud Office) is also relevant in this respect, see the Commission decision of 27 September 2013 amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office, OJ L 257/19, 28.9.2013. See also Zwiers, *The European public prosecutor's office, analysis of a multilevel criminal justice system* (Intersentia 2011).

taining the main competences at the Member State level, this proposal is interesting from many angles and many different aspects in relation to legal certainty. Adding yet another strong focus point on the prosecutorial side in EU criminal law poses many potential problems for legal certainty, such as lack of equality of arms and especially in relation to applicable jurisdiction, which procedural safeguards apply. It is not possible to go into all aspects of the proposal that might be relevant from a legal certainty point of view here. In this article, the chapters on procedural safeguards (IV) and judicial review (V) are of interest. These will be analysed from a legal certainty perspective.

As for procedural safeguards, the proposal firstly lists the rights that the suspected or accused person is to have.[117] These mainly correlate with the applicable directives in EU criminal law today[118] and the person shall have these rights from the time that they are suspected of having committed an offence.[119] The proposal does not further elaborate when this takes place. The proposal further states that suspected and accused persons shall have all procedural rights available under applicable national law.[120] The proposal secondly focuses on the right to remain silent and the presumption of innocence. The right to remain silent shall apply in accordance with national law when the suspect or accused person is questioned,[121] and the person is to be assumed innocent until proven guilty according to national law.[122] Thirdly, the proposal contains a provision on the right to legal aid. The suspected or accused person shall, again in accordance with national law, have a possibility to legal assistance free or partially free of charge, if he cannot pay for it himself.[123] Fourthly, the proposal has a provision on evidence, stating that the suspect or accused shall have the possibility in accordance with national law to present evidence to the consideration of the EPPO.[124] It continues stating that the suspected or accused person shall have the right to request the EPPO to gather evidence relevant for the investigation, and this is again to be done in accordance with national law.[125]

These are not a complete overview of the possibly necessary procedural safeguards or legal certainty safeguards within the EU today, but are those considered of importance for the functioning of the EPPO. The same critique as in relation to the minimum procedural rights in chapter 6.3 can of course be said to apply here; the rights guaranteed are narrow in scope and the added value is sometimes hard to grasp. At the same time, the

117 Art.32 of the proposal.

118 Art. 32(2) points a-f of the proposal.

119 Art. 32(3) of the proposal.

120 Art. 32(5) of the proposal.

121 Art. 33(1) of the proposal.

122 Art. 33(2) of the proposal.

123 Art. 34 of the proposal.

124 Art. 35(1) of the proposal.

125 Art. 35(2) of the proposal.

EPPO proposal does not as such create any rights in relation to procedural safeguards, but only lists the relevant EU instruments regulating these, or relies on the national law. No rights are as such introduced however, would the national law not have such rights available. This is interesting, as there seems to be no enhancement of the rights of the individual or legal certainty in this respect, whereas the EPPO enhances the possibilities of the prosecutorial side. The lack of balance in EU criminal procedural law has already previously been criticised.[126]

In the EU setting, the balance can prove to be even more interesting, if the criminal justice system for some parts becomes European, in the meaning of 'supranational criminal law'. At the moment, all actors are still national, the police, prosecutors and the courts. There is no EU court with competence to sentence individuals to criminal responsibility or to judicially review such national decisions (the ECHR is not considered here). The same will apply also when EU criminal law is directly enforced.[127] The EPPO proposal does not seem to alter this, as the proposed EPPO would to a large extent maintain the competence at a national level.

This is further seen in the provision regulating judicial review of procedural measures of the EPPO. Article (36(1)) of the proposal states that

> *[when] adopting procedural measures in the performance of its functions, the European Public Prosecutor's Office shall be considered as a national authority for the purpose of judicial review.*

This is interesting from many angles. It emphasises that the primary competence still will be national, or at least semi-national. The prosecutorial competence of the EPPO will have some sort of semi-supranational form, mainly still within the Member States' competence but having some increased efficiency which adds some European features. Notwithstanding, the decisions made by the EPPO are to be considered national ones, and the judicial review of such decisions will still only be national. It would perhaps seem more logical if the CJEU would be competent for the judicial review of the procedural measures of the EPPO in the sense that there is a European dimension in deciding those measures. Especially for issues concerning deciding on the ancillary competence, the applicable jurisdiction or certain investigation measures, the CJEU would seem more legitimate to decide on judicial review of such decisions.[128]

Taking into account the reluctance of the Member States to give further competences to the EU, this might seem logical, but how this will be dealt with in practice and what it results in for the individual is to be seen. The prosecutorial side has been strengthened

126 Chapter 5 above and Asp *et al.* A manifesto on European Criminal Procedure Law, *ZIS* 11/2013 pp. 430-466 and on a possible Eurodefensor, Schünemann (ed.) *Gesamtkonzept für die Europäische Strafrechtspflege, A programme for European criminal justice* (Carl Heymanns Verlag 2006) pp. 301-307.

127 See further arts. 256-281 TFEU on the competence of the CJEU.

128 See arts. 13, 14 and 26 of the proposal.

but it can be argued that no additional safeguards or powers have been granted to the defence side. This is perhaps not surprising, but less desirable from a legal certainty perspective. If the courts of the Member States are equipped for this task and the legal certainty of the individuals will not suffer from labelling the EPPO as national in this sense, then of course this would not be problematic. If this focus leads to an unbalanced process to the detriment of the defence, this becomes more problematic. For the realisation of the EPPO, it is difficult to say how this will function or when it will function.

It is interesting to note that the model rules for the EPPO suggest that there should be a possibility to review the legality of the measures of the EPPO by the CJEU.[129] The model rules reach further in many other aspects, such as the competences of the EPPO, where the model rules foresee a more supranational character of the EPPO and where the safeguards relevant for legal certainty are somewhat further elaborated on.[130]

7 Conclusion

This article has shown that legal certainty within the area of freedom, security and justice encompasses many different aspects. Common for these is today that the focus has somewhat shifted to putting the individual in the centre. This is positive, but at the same time it can be concluded that legal certainty and especially the rights of the individual still need to be focused on. Legal certainty should have a stronger role within the area, and there are many issues to resolve for this to take place. Instruments focusing on legal certainty being initiated later than the respective repressive ones, the overall focus on effective crime combatting and the sometimes ad hoc nature of EU criminal law all influence the role of legal certainty.

Mutual recognition and cooperation generally is state driven and has state interests as a main focus. Newer instruments and areas have a slightly lesser state interest, but mutual recognition should nevertheless not in any case undermine the protection of human rights nor should it lead to Member States avoiding responsibility for fundamental human rights. Mutual recognition should not enable Member States to misuse instruments and rely on effectiveness to the detriment of the suspected or accused person. Measures increasing minimum procedural rights or the rights of victims are good examples of this. The EU should strive for a higher protection of minimum procedural rights and through this for a higher protection of legal certainty. This should by no means result in adoption of a lower standard than before, nor accepting lower standards than what a Union today should strive for. This applies for the rights of the victim, which need to be taken seri-

[129] Rule 7 (judicial control) of the model rules for the procedure of the EPPO, available on the webpage of the project: http://www.eppo-project.eu/ (last visited 19.2.2014) and see also Ligeti (ed.), *Towards a prosecutor for the European Union* (vol. 1, Hart Publishing 2013).

[130] Rule 1 (status and competence) of the model rules as well as rules 8 to 19 under chapter 2 of the model rules, regulating general rules on procedural safeguards and evidence.

ously in a European perspective and especially in situations resulting from cross-border proceedings.

The proposal on the EPPO shows that emphasis is still on the effectiveness of crime combatting and from the mutual recognition and harmonisation instruments it can be concluded that these do not today represent a coherent system at the EU level. Legal certainty and equality of arms should be two of the main focuses of the EPPO, and this institution should not further emphasise only effective crime combating. Effective protection of the financial interests of the EU is important, but the balance of the system should be kept in mind. These examples show the complexity of EU criminal law and the importance of safeguarding legal certainty aspects in all of these areas.

The Commission has recently issued a communication on a new EU framework to strengthen the rule of law.[131] The Commission has defined the principles expressing the core meaning of the rule of law as common values of the EU as:

> *Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law…*[132]

This definition of the rule of law is very similar to the one of legal certainty used in this article. Some positive development could be seen already earlier, but focus as of March 2014 seems to be even more on legal certainty, or the rule of law, as the Commission labels this. The Commission continues by stating that '[t]his means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable'.[133] What the Commission proposes, in brief, is a new framework for the rule of law, which main purpose is to address threats to the rule of law. These are to be of a systemic nature and this new framework is to be added to the existing EU procedures available within Union law today.[134]

This is interesting and an up-to-date reaction by the Commission. This seems positive for legal certainty and its role becoming more fundamental within the area of freedom, security and justice, which is well motivated. Legal certainty should be better prioritised

131 Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11.3.2014.

132 COM(2014) 158 final p. 4, emphasis included in the original text.

133 Ibid. p. 4.

134 These are the infringement procedure in art. 258 TFEU and the preventive and sanctioning mechanisms in art. 7 TEU. See also the Annexes to the Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, annexes 1 and 2, 11.3.2014.

within the area of freedom, security and justice and the whole area should be more balanced. The focus on the new framework for the rule of law adds an impetus for a better future in this respect. Peers has however commented on this communication and although being relatively positive, also stated that 'there are no specific overriding themes that would bring together the EU's future JHA plans into a coherent system.'[135] The lack of coherence in the system can obviously impact negatively on legal certainty within the area of freedom, security and justice, and only the future can show us which position legal certainty gains.

[135] Peers, Analysis The next multi-year EU Justice and Home Affairs programme, Views of the Commission and the Member States of 12.3.2014, available at http://www.statewatch.org/analyses/no-238-new-jha-programme.pdf (last visited 13.3.2014).

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Behavioural Analysis of Criminal Law: A Survey

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1 Introduction

Behavioural analysis of criminal law exploits social science methodologies (behavioural economics, psychology and even sociology) to explore the effects of criminal law norms on criminals, judges, juries and other decision-makers, to determine the optimal type and size of criminal sanctions, to identify the optimal design of the enforcement system and the rules of evidence. Behavioural analysis of criminal law often addresses, criticises, or complements the findings of the traditional economic tools by using social sciences findings concerning the content of individuals' beliefs, and the content of their preferences. As criminals, policepersons, victims of crime, judges, and other relevant agents form beliefs concerning probability of detection and conviction, and those affect the propensity to commit crimes, enforcement policy, evidence law and procedural law are as relevant to the understanding of the effects of criminal law as the substantive doctrines of criminal law itself. Hence both the economic and the behavioural approaches to the analysis of criminal law challenge the traditional doctrinal distinctions between criminal law, criminal procedure and evidence and, last, the enforcement policy.

The behavioural approach to criminal law is founded on the research of behavioural economists, psychologists and sociologists.[1] Unlike traditional neo-classical economics, the behavioural perspective is eclectic rather than unitary; it is composed of various psychological findings including cognitive biases and their effects, prospect theory, the effects

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1 For previous surveys of the behavioural approach to criminal law, see McAdams and Ulen, Behavioral Criminal Law and Economics, in *3 Criminal Law and Economics: Encyclopedia of Law and Economics 403*, ed. Garoupa (Edward Elgar 2009) pp. 413-426, Garoupa, Behavioral Economic Analysis of Crime: A Critical Review, in *EUR. J.L. & ECON*. 15: 5, 8, 12-13 (2003), Jolls, On Law Enforcement with Boundedly Rational Actors, in *The Law and Economics of Irrational Behavior 268*, eds. Parisi and Smith (Stanford University Press 2005) pp. 272-281. This survey differs however from these surveys as it aims also to explore the philosophical foundations of the field. For a general description of economic and behavioural approach to criminal law, see Harel, Economic Analysis of Criminal Law: A Survey, in *Research Handbook on the Economics of Criminal Law*, eds. Harel and Hylton (Edward Elgar 2012).

of social norms, findings concerning the ways preferences and beliefs are being shaped and even studies concerning happiness. Behavioural theorists call for the exploitation of various cognitive misperceptions, biases and heuristics to increase the deterrent effect of criminal law prohibitions and sanctions and/or increase their effectiveness in other ways.

This survey starts by examining in part 2 the theoretical foundations of behavioural analysis of criminal law. I contrast behavioural analysis with retributive justice values and, then, I contrast the behavioural approach to criminal law with traditional neo-classical economic analysis of criminal law and point out the distinctive features of the former. Part 3 illustrates the ways in which various behavioural phenomena can be used to understand the effects of criminal law norms and to design criminal law in a way that serves its social goals, in particular deterrence. Part 4 examines critically the potential contribution of behavioural studies to the optimal design of the legal system.

2 Theoretical foundations

To understand the contribution of behavioural analysis of criminal law to the study of law one needs to point out what is distinctive about behavioural analysis of criminal law, namely in what ways behavioural analysis modifies the ways criminal law should be understood and/or reformed. In the first section of this Part, I contrast economic/behavioural analysis of criminal law with the traditional doctrinal/analytic approach based on retributive justice. In the second section I contrast the behavioural approach with its older relative – the traditional economic approach to criminal law – and examine the commonalities and the differences between these two fields.

2.1 Criminal law versus the economic/behavioural analysis of criminal law

The traditional criminal law theorist believes that the criminal law primarily guides people and instructs them. Criminal law sanctions ought to be imposed on agents who committed wrongful acts because they 'deserve' to be punished, and the severity of the criminal sanction ought to be proportionate to the wrongfulness of the act and to the culpability of the actor.[2]

Some retributivists oppose using criminal law for the sake of realising any social goals including deterrence and/or just distribution, as such a use violates the basic Kantian principle under which one ought not use a person only as a means (not even as a means to deter or prevent crimes).[3] It is unjust to inflict a sanction on the person simply because

[2] Duff, *Intention, Agency and Criminal Liability* (B. Blackwell 1990) p. 103, Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) pp. 454-459, Nozick, *Philosophical Explanations* (Harvard University Press 1981) pp. 363-397.

[3] Rauscher, Kant's social and Political Philosophy, in *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/kant-social-political/ (last visited 12.5.2014).

such a sanction brings about socially desirable outcomes; the only justification for such a sanction is that the person 'deserves' it.

This view contrasts sharply with the view of law and economics and behavioural theorists. Under their view, criminal law is a mechanism for preventing/deterring undesirable behaviour.[4] Most typically criminal law norms (as well as other legal norms) are perceived as incentives for individuals to behave in a way that is socially optimal. A state of affairs that is socially optimal is often identified with efficiency, but it need not be identified only with efficiency. Distributive justice concerns could also be regarded as a legitimate goal of the economic/behavioural analysis.[5]

Unlike the retributivist tradition which often regards punishment as desirable in itself irrespective of its consequences, economic and behavioural approaches regard punishment as evil in itself (given its costs to society and to the criminal) but, it is at times a necessary evil to deter or prevent crime.[6]

By regarding efficiency (or any other social goals) as the primary (or even exclusive) consideration underlying criminal law, economic analysis of law as well as behavioural analysis conflict with the retributivist tradition and, such a conflict inevitably triggers incongruities between criminal law as it is commonly justified and understood and the economic/behavioural approach to criminal law. Let me briefly explore two examples of such incongruity.

The first incongruity touches upon fundamental assumptions concerning human rationality. In different ways the traditional criminal law approach and the law and economics approach are founded on assumptions concerning rationality. In contrast the behavioural approach relies heavily on the irrationality of agents or, at least on assumptions concerning 'bounded rationality', namely, on the existence of limitations on rationality. Most typically, the behavioural approach to criminal law often calls for exploiting cognitive errors and irrational human dispositions to deter or prevent crime. The policy recommendations of behavioural theorists in such cases are founded often on methods that can be described as manipulative and fraudulent. For instance it was argued that to deter parking violations one ought to use 'tricks' such as using 'large, bright orange tickets that

4 This view follows the utilitarian theory developed by Bentham, *An Introduction to the Principles of Morals and Legislation 74*, eds. Burns and Hart (1996). Becker, Crime and Punishment: An Economic Approach, in *Journal of Political Economy* 76:169-217 (1968), used contemporary neo-classical economics tools to develop Bentham's insights. For a more legally informed doctrinal analysis of criminal law along these lines, see Posner, An Economic Theory of Criminal Law, in *Columbia L. Rev.* 85:1193 (1985).

5 Harel, Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault. *California L. Rev.* 82:1181, 1201-8 (1994), Harel and Parcharmovsky, On Hate and Equality. *Yale L.J.* 109:509 (1999).

6 This was already the view of Bentham 1996 who maintained: 'all punishment is mischief, all punishment in itself is evil.' Bentham also inferred from this observation the principle of 'frugality of punishment', namely that punishment ought to be as small as possible to achieve its social goals. I believe it is unfortunate that this principle has been forgotten by contemporary legislators and judges.

read 'VIOLATION' in oversize letters on the drivers' side window where they are clearly visible to other drivers passing by.' The availability heuristic discussed below predicts that such a tactic would lead agents to overestimate the prospects of a parking ticket.[7]

In contrast, classical retributivism is often based on claims concerning the rationality of individuals and their capacity to make informed moral judgments and act on their basis. Arguments concerning 'free will' of individuals and their capacity to make autonomous choices are deeply entrenched in the retributivist tradition. To illustrate, Antony Duff's 'communicative theory' justifies punishment by pointing out that punishment conveys moral condemnation of the wrongful act.[8] The criminal process is described in his theory as a dialogue between the state and the criminal in which the state provides arguments and the criminal responds to these arguments.

The second important incongruity between criminal law as understood by traditional criminal law theorists and the economic/behavioural approach to criminal law focuses on what counts as punishment. The retributivist believes that punishment ought to be inflicted because criminals 'deserve' their punishment, and hence that what counts is the ex-post sanction – the *actual punishment* inflicted on the criminal. The retributivist acknowledges of course that sometimes the criminal is not detected and, hence, no punishment is inflicted. But once detected the criminal ought to suffer in proportion to the gravity of the crime. In contrast, economic and behavioural theorists of law regard criminal law as an instrument designed to provide optimal incentives. The sanctions that are relevant for their enterprise are the ex-ante sanctions – the *expected punishment* taking into account the probability of detection. Harsher actual sanctions are necessary therefore to the extent that the probability of detection is low and vice versa.

It follows from this analysis that distinctions that are central to legal doctrine such as the distinction between substantive criminal law, procedural law, evidence law, and the design of enforcement institutions, are perceived by economists and behavioural scientists to be artificial. As the effectiveness of deterrence (as well as other social goals) hinges not only on the substantive doctrines of criminal law but also on the probability of detection and conviction, the law of evidence and the enforcement policy become central to the economic/behavioural analysis and are inseparable from the substantive doctrines of criminal law. One of the most interesting and somewhat counter-intuitive results of this approach is that under both the economic and the behavioural approach, the optimal size of the criminal sanction is inversely related to the probability of detection and conviction. This view differs sharply from the retributivist tradition, which believes that the actual (rather than expected) punishment ought to be proportionate to the wrongfulness of the act and the culpability of the actor.

7 Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics. *Stanford L. Rev. 50:1471* (1998).

8 Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart University Press 2007).

2.2 Economic versus behavioural approaches to criminal law

The standard law and economics account of criminal behaviour begins with the observation that criminals (as well as other relevant agents such as judges, jurors, policepersons, and victims of crimes) are rational decision-makers.[9] Rationality however is understood differently than the rationality as understood within the retributivist tradition. Rational individuals as understood within this tradition are self-interested; they decide whether to commit a crime on the basis of weighing the expected costs and benefits resulting from it. These costs and benefits are not merely monetary; they include non-monetary concerns including sadistic satisfaction, love of adventure risk, guilt feelings, stigma etc.

The traditional economic analysis of criminal law explains human behaviour in terms of the expected costs and benefits of crime. These costs and benefits include parameters such as the probability of detection, the size of the sanction, the attitudes of individuals towards risk, the expected costs of the sanctions, etc. The basic premise of this analysis is that individuals make rational judgments on the basis of these parameters and guide their behaviour accordingly.

Many of the behavioural theories examined in this article challenge this claim. For instance, it is pointed out that the expected sanctions do not guide people's behaviour in mechanical or predictable ways. Criminal law influences individuals by modifying their beliefs and preferences. If there are systematic biases that distort the judgments of individuals, such biases alter individual behaviour and result in irrational behaviour. False beliefs concerning the severity of the sanction, the probability of detection etc. would inevitably lead the criminal either to commit crimes it is irrational for him to commit or not to commit crimes it is rational for him to commit. Yet, behavioural theorists also believe that such biases are not erratic or arbitrary; they are predictable and therefore can be exploited by policymakers. At the same time, behavioural law and economics maintains that policymakers/legislators themselves are also subject to such cognitive biases and those distort their judgments. Note that in the present context, the terminology of 'biases' and 'distortion' is not meant to be normative but purely descriptive; it is meant to denote that the behaviour deviates from the assumptions of economic rationality.

The dichotomy between rationality and irrationality is not always precise or easy to draw. The controversy concerning rationality is complicated given that many of the distortions identified by behavioural scientists may be rational in the long run as they serve (at least in the long run) to promote the interests of the agents. They often reflect therefore a difference between rationality with respect to any individual decision and rationality in forming long-term rational strategies.[10]

[9] Becker, The Economic Way of Looking at Life, in *Nobel Lecture, Economics 1991-1995,* ed. Persson (1997) pp. 38, 41.

[10] Kahneman, Maps of Bounded Rationality: Psychology for Behavioral Economists. *AER* 93:1449-75 (2003).

The behavioural approach exploits empirical and experimental findings either to complement or, at times, to challenge the premise of rationality of human agents. The difference between complementing and challenging deserves attention. Behavioural scientists complement the findings by attributing to individuals certain preferences on the basis of psychological observations. Thus, for instance, behavioural scientists may establish that under certain circumstances individuals can be risk-averse or risk-loving depending on the way they frame a given choice or that they discount future benefits hyperbolically. These dispositions are not required by rationality but they are not precluded by it either. At times behavioural scientists go further and challenge the findings of economic theory by pointing out that individuals are 'irrational'; they form false or misguided beliefs which are not supported by the evidence at their disposal, (e.g., they are too optimistic); they assess probabilities on the basis of anecdotal evidence; they make decisions based on the ways circumstances are being presented to them (framing) and not on the basis of how things really are. In such cases individuals operate in ways that fail to maximise their own utility.

The boundaries between complementing and challenging the findings of economic theory are not always clear, as it is not always clear what choices are rational or irrational. While it is always intellectually appealing for behavioural theorists to describe their findings as refuting the rationality of the agents, the question of whether such findings complement economic theory (by identifying the actual beliefs and preferences of individuals) or establish that individuals are irrational (because their beliefs or preferences are 'irrational'), is less crucial than simply identifying the behavioural phenomena and their potential relevance to legislators, administrators, and judges.

3 The behavioural approach to criminal law

Being ultimately a critical methodology designed to complement and challenge the findings of economic analysis of law, one traditional way of presenting behavioural findings is by contrasting them with the findings of traditional economic theory.[11] In the following discussion I shall follow this approach. At times however I will also contrast the behavioural findings with the retributivist tradition.

A word of caution: the behavioural analysis of law often applies general findings of behavioural science to the legal context. Psychologists investigate and make predictions as to how individuals act under uncertainty; what beliefs they form in different circumstances; what preferences they are disposed to adopt, etc. Legal theorists often apply these general predictions to the legal context. Such a methodology has risks as predictions concerning the behaviour of human beings are often sensitive to the context, and individuals

[11] Harel, Economic Analysis of Criminal Law: A Survey, in *Research Handbook on the Economics of Criminal law 10,* 2012.

facing a choice to commit a crime or to sentence criminals may behave differently than individuals facing choices in other contexts. To overcome this problem, behavioural law and economics theorists often examine empirically/experimentally the soundness of the general predictions in specific legal contexts. They do not apply automatically the general observations made by social scientists to the legal context. Instead they try to make independent investigations that involve legal uncertainty.

A much greater concern for the behavioural approach to law is the reliability of the behavioural method as such. Empirical/experimental research is currently a battlefield where different methodologies are being advocated and criticised, and theorists coming from different methodological schools expose deficiencies of other methodologies. This survey does not examine these debates and it will use indiscriminately research by theorists coming from different schools including in particular behavioural economics, cognitive psychology, and sociology. The reliability of one method or another is of course important but, as my aim is illustrative, it is not necessary to explore this issue here. The rest of this part 3 examines various behavioural phenomena that are relevant to criminal law doctrine or related fields.

3.1 Behavioural findings and their relevance to criminal law

As stated at the outset the behavioural analysis of law is an eclectic field. In this section I investigate various behavioural phenomena that are relevant to criminal law. The analysis is divided into two sub-sections. I first discuss behavioural phenomena that are individual and psychological, and then behavioural phenomena that are primarily sociological as they involve social interaction among individuals.

3.1.1 Psychological findings and the law

Behavioural observations on the optimal design of criminal sanctions and probability of detection

Criminal law differentiates sharply between the size of the sanction and the probability of detection and conviction. The size of the criminal sanction ought to reflect the seriousness and hideousness of the crime. The more hideous the crime, the harsher the sanction ought to be. Murder is ordinarily more serious wrong than burglary, and burglary is more serious than theft. The punishments for the different offences should reflect the hierarchy or gravity of the offence. Under this view, there is no relation between the probability of detection and conviction, and the size of the sanction. Empirical studies indicate that the traditional strict separation between these two questions reflects not only legal doctrine

but also the moral intuitions of most people. Individuals believe that the size of the sanction ought not to depend on the probability of detection.[12]

Economic analysis of criminal law rejects this view. The primary purpose of criminal sanctions is to deter individuals from anti-social behaviour. Increasing the probability of detection and conviction, and increasing the size of the sanction, are both congenial to deterrence. Both the probability of detection and conviction and the size of the sanction determine the size of the *expected sanction*, and it is the expected sanction that matters from the perspective of deterrence. As the expected sanction should not exceed what is necessary for the purpose of deterrence, it follows that the harsher the sanction, the lesser the probability of detection and conviction ought to be, and vice versa.

The legal system ought to determine not only the size of the expected sanction but also the size of the expected sanction's components: the probability of detection and conviction on the one hand and the size of the sanction on the other. In his seminal article on the economics of criminal law, Gary Becker provides a simple, compelling, and highly counter-intuitive answer to this question.[13] Under Becker's view, the answer to this question depends on the costs of increasing the size of the sanction on the one hand and increasing the probability of detection on the other. Becker maintains that if increasing the probability of detection is much more costly to society than increasing the size of the sanction, it follows that the legal system ought to inflict harsh sanctions even for the most trivial offences.[14]

The possibility that efficiency may under certain plausible conditions require increasing sanctions and reducing the probability of detection horrified even the most orthodox advocates of law and economics who tried hard to provide counter-arguments. For instance some theorists argued that harsh sanctions may have negative implications as they induce offenders to increase their investment in precautions, and therefore it may have negative effects on the probability of detection and conviction.[15] Further it was argued that imposing harsh sanctions for all crimes undermines marginal deterrence; if I already committed a parking offence for which I am liable to be executed, I would not be deterred from committing more serious crimes, e.g., killing eyewitnesses.[16]

12 Sunstein, Schkade, and Kahneman, Do People Want Optimal Deterrence, in *Journal of Legal Studies* 29:237 (2000), Baron and Ritov, The Role of Probability of Detection in Judgments of Punishment, in *Journal of Legal Analysis* 1:553-90 (2009).

13 Becker, Crime and Punishment: An Economic Approach, in *Journal of Political Economy* 76:169-217 (1968) pp. 183 – 184.

14 *Ibid.*

15 Mikos, Enforcing State Law in Congress Shadow, in *Cornell L. Rev.* 90:1411 (2005).

16 Posner, *Economic Analysis of Law* (Wolters Kluwer for Aspen Publishers 2007). I think that despite the fact that this is considered the standard and the most compelling efficiency-based reply to Becker's challenge this explanation fails. Even if the sanctions are harsh, marginal deterrence can be guaranteed by differen-

The behavioural tradition addresses this concern differently. Behavioural scientists explore which components of the criminal sanctions have a greater deterrent effect: the probability of detection or the size of the sanction. More specifically, they argue that while both increasing the sanction and elevating the probability of detection affect criminal behaviour, they need not necessarily have identical effects.

To clarify this point, let us define the concepts of risk neutral, risk averse and risk loving individuals. An individual is risk neutral to sanctions if he is indifferent as to two sanctions with equal expected value. A fine of $10,000 with a 1% probability of detection deters such an individual to the same degree as a fine of $100 with a 100% probability of detection. An individual is risk averse if he is deterred more by a harsh sanction with a low probability of detection (e.g., $10,000 with a 1% probability of detection) than by a light sanction with a high probability of detection (e.g., $100 with a 100% probability of detection). A risk loving individual is deterred more by a light sanction with a high probability of detection (e.g., $100 with a 100% probability of detection) than by a harsh sanction with a low probability of detection (e.g., $10,000 with a 1% probability of detection). If individuals are risk averse, the policymaker can increase deterrence by imposing harsh sanctions with low probabilities of detection; if individuals are risk loving, deterrence may be increased by imposing light sanctions with high probabilities of detection.

Criminology research has been struggling with the question what has greater influence on criminal behaviour: the certainty or severity of the criminal sanctions.[17] While empirical researchers debate this issue there are behavioural phenomena that support the claim that certainty should have greater effects than severity, namely that individuals are risk loving; they are deterred more by low sanctions with high probabilities of detection than by harsh sanctions with low probabilities of detection.

Take first the case of incarceration. Increasing the size of a sanction from a one-year to a two-year prison term does not double the deterrent effects of the sanction, because of a psychological phenomenon called discounting of the future.[18] Compare Arthur, who expects to go to the dentist tomorrow and have a painful treatment, with Betty, who expects to go to the dentist next month. Arthur is anxious and wakes up at night anticipating the pain while Betty has no anxiety at this point. Individuals tend to discount the significance

tiating the probability of detection for light and grave offences, i.e. by investing greater effort in detecting grave offences. For another explanation along the lines of traditional law and economics, see Polinsky and Shavell, Optimal Use of Fines and Imprisonment, in *Journal of Public Economics* 24:89 (1984).

17 Grogger, Certainty vs. Severity of Punishment, in *Economic Inquiry*, v29 n2 (April 1991) pp. 297-309.

18 For an accessible explanation of discounting, see Shane, Loewenstein, and O'Donoghu, Time Discounting and Time Preference: A Critical Review, in *Journal of Economic Literature* XL:351-401 (2002). For an application to the case of incarceration, see Harel and Segal, Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime, in *American Law and Economics Review* 1:295 (1999). Some theorists raised the conjecture that long periods of imprisonment have very small deterrent effect because of 'hyperbolic discounting', see Garoupa 2003 pp. 12–13, Bronsteen, Buccafusco and Masur, Happiness and Punishment, in *University of Chicago Law Review* 76 no. 3 (2009).

of distant future events. It follows that a second year of imprisonment (which inevitably starts only after the end of the first year) has a lesser deterrent effect than the first year (which starts immediately after conviction). A prison term of one year with a 2% probability of detection has a greater deterrent effect than two years with a 1% probability.

Another relevant explanation is based on the observation that legal sanctions are only part of the overall sanctions imposed on criminals. The criminal also suffers from stigma, which in turn often has both monetary and non-monetary effects on the criminal.[19] Criminal conviction exposes the criminal to both legal and social sanctions. Assume that conviction exposes the criminal to a legal sanction of $100 and to a social sanction worth $100 to him. The sanction is effectively $200. Assume also that the probability of detection is 1% and the expected overall sanction (consisting of the legal and non-legal sanction) is therefore $2. If the state increases the legal sanction from $100 to $200, the overall sanction increases from $200 to $300 and the expected sanction increases as a result to $3. Doubling the size of the (legal) fine in this case from $100 to $200 does not double the overall sanction. Yet doubling the probability from 1% to 2% would double the expected sanction from $2 to $4. Increasing the probability of detection has a greater effect on deterrence than increasing the sanction.[20]

Behavioural effects of uncertainty: the punishment and the detection roulettes

Criminal law tradition is committed to reducing as much as possible any uncertainty or unpredictability as to the scope of criminal offences and the size of the criminal sanction. Such certainty and predictability is required by principles of the rule of law and, consequently, such a principle is often entrenched in bills of rights and constitutions.[21] On the other hand, there is no attempt on the part of the social planner to guarantee certainty with respect to the probability of detection or conviction.

To illustrate, consider the following example. Arnold and Betty commit an identical offence under similar circumstances. Arnold is sentenced to 10 years, while Betty is sentenced to 5 years. This gap seems unjust and may perhaps provide grounds for appeal. There is no reason why different sanctions are imposed on individuals who committed identical offences under identical circumstances. In contrast, assume that when Arnold commits the offence, police invest little in enforcement and, consequently, the probability of detection is low. The police then increase the investment in detection, and when Betty commits the offence, she is caught as a result of this special effort by the police. It is diffi-

19 On the dramatic monetary repercussions of criminal conviction, see Lott, An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of Individual Reputation, in *Journal of Legal Studies* 21:159-87 (1992).

20 Traditional law and economic theorists could easily accept such an analysis and, strictly speaking, this observation ought not to be classified as 'behavioural'. I include it here as some behavioural scientists often emphasise the significance of stigma.

21 Harel and Segal 1999 pp. 281 – 285.

cult to claim in such a case that Betty was discriminated against even if she could not have known when she committed the offence that the police would increase its investment in detection, and even if she can prove that she would not have been caught unless the police changed its enforcement policy.

Another indication of the difference between uncertainty with respect to the size of the sanction and uncertainty with respect to the probability of detection can be found in the information given to individuals. Criminal law provides information with respect to the size of criminal sanctions; it does not provide such information with respect to the probability of detection. Criminal law doctrine guarantees that the sanctions meted out would not be more severe than the one in force when the offence was committed, but it does not guarantee that the probability of detection remains fixed. It is a basic principle of criminal law (and it is part of the rule of law more generally) that increasing a sanction for a criminal offence does not apply retroactively. A potential criminal can 'rely' on the size of a sanction as is specified in the law at the time she commits the offence. On the other hand, typically no legal system allows a criminal to argue that the probability of detection increased after the offence was committed.

More generally, different legal ethos governs the size of legal sanctions and the probability of detection. The severity of the criminal sanction reflects the seriousness of the offence; hence, the legal system is committed to consistency in inflicting sanctions. Most importantly, it is committed to providing 'fair warning' to criminals with respect to the size of the criminal sanctions. The detailed American Sentencing Guidelines are perhaps the most evident manifestation of the commitment of the criminal law system to provide a fair and precise warning. On the other hand, the probability of detection is under the dominant tradition a function of pragmatic considerations, which change from time to time. The legal system rejects punishment roulettes and tries to guarantee certainty and predictability with respect to the size of the sanction. It does not, however, oppose detection roulettes and the probability of detection is subject to uncertainty.

The differential treatment of punishment on the one hand and probability of detection on the other hand appears natural to traditional criminal lawyers, but from an economic perspective it is puzzling. After all economic analysis of law regards both punishment and detection as components of the expected sanction. Why should there be such a major difference between the treatment of the size of the sanction and the probability of detection?

A natural way to justify the differential treatment is to explain it on behavioural grounds as an effective means to increase deterrence. This justification is based on the expected reaction of a criminal to punishment roulette on the one hand and probability of detection roulette on the other hand.[22] To illustrate, compare the two following legal systems. Under the first system, every convicted thief is sentenced to two years in prison. Under the second system, there is a sentencing roulette that inflicts a sanction of three

22 *Ibid.*

years in prison on 50% of thieves and one year in prison on the other 50% of thieves. The expected sanction is two years in prison. Which system is more effective?

The answer to this question depends on the deterrent effects of each one of these systems. If thieves were risk averse, they would prefer the first system to the second system, and, consequently, sentencing roulette would have greater deterrent effect. If, on the other hand, thieves are risk loving they would prefer sentencing roulette, and therefore the deterrent effect of a certain sanction would be greater. Similar observations can be made with respect to the probability of detection roulette. If criminals prefer probability of detection roulette over a known probability (e.g., 50% of the criminals are caught with a probability of 1% and 50% with a probability of 3%), the deterrent effect of probability of detection roulette would be lower than the deterrent effect of a known probability (2%) and vice versa.

We can now evaluate the desirability of sentencing roulette on the one hand and probability of detection roulette on the other. As we saw earlier, the existing legal system rejects the sentencing roulette but endorses the probability of detection roulette. The current system is justified only if criminals are risk loving with respect to sentences but risk averse with respect to the probability of detection. There are indeed good reasons to believe so. As demonstrated above, criminals are likely to be risk loving with respect to terms of incarceration because of their disposition to discount future costs. Hence, predictable (fixed) terms of incarceration (e.g., 2 years in prison) are likely to deter individuals more than risky terms with the same expected length (50% of 1 year in prison and 50% of 3 years in prison). In other words, due to the discounting of the future criminals are likely to value the year they may gain by the lottery (the second year in prison) more than the year they may lose by the lottery (the third year) and hence they are likely to prefer a lottery over a fixed term in prison.

The infliction of fines requires a different analysis since unlike years in jail the entire fine is paid at once. There is however theoretical support for the view that criminals are risk-loving also with respect to fines. One of the major findings of prospect theory is that individuals are (typically) risk-averse with respect to gains but risk-loving with respect to losses. To determine whether a person is risk-averse or risk-loving one ought first to identify whether the agent perceives the decision as involving a loss or a gain. The subjective perception of a decision as involving a gain or a loss is often highly sensitive to the way the decision is described to the agent and to the context in which the decision is being made. Thus, if individuals face a choice between an 80% probability of gaining $100 or receiving (for certain) $80 they would prefer receiving $80. In contrast, if individuals face a choice between an 80% probability of losing $100 or losing (for certain) $80, they would prefer the lottery to the loss.

Punishment is naturally understood as a cost and consequently, under prospect theory one would expect criminals to be risk loving with respect to a sentencing lottery

involving fines. These observations support the existing legal regulation of uncertainty under which sentences are certain and predictable and probabilities of detection are not.

Yet, given the sensitivity of risk propensities to the 'framing' of the decision as involving either a loss or a gain, one may reach also other conclusions. In an experiment designed to examine the risk propensities of individuals to criminal fines, it was found that the transition from a certain/predictable schemes of fines to a risky scheme of probabilistic fines increased rather than decreased the effectiveness of deterrence.[23] One possible explanation is that individuals do not evaluate the sanction in isolation; instead they evaluate it in conjunction with the expected benefits of the crime. In deciding whether to commit a crime individuals discount the costs (fines) from the benefits and, if the sum is positive, they treat their decision as a decision involving gains. Prospect theory would in such a case predict that criminals would be risk-averse, and if they are risk-averse the optimal sanction ought to be probabilistic.

This example illustrates that behavioural science predictions are often not well defined. Punishment is clearly a cost to individuals who commit crimes. But it cannot be assumed without further investigation that criminals treat punishment as a cost or that their risk propensities with respect to criminal sanctions are aligned with the predictions of prospect theory concerning losses. What determines whether a person is risk-averse or risk-loving is the framing of the decision by the agent as a gain or a loss and not any external or 'objective' judgment as to its nature. As one theorist argued: '[w]hile the predictions of prospect theory are clear once a reference point has been established…it is far less clear what constitutes a reference point'.[24]

How to enrich the State by using prospect theory

Tax evasion is among the most common criminal offences and many resources are invested in an effort to reduce its scope. Behavioural scientists believe that prospect theory may be used to reduce the scope of tax evasion.[25]

As mentioned above, prospect theory predicts that individuals have differential attitudes towards risk. Risk attitudes are different in cases in which the decision involve probabilistic gains and cases in which the decision involves probabilistic losses. While

[23] Baker, Harel and Kugler, The Virtues of Uncertainty in Law: An Experimental Approach, in *Iowa L. Rev*. 89:457-68 (2004).

[24] Teichman, The Optimism Bias of the Behavioral Analysis of Crime Control, in *University of Illinois L. Rev.* 1696 (2011). This is part of a larger concern raised by Teichman, namely the concern that some cognitive phenomena are indeterminate. I investigate this concern at greater length below.

[25] Yaniv, Tax Compliance and Advance Tax Payments, in *National Tax Journal* 52:753 (1999) pp. 1700 - 1701, see also Guthrie, Prospect Theory, Risk Preference and the Law, in *Northwestern University L. Rev.* 97:1115, 1142-45 (2002-2003).

individuals are risk averse with respect to gains, they are often risk loving with respect to losses.

Tax evasion can be described as a lottery. The individual faces a choice to pay his taxes or to pay a smaller amount but to face a risk that, if caught, he would be subject to a large fine. The inclination to take risks hinges on the question of whether individuals perceive the lottery as a lottery designed to increase their gains or to reduce their losses. Further, the state can influence (at least to some extent) whether the lottery is perceived as minimising losses or maximising gains. Thus, the state can partially control the risk attitudes of individuals and manipulate them to promote its ends, namely to reduce tax evasion.

One instrument used by the state is advance tax payment. The state deducts money during the year and, at the end of the year, the taxpayer is required to provide an annual report of his income. If the income is larger than the evaluation on the basis of which the advance payments were made, the taxpayer pays the difference to the state. If the income is lower than the evaluation on the basis of which the advance payments were made, the tax authorities pay back the difference to the taxpayer. Should the state make a high evaluation of the income (and therefore most likely return money to the taxpayer at the end of the year) or should it make a low evaluation of the income (and charge the difference from the taxpayer at the end of the year)?

Prospect theory would recommend that the state make a high evaluation. High advance tax payments mean that tax evasion is a lottery over gains rather than losses. The taxpayer has already made the payment and he expects to get a return which, it is likely, will be perceived by him as a gain. Given the prediction of prospect theory that individuals are risk loving with respect to losses, one may expect that individuals would be more inclined to engage in tax evasion under a scheme in which the advance payments are small (and therefore the lottery involves losses) than in a scheme in which the advance payments are high (and therefore the lottery involves gains). Deterrence considerations suggest therefore that the state ought to prefer a system in which advance payments are high over a system in which advance payments are low, as high advance payments will result in greater compliance with the law.

Prediction postdiction and the law

Much of the discussion so far has focused on uncertainty. One of the interesting findings related to decision-making in uncertain situations is the differential treatment of future versus past uncertainty.[26] Psychological research suggests that individuals are less willing to bet on past events than on future events.

Assume that you have to bet on the result of tossing a die. In one case the die has already been tossed while in a second case the experimenter is going to toss it. It seems as

[26] Guttel and Harel, Uncertainty Revisited: Legal Prediction and Legal Postdiction, in *Michigan L. Rev.* 107:467 (2008).

if there is no difference between the cases. The probability of guessing correctly in both cases is identical. However, experimental research indicates that individuals react differently in these cases.[27] In another famous experiment, subjects were asked to choose between two possible bets: one involved guessing whether a particular stock had increased or decreased in value on the day *prior* to the experiment and the second involved guessing whether a particular stock would increase or decrease in value on the day *after* the experiment. The results indicated that 70% of individuals preferred the second bet.[28] It is shown below that the social planner can use the differential attitudes toward the past and future uncertainty in order to increase the deterrent effects of criminal law.

Precautions against crime are divided into two types. Some precautions operate before the crime is committed (e.g., cameras and LoJacks). Other precautions operate after the crime is committed (e.g., police patrols). The empirical findings concerning uncertainty indicate that precautions of the first type are more effective than precautions of the second type. In the case of the first type of precautions, the criminal bets on precautions, which operate at the time *the offence is committed*. He is asked therefore to bet on a die that has already been tossed, e.g., on the question of whether a camera documents his behaviour. In the case of the second type of precautions, the criminal is asked to guess the probability of a future event, e.g., a police patrol. The differential treatment of prediction and postdiction suggests that criminals are more likely to bet in the second case than in the first. Consequently, the first type of precautions is more effective.

One way to illustrate this point is to re-examine the operation of tax enforcement authorities. Typically, tax authorities use samples of individuals who are selected randomly. The sample is selected at the end of year. Taxpayers who consider committing fraud bet on the future; they bet that their names will not come up in the sample. It is easy to see how the system can change such that taxpayers bet on the past rather than on the future. If the lottery takes place not at the end of the year but at the beginning of the year, the taxpayers bet not on the question of whether their names *will* come up on the sample but whether their names *already appear* in the sample. This latter bet has greater deterrent effects.

The availability heuristic and criminal law

The traditional economic approach explores the influence of the size of sanctions and the probability of detection on deterrence. Behavioural economists argue that deterrence is not a product of the *actual* size of a sanction or the probability of detection but a product of the *beliefs* concerning the size of the sanction and the probability of detection. Can

[27] Rothbart and Snyder, Confidence in the Prediction and Postdiction of an Uncertain Outcome, in *Can.J.Behav.Sci.* 2: 38 (1970).

[28] Heath and Tversky, *Preference and Belief: Ambiguity and Competence in Choice under Uncertainty* (Stanford University 1990) pp. 5 – 28.

we examine how these beliefs are formed and shaped? Can we affect the content of these beliefs?

Some (and perhaps most) readers of this article have considered once or twice in their life whether to speed or to park illegally.[29] In such cases those readers also thought of the potential risks of such behaviour: the risk of being fined. But (with the possible exception of the fine for illegal parking) it is likely that the readers did not know the precise sanctions for such behaviour and certainly did not know the probability of detection.

How did those who decided to speed (or not to speed) or to park illegally and risk a fine (or drive for the third time around the block and look for a legal parking space) form their decision? There is perhaps one parameter that influences greatly such a decision. If on the evening before the event, one of your friends complained about getting a speeding ticket or you read in the paper a report on a police campaign against speeding, you are more likely to comply with the law. Psychologists call this phenomenon availability. The term 'availability' denotes the disposition of individuals to form their beliefs on the basis of anecdotal information, which they can easily recall from memory.[30] A famous example corroborating the availability heuristic is based on the following experiment. Individuals are asked how many seven-letter words in a 2,000-word section of a novel end in 'ing' give much larger estimates than individuals asked how many words in such a section have 'n' as the second-to-last letter, despite the fact that objectively there are more words which satisfy the latter than the former. It is simply the case that individuals can more easily recall examples of the former type of words than the type of the latter. More relevant for us is the finding that people tend to overestimate vivid/salient risks, such as car and plane accidents, school shootings, nuclear accidents, and underestimate less visible or publicised risks, such as heart disease. The former are well publicised and therefore people tend to overestimate the prospect that they may occur.

Our beliefs concerning the size of sanctions and the probability of detection are not formed by reading the penal law or reading the annual statistics collected by the police. Empirical findings show that individuals have little information both with respect to the size of the criminal sanctions and with respect to the probability of detection.[31] Instead these beliefs are often formed by a story we read in the news or an anecdote told by a neighbour.

Some theorists proposed to use the availability bias to reduce the rate of illegal parking by using colourful and visible parking tickets. The argument is that neighbours and

[29] Interestingly this was the trigger for the seminal article on the subject of criminal law and economics by Becker, see Becker 1997 pp. 38, 41. It seems that the only offence that can excite the minds of professors are speeding or parking offences.

[30] Tversky and Kahneman, Availability; A Heuristic for Judging Frequency and Probability, in *Cognitive Psychology* 5:207 (1973).

[31] Robinson and Darley, Does Criminal Law Deter? A Behavioral Science Investigation. in *Oxford Journal of Legal Studies* 24:173-205 (2004).

pedestrians will remember such tickets, thus creating great deterrent effects.[32] More generally, this view would imply that to be effective, enforcement activity ought to be salient and vivid such that it will be registered in the minds of potential criminals. The availability bias also suggests that the public punishments used in the Middle Ages (e.g., public flogging or public execution) was congenial to deterrence not because it provided accurate information concerning the probability of detection, but because it provided a memorable and salient reminder to individuals of the risks of conviction. Imposing overly harsh sanctions and publicising this fact may arguably be conducive to deterrence for this reason.[33]

It has also been pointed out that the availability heuristic influences not only potential criminals but the public opinion and this may lead to sub-optimal legislation or sub-optimal law enforcement policies. One theorist argued, for instance, that 'in criminal law, street crime (theft and violent crime) is especially vivid and frightful for most people. In contrast, white-collar crimes, such as financial frauds in which many victims lose small amounts, seem much less threatening'.[34]

The availability heuristic may affect not only decisions by people subject to the law, but also the decisions of policy-makers. Judges may impose harsher sanctions on criminals who have committed crimes that are salient. Crimes that they can easily recall from the press may be perceived as more threatening. More particularly they may perceive such crimes to be more common that they really are. Anecdotal evidence may influence their judgments in ways that do not accurately reflect the reality. Interest groups may exploit the availability heuristic by using anecdotal evidence designed to affect public opinion. For instance, potential victims of crime may overinvest in precautions against crime due to the intentional manipulation on the part of firms expected to gain from selling such precautions. To do so, such firms need not lie about the frequency of crime; they simply need to publicise anecdotal horrific stories concerning crime.

Over-optimism and criminal law

One of the persistent finding of behavioural scientists is that individuals tend to be over-optimistic. For instance it was noted that individuals tend to believe that they are very unlikely to divorce even at the face of the statistics indicating a very high rate of divorce. It has been claimed that over-optimism weakens deterrence by both causing po-

32 Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, in *Stanford L. Rev. 50:1471* (1998) p. 1538.

33 Legal theorists have used this argument to justify the imposition of capital punishment. It was argued that given the salience of capital punishment, it would be highly effective, see Sunstein and Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, in *Stan L. Rev.* 58:703, 714 (2005) p. 714.

34 Brown, Costs Benefit Analysis in Criminal Law, in *California L. Rev.* 92:323, 342 (2004) p. 342 .

tential criminals to overestimate the benefits resulting from crime and to underestimate the probability of detection and the size of the sanctions.[35]

Policy-makers ought to take these factors into account in determining the size of the expected sanction, and impose a harsher expected sanction than the sanction sufficient to deter individuals who calculate correctly the expected costs and benefits of crime. One may doubt, however, the degree to which the optimism bias should be used by policymakers. As potential criminals often have no knowledge concerning the probability of detection, it is not necessarily the case that one can take the actual probabilities of detection as a starting point and infer that criminals' subjective assessments of the probability of detection are lower. It was also pointed out that over optimism may cause criminals to underinvest in precautions, i.e., to be less careful; and such underinvestment on their part may be conducive to law enforcement.[36] Further over-optimism may also affect the behaviour of victims of crime and cause them to undervalue the risks of crime and consequently to underinvest in precautions against crime. This may require policy-makers to increase rather than decrease sanctions. The different effects of over-optimism on criminals and on victims of crime make it particularly difficult to know whether overall criminal sanctions ought to be harsher or lighter than the sanctions sufficient to deter individuals who calculate correctly the expected costs and benefits of crime.

Last, over-optimism may affect judges who may over-estimate the deterrent effects of sanctions and thereby impose harsher sanctions than optimal. They may therefore be too optimistic as to the influence of sanctions on the frequency of crimes and therefore impose sanctions that are excessive. Drawing attention to over-optimism of judges may perhaps 'de-bias' judges, namely enable them to provide more accurate evaluations and thus to be more realistic about the limitations of criminal sanctions.

Positive criminal duties: the duty of rescue

Criminal law typically consists of negative duties: it prohibits individuals from committing murders, thefts, and rapes. Liberal criminal law theorists are reluctant to impose positive duties. Yet this reluctance is not universally accepted. The approach of common law systems on the one hand and European or religious systems on the other hand is different; the former systems are much more reluctant to impose a duty of rescue. Positive duties exist in criminal law even in common law systems, but they typically hinge on the existence of prior relationships (such as the parent-child relationship) or special circumstances (such as drivers who observe a traffic accident). A classic case illustrating the common law's reluctance to impose positive duties is its refusal to embrace so-called 'good Samaritan' duties – i.e., duties to rescue.[37]

35 Garoupa 2003 p. 9.

36 *Ibid.*

37 Weinrib, The Case for a Duty to Rescue, in *Yale L.J.* 90:247 (1980).

Traditionally, the reluctance to impose positive duties is justified on grounds of autonomy. The legal system ought to protect the 'negative liberty' of individuals but it cannot dictate to them what to do. Richard Posner and William Landes think that legal responsibility for failing to rescue characterises communist or fascist legal systems, because the imposition of responsibility is a form of 'conscription for the social service'.[38] Under this view, individuals ought to be legally required not to cause harm to others but they ought not to have any legal obligations whatsoever to help others. Can the absence of positive duties in the common law be justified?

Arguably, it is very difficult to explain the absence of positive duties on economic grounds. The utilitarian tradition, which provides the normative foundations for economic analysis of law, imposes very demanding duties on individuals. Maximising utility requires one individual to help another as long as the marginal utility resulting from one's efforts is greater than the costs. My duty is therefore to serve the beggars of Jerusalem instead of sitting in my air-conditioned office and writing this text.[39] Naturally, it does not follow that the legal system ought always to impose such duties, as sometimes there are grave costs to legal enforcement. Yet it is quite difficult to explain in economic terms why, if I sit on the beach watching birds while my desperate friend is struggling to save his life in the water, the law ought not impose a legal duty to interrupt my favourite hobby and throw a rope to save him.

It is evident that often individuals engage in rescue even without a legal duty to do so.[40] But it seems that imposing legal sanctions would increase the willingness to rescue. One challenge to this view rests on behavioural conjectures, and especially on the influential conjecture of Richard Titmuss in his famous book, *The Gift Relationship from Human Blood to Social Policy*.[41] In this book, Titmuss identifies a psychological phenomenon that he labels 'crowding out'. Titmuss explores the practice of blood donations, comparing the American practice (in which blood donors receive monetary compensation) with the British practice (in which blood donors get no such compensation). Titmuss found that the willingness to donate blood in Britain is greater than the willingness to donate blood in the U.S. despite the absence of monetary compensation in Britain. His claim (which is highly controversial) is that monetary compensation reduces or annuls altruistic incentives, and therefore, the blood supply in a society in which blood donors receive monetary compensation may be lower than in a society in which blood donors receive no such compensation.

38 Posner and Landes, Altruism in Law and Economics, in *American Economic Review* 68:417 (1972).

39 Hills, Utilitarianism, Contractualism and Demandingness, in *Philosophical Quarterly* 60:225 (2010).

40 Heyman, Rescue Without Law: An Empirical Perspective on the Duty to Rescue, in *Texas L. Rev.* 84:653-738 (2006).

41 Titmuss, *The Gift Relationship: From Human Blood to Social Policy*, eds. Oakley and Ashton (New Press 1997).

Titmuss focuses his attention on monetary incentives 'crowding out' altruistic motivations, but his hypothesis can apply also to legal (and in particular criminal) sanctions 'crowding out' the same altruistic motivations. Under this view, by imposing a criminal law duty, law may weaken rather than strengthen the disposition of individuals to invest in rescue. Individuals may invest in rescuing precisely because they perceive it as a moral duty. Imposing legal responsibility for failing to rescue may turn the act from an act of charity, indicating the virtues of the rescuer, into an act that is merely done out of compliance with the law. Hence, legal sanctions may 'crowd out' the altruistic motivations and thus reduce the willingness to rescue.[42]

3.1.2 Sociological findings and criminal law

Criminal law and social norms

Social Norms Theory is based on the conjecture that there is an interaction between law and social norms. This view rejects the equation of criminal law sanctions as costs that decrease the inclination of criminal behaviour. While criminal law sanctions are also costs they are not only costs. Instead, the legal sanction itself influences individual preferences and social attitudes, and much of the influence of criminal law hinges on the resulting changes in preferences and also social pressures and stigma.

One branch of the social norms movement maintains that criminal behaviour is not determined primarily by the size of sanctions or the probability of detection. A person's criminal behaviour is influenced to a larger extent by the behaviour of other members of the person's social group, the rate of compliance in the society as a whole, perceptions of the justness of the legal system, etc.[43] The view under which law is merely an external incentive whose size is determined by legal sanctions does not reflect reality. In fact, there is an ongoing interaction between legal norms and social norms. The legal norms and the size of the sanctions inflicted on violators influence one's inclinations to perform the act and her perception as to whether such an act is morally appropriate. The effectiveness of the enforcement of criminal law norms determines to a large extent the social attitudes towards the legal norms and, in particular, the social norms governing behaviour.

A famous example identified with the social norms movement can illustrate these conjectures. The 'broken windows' metaphor is used to convey the idea that the willingness of individuals to obey the law depends on their environment. In particular, the theory posits that minor violations – graffiti, abandoned buildings, garbage, etc. – regularly

[42] This conjecture may also be supported by Gneezy and Rostechini, A Fine is a Price, in *Journal of Legal Studies* 29:1-17 (2000). In this case it was documented that once a fine was imposed on parents who are late in picking up their children from day-care, the amount of late arrivals increased.

[43] Posner, *Law and Social Norms* (Harvard University Press 2000), Kahan, Social Influence, Social Meaning and Deterrence, in *Virginia L. Rev.* 83:349 (1997).

encourage criminal activity.[44] This conjecture led the former mayor of New York City, Rudy Giuliani, to strictly punish such minor violations, as he believed that individuals adjust their behaviour not to the expected sanction but to the norms of behaviour prevailing among their neighbours and friends.[45]

In a famous experiment, the psychologist Phillip Zimbardo left a car with a broken window unattended and documented the resulting vandalism. Zimbardo found that the car had a negative effect on the behaviour of individuals.[46] The influence of social norms has different explanations, some of which can be accommodated within the frame of neo-classical economics. One explanation is the 'signalling' theory. Under this theory, individuals gain information from their environment with respect to the level of enforcement. Thus, minor violations (such as graffiti or broken windows) signal to individuals that the social order has collapsed and the probability of detection is low; therefore, crime is beneficial. Another explanation is based on the stigma effects of minor violations. If stigma is affected by the crime rate, a high rate for a crime indicates that there is no stigma attached to the crime.

Despite these observations it is important to note that these observations are highly controversial; the 'broken windows' theory was used to promote a right-wing political agenda and its implications have often therefore been exaggerated. One can nevertheless appreciate its scientific soundness without supporting the wild conjectures made by its ideological proponents.

3.2 Summary and critique

Part 3 provided various examples for the use of behavioural phenomena to understand the effects of legal rules and the effects of evidence rules and law enforcement policies. Further it also indicated how the lawmakers and policymakers can make use of these phenomena in designing laws and policies. Note that this section illustrates a central feature of the behavioural analysis of law, namely, that in contrast to traditional or classical law and economics behavioural law and economics does not have a single unifying theory. It is based on numerous empirical and experimental findings. Applying those to the field of criminal law often requires sensitivity to circumstances and context, and should be done with caution. Mechanical application of psychological and sociological findings without examining their relevance to the criminal context is often misguided.

The primary accusation of behavioural scientists is that traditional advocates of law and economics blinded themselves to the realities of law and criminality. More specifically they argue that criminals are not self-interest maximisers, and do not operate in the

44 *Ibid, p. 369.*

45 Harcourt and Ludwig, Broken Windows: New Evidence from New York City and five-City Social Experiment, in *U. Chicago L. Rev.* 73:271-74 (2006). Harcourt and Ludwig dispute the effectiveness of these methods.

46 See Kahan 1997 p. 356

ways attributed to them by economists. At best, we ought to complement traditional law and economics by examining what the real beliefs and preferences of criminals are. At worst, we ought to reject some of the premises of economic models. This article identified numerous behavioural phenomena that are relevant to the analysis of criminal law. These phenomena are only representative illustrations and many more could be discussed.

I wish to devote this part to raise some critical comments on the behavioural movement and the applicability of its findings to criminal law. The behavioural analysis examined above is subject to criticisms of two types: internal and external. Among the internal criticisms, one may mention specifically what one theorist labelled 'indeterminate biases', namely the use of terms that acquire precise meanings only in specific contexts such as gains or losses in prospect theory.[47] As illustrated above there is no natural way to classify punishment and it could be classified either as a loss if looked at separately or as a gain if looked at in conjunction with the gains resulting from the crime. This is not unique to the case of punishment, and it raises doubts as to the potential contribution of prospect theory to policy-making.[48] Further it was pointed out that the multiplicity of biases generates uncertainty as some of these biases may offset one another. People may for instance be over-optimists (and therefore underestimate the probability of detection) but, at the same time, be subjected to an availability bias which leads them to overestimate the probability of detection. It is difficult to predict under such circumstances which among conflicting biases is stronger or more effective.[49]

Beyond these internal objections, there is a sense that behavioural law and economics treats individuals mechanistically. Punishment is designed to 'train' the criminal. Concepts such as autonomy or choice, which are so central to criminal law, do not have a place within the behavioural tradition. Ironically, in the long run this view may erode the effectiveness of criminal law and, in particular, the effectiveness of the stigma attached to crime. If criminal law is nothing but a system of incentives whose effectiveness hinges on manipulation, fraud and cognitive biases (rather than a system of norms designed to guide individuals and aid them in deliberating on what ought and what ought not to be done), individuals would inevitably lose any feelings of shame or guilt or respect towards the criminal law. Instead, they would treat criminal law in the same way they treat powerful thugs. Such thugs inevitably intimidate, but their judgments do not guide individuals and their commands are disobeyed whenever it is safe to do so.

Last, some criminal law theorists believe that punishment is designed to cause pain to individuals and not only to deter them. Punishment is about retributive justice and it

47 See Teichman 2011 pp. 1700 - 1704

48 For an attempt to address this objection, see Zamir, Loss Aversion and the Law, in *Vanderbilt L. Rev.* 65:829 (2012) pp. 889 – 892.

49 See Teichman 2011 pp. 1704 – 1706.

seems that retributivism has no place either in the classical law and economics tradition or in behavioural law and economics.

4 Concluding remarks and future challenges

I will not deceive the reader by denying that the behavioural analysis of criminal law has so far had very limited effect on legal practice. There are very few fields in which economic analysis in general and behavioural analysis in particular had lesser impact than in the field of criminal law.

Perhaps, as I argued in a different context, the reason is the great interest of the public in criminal law (in contrast to other more technical fields of law). Criminal law deals with murder, robbery, blood, and love and beneath the gowns of judges one can sense intense passions and human sentiments.[50] The smell of blood, sweat and sperm can barely be disguised when criminal law is at stake. Economics and behavioural economics seem too impoverished to govern this field where death, blood, sex, love and hatred intermingle with each other. Perhaps philosophers rightly observe that retributivism is a primitive sentiment that ought to be overcome. But nobody has yet taught us how to do this, and the public and the legislature do not pay attention the pleadings of philosophers.

Furthermore, beyond the positive or negative effects of criminal law prohibitions on human behaviour, it is still the case that the existence of criminal law prohibitions (independent of what they are or what their effects are) serves, as Durkheim observed, to reinforce social solidarity. Durkheim believed therefore that society needs crime. To illustrate why Durkheim said:

> *Imagine a society of saints, perfect cloister of exemplary individuals, crimes, properly so called, will there be unknown; but faults which appear venial to the layman will create there the same scandal that the ordinary offence does in ordinary consciousness. If, then, this society has the power to judge and punish, it will define these acts as criminal and treat them as such.*[51]

Criminal law is not merely a means of training and inducing individuals to behave; it maintains and protects the social framework. This function cannot easily be translated into the language of economics or psychology.

These observations do not imply that economic or behavioural insights cannot be useful, but merely that their effects are at least ordinarily limited to the more technical aspects of criminal law, such as regulatory or white collar offences. Legal doctrine will continue to be governed by the Freudian id rather than by the rational ideals of social

50 See Harel 2012.

51 Durkheim, *The Rules of Sociological Method*, translation by Solovay and Mueller, ed. Catlin (Free Press of Glencoe 1964).

scientists. I also dare say that this is not merely a prediction but also a hope. Criminal law is the field where the ideals of freedom and autonomy are particularly important. As mentioned above, the behavioural approach sharply conflicts with this view; criminal law is understood to be about training individuals to behave according to the norms rather than teach them about what is right and wrong and guide them in their moral deliberations. Such an approach undermines the pretence of the criminal law to guide us, to aid in deliberating and to provide an inspiration.

This is but an example of a gap in the literature on the behavioural analysis of law. More specifically I want to urge social scientists and legal theorists to think harder what the normative significance of our preferences is. Precisely as in the context of criminal law I pointed out a tension between the ideals of autonomy and freedom of choice and the behavioural approach to criminal law, so such tensions can be found in other fields. Contract law theorists influenced by behavioural studies urge us to differentiate between our 'true' preferences and those resulting from cognitive biases. Ultimately to know what we really want, we ought to launder the preferences and beliefs, to purify them. But the more successful behavioural scientists are in pointing out biases and misperceptions the less the faith one has in the very existence of independent and authentic preferences that merit respect.

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Empirical Descriptions of Criminal Sentencing Decision-Making

The use of statistical causal modelling

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1 Introduction

There is nothing new about using empirical social science in the realm of sentencing law and practice. Sentencing has employed empirical descriptions of crime and sanctioning for centuries, just as law, crime, and punishment have been the subjects of sociological analysis throughout modern time. The novelty – if any – lies in the volume and authority of empirical social scientific descriptions over the last half-century. Today, empirical social science is an indispensable part of administrating sentencing systems in the Scandinavian countries. Many sentencing policies are prepared with reference to empirical accounts of sentencing practices and problems. Empirical descriptions of legal decision-making processes are more frequent, and empirical surveys of public and user attitudes towards sentencing decision-making, its quality and efficiency, have become integral parts of organisational management in local, regional, and national jurisdictions.

Empirical social science is used in many different ways with regards to sentencing. First, it is used to explain the causes, interpretive frameworks, as well as the consequences of sentencing law and practice.[1] What are the causes and the effects of the use of mediation and other alternatives? What is the explanation of the changing regulatory techniques employed in sentencing law? Are they reactions to a transnational deficit in public confidence? What are the effects of specific sentencing arrangements on specific crime preventive goals? For example, the correctional value of prison and suspended sentences,

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1 Aubert, *Om Straffens sosiale funsjon* (Akademisk Forlag 1954), Lappi-Seppälä, Explaining Imprisonment in Europe, *European Journal of Criminology* 8, no. 4 (2011), Aas, *Sentencing in the Age of Information. From Faust to Macintosh* (GlassHouse Press 2005).

of community service or youth sanctions?[2] Second, empirical social science is increasingly used as a theoretical and methodological framework to compare sentencing and other legal disciplines across countries.[3] For example, by exploring if sentencing arrangements in Scandinavia are exceptions to otherwise widespread Western penal trends.[4] Also, with social science comes a greater appreciation of the forms and techniques of transnational structures and how they interplay with local ones, leaving sentencing law and practice shaped by both.[5]

In this article, I investigate the most frequently used model in social scientific descriptions of sentencing decision-making – the statistical causal model. After having described the model and its characteristics, I identify and discuss three different aspects of sentencing decision-making that significantly challenge the usefulness of this model. My claim is that the model suffers from significant shortcomings. The model has a poor conception of law, it fails to grasp the dynamic processes through which facts and law are constructed, and it does not adapt to the rapidly changing organisational landscape of sentencing decision-making. Other and new models and methodologies should be brought to use.

2 The statistical causal model of sentencing decision-making

The primary function of most empirical descriptions of sentencing is to provide a reliable mirror in which sentencing law and policy can look to see if it recognises itself, if it likes what it sees, and if other and non-legal structures bear upon sentencing decision-making. Is offence severity actually the most important sentencing determinant? Does ethnicity matter to the sentencing? Which sentencing ideologies actually drive judges? And

2 Examples of this kind of Scandinavian research include Bondeson, *Fangen i fångsamhället. Socialisationsprocesser vid ungdomsvårdsskola, ungdomsfängelse, fängelse och internering* (Norstedt 1974), Clausen, *Samfundstjeneste - virker det?* (Djøfs Forlag 2007), Kjær, The Effects of Mixing Offenders with Non-Offenders: Findings from a Danish Quasi Experiment, *Journal of Scandinavian Studies in Criminology and Crime Prevention* 12, no. 1 (2011), Tranæs and Geerdsen, *Forbryderen og samfundet. Livsvilkår og uformel straf* (Gyldendal 2008). Examples are also found in Kyvsgaard, *Hvad virker - hvad virker ikke?* (Djøfs Forlag 2006).

3 See Cotterell, Comparatists and Sociology, in *Comparative Legal Studies: Traditions and Transitions*, eds. Legrand and Munday (Cambridge University Press 2003), Friedman, The Concept of Legal Culture, in *Comparing Legal Cultures*, ed. Nelken (Aldershot 1997), Nelken, ed., *Comparative Criminal Justice and Globalization* (Ashgate Publishing 2011). Concrete examples include Jones and Newburn, Comparative Criminal Justice Policy-Making in the United States and the United Kingdom. The Case of Private Prisons, *British Journal of Criminology* 45 (2005), Three Strikes and You're Out. Exploring Symbol and Substance in American and British Crime Control Politics, *British Journal of Criminology* 46 (2006).

4 Lappi-Seppälä 2011, Pratt, Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism, *British Journal of Criminology* 48, no. 3 (2008). See also Ugelvik and Dullum, *Penal Exceptionalism? Nordic Prison Policy and Practice* (Routledge 2012).

5 Nelken, ed., 2011.

what effect, if any, do confessions have on the length of prison sentences? Is sentencing practice uniform between courts?

Answers to these and other empirical questions of sentencing law and practice have become an accepted part of some legal research and of much policy-making. Methodologically, there are significant variations. Some studies use ethnographic approaches relying on qualitative and interpretative methods. Others, and by far the overwhelming majority of studies, continue to rely on quantitative and statistical methods designating sentencing decision-making as a causal relationship between fixed sentencing factors and sentencing outcomes. Through a variety of shapes and levels of complexity, the model plays the by far biggest descriptive role in sentencing research and policy.[6]

The simple version – counting the type, number, and amount of sanctions for particular offences – is well known and has been practiced for more than a century. It continues to dominate empirical work in public policy making. In the last thirty to forty years, statistical descriptions have become more common in both research and in policy, more reliable, and much more detailed. With the advancement of practical statistical tools in the 1960s, 70s, and 80s, and with the increased power of computers from the 80s onwards, multivariate statistical analysis (examining the relationship between multiple sentencing factors and the sentencing outcome) have become more mainstream to use.[7] It is this advancement of practical statistical technologies that has made available current empirical descriptions of sentencing decision-making and the factors that determine its outcome.

There is no question that the technical and methodological development from the empirical studies of von Eyben and Aubert in the 1950s and 60s to the later studies of Vestergaard in the 1980s, and again to the more recent studies of Kyvsgaard, BRÅ, Wandall and Hinkkanen and Lappi-Seppälä in the 1990s and 2000s, is significant.[8] Yet, the basic structure remains the same: *A model of sentencing that measures the variation in sentencing outcome (type of sanction and size of sanction) as a function of variations in multiple sentencing factors.* In the following I will refer to this model as 'the statistical causal model' or just 'the model'.

6 See for example the overview of Scandinavian sentencing research in Hinkkanen and Lappi-Seppälä, Sentencing Theory, Policy, and Research in the Nordic Countries, *Crime and Justice* 40, no. 1 (2011).

7 Hacking, *The Taming of Chance* (Cambridge University Press 1990), Stigler, *Statistics on the Table. The History of Statistical Concepts and Methods* (Harvard University Press 2000).

8 Aubert, Krigsrettsdommene i militærnektersaker, *Tidsskrift for Rettsvitenskap* 69 (1956) and *Straff og lagdeling* (University of Oslo 1963), BRÅ, Sannolikheten att dömas till fängelse. En Statistisk analys (Brottsförebyggande Rådet 2000), von Eyben, *Strafudmåling* (Gads Forlag 1950), Hinkkanen and Lappi-Seppälä 2011, Kyvsgaard, Samfundstjeneste i empirisk belysning, *Juristen* 4 (1999), Vestergaard, *Sanktionsundersøgelsen. Design og heuristik* (University of Copenhagen 1982), Wandall 2004.

The design of the model

Hogarth aptly describes this model of sentencing-decision making as a black box through which selected sentencing factors affect the outcome of sentencing decision-making.[9] What happens inside the black box is not clear. In some such models a few selected procedural factors are included to account for some of the processes between input and output factors. Models almost never account for the effect of variations between different kinds of sentencing institutions (court, prosecution, police), and almost never for the effect of variations between different courts or judges.[10]

The typical trademark of the model is its pragmatic combination of quantitative methodology and causal logic. It uses quantitative methodology to study the correlations between semantically pre-defined sentencing factors and pre-defined sentencing outcomes; and it relies on a logic of causality by assuming that statistical correlations between sentencing factors and outcome factors are causally related, when controlling for other possible correlations. For example, a categorically defined factor for 'prior criminal record' and its correlation with 'length of imprisonment, measured in months'.[11]

Sentencing factors

In describing sentencing decision-making this statistical causal model typically includes sentencing factors (variables) for the severity of crime, the prior criminal record, the personal circumstances of the defendant, and a few procedural circumstances, such as trial form and confession. Sometimes interaction effects between some variables are included in the analysis.

The criminal offence is always included and with few exceptions follows officially recognised distinctions, e.g. value of stolen property, aggravated nature of violence, or the weight of illegal drugs. Though we do know that the effect of offences vary according to a range of different internal narratives, this is typically not reflected in the variables.[12] Hinkkanen and Lappi-Sepälä include a wide range of offence characteristics, extracted from written judgments. Yet, even that source is limited to what has actually been written down in official court documents, and is often not identical to all that was communicated during trial.

The prior criminal record is typically constructed as a dichotomous variable (prior crime; no prior crime). In some studies, a second distinction between prior similar and prior different crime, is included. However, rarely, if ever, are other distinctions included.

9 Hogarth, *Sentencing as a Human Process* (University of Toronto Press 1971).

10 See further references in Wandall 2004 p. 155. See also Grendstad, Shaffer, and Waltenburg, Ideologi og grunnholdninger hos dommerne i Norges Høyesterett, *Lov og Rett* 51, no. 4 (2012).

11 See for example Hinkkanen and Lappi-Seppälä 2011 p. 396.

12 Ibid.

The same goes for the difference in the effect that prior crime can be expected to have for different offence categories.[13]

Personal and social circumstances of the defendant are often included in statistical causal models of sentencing. Age is typically included as a dichotomous variable (+/-18 years of age). This does mirror the official discourse, but does not reflect the fact that statistical effects are found between different age groups too, or with the fact that the effect of age can be expected to vary with the effect of other variables (offence category, prior crime, gender). Other aspects of personal and social circumstances – income, education, family conditions, employment, social ties, etc. are more difficult to collect data on for practical methodological reasons. In models used in policy reports, such variables are almost never included. In research projects, attempts are more often made to capture useful indicators for such variables. BRÅ used an aggregate statistical construction of presence of mitigating circumstances.[14] Kyvsgaard used available information about defendant's 'suitability for community service', and Wandall used a range of indicators of social integration.[15] Gender is included as a suspect category more and more often, as is ethnicity where numbers allow.[16]

Fourth, *procedural factors* are increasingly included in empirical descriptions and modelling of sentencing decision-making. Trial form, confession, and length of trial are among the more often included. However, well-known interaction effects between offence-related variables and procedural variables are rarely included as are other and equally empirically relevant procedural factors. Among others, the latter includes partly withdrawal of charges, part confessions, and the use of pre-trial custody.[17]

When it comes to the *sentencing outcome*, statistical causal models typically include the sanctions formally recognised as penal sanctions (conditioned charge withdrawal, fine, suspended sentences, combination sanctions, prison sanctions, etc.). Less often are procedural decisions and ancillary orders (e.g. confiscation, commercial disqualification, and other administrative orders), as well as monetary damages, included.

Statistical causal models bring enormous power to the description, analysis, and understanding of sentencing practices. Undoubtedly, they serve as an important tool in maintaining Scandinavian sentencing law and policy in an on-going dialogue with actual practices. Perhaps therefore it seems only natural to take a closer look at the design of this model and how it fares with empirical and theoretical challenges in the realm of sentenc-

13 Aubert 1963, Wandall 2004.

14 BRÅ 2000.

15 Kyvsgaard 1999, Wandall 2004.

16 Holmberg and Kyvsgaard, Are Immigrants and Their Descendants Discriminated against in the Danish Criminal Justice System?, *Journal of Scandinavian Studies in Criminology and Crime Prevention* 4, no. 2 (2003).

17 Vestergaard 1982, Wandall 2004.

ing. In the following I will focus on three empirical and theoretical challenges and discuss to what extent the statistical causal model is capable of responding to these.

3 The legal complexity of sentencing

The first challenge is about how the statistical causal model describes law and legal structures. Understanding *how* – not merely *if* – law matters in criminal sentencing has become increasingly relevant. The number of qualitatively different statutory rules, official guidelines, managerial standards, court practice guidance, and other kinds of regulations are being produced in an unprecedented volume. The institutions involved in the production of legal rules and standards are no longer merely legislature and courts, but also the police, the prosecution service, the department of correction and the many specialised departments that handle the wide range of different categories of cases. Any empirical ambition to describe sentencing and the structures that govern it requires a conception of law and legal structures that reflects this complexity.

The assumption of the statistical causal model is that it is possible to describe legal factors using social scientific variables, and that we can distinguish between legal and extra-legal factors using empirical social science validity tests of statistical relationships. Hinkkanen and Lappi-Sepälä defend research based on this assumption in their account of Scandinavian sentencing:

> *Extralegal coefficients should not be used in setting normative starting points for sentencing, so information on normative factors may be lost. Extralegal factors should be studied separately, by adding extralegal factors after the normative factors and structure are set.*[18]

However intuitively straightforward this sounds, it is problematic. First of all, describing legal factors using social scientific categories involves a change in disciplinary discourse. We rarely take notice of these disciplinary changes – but we do make them. Max Weber, who famously associated legal norms with social control, wrote about this:

> *When we speak of 'law', 'legal order', or 'legal proposition', close attention must be paid to the distinction between the legal and the sociological points of view.*
>
> *...*
>
> *the ideal 'legal order' of legal theory has nothing directly to do with the world of real economic conduct, since both exist on different levels. One exists in the realm of the 'ought' while the other deals with the world of the 'is'. If it is nevertheless said that the economic and the legal order are intimately related to one another, the latter is understood, not in the legal, but in the sociological sense, i.e., as being empirically valid.*[19]

[18] Hinkkanen and Lappi-Seppälä 2011 p. 311.

[19] Weber, *Economy and Society* (University of California Press 1978), p. 311-312.

However different from any contemporary theoretical position, Weber's remark serves well to remind us that empirical social scientific descriptions are exactly that – social scientific and empirical. It is in this latter sense that statistical causal models describe sentencing decision-making. This means that the model uses a different test of validity to determine if a sentencing factor is relevant or not, than do law. In the statistical causal model the test is if there is a statistically probable correlation of relevance. In a traditional legal model the question is rather if there is a sufficient legal reference. The validity tests are different and one cannot deduce from one to the other. Think for example of the fact that while empirical studies have found that socio-economic marginalised groups of young men are targeted discriminatorily in sentencing, all the legal decisions that went into these empirical descriptions were typically upheld in court and when appealed, also on appeal.

The second way in which this difference in disciplinary point of view is relevant, is that legal concepts do not have fixed meanings which can be translated into social scientific statistical categories. When translated, an irreversible change or selection of meaning also takes place. This cannot be handled by a mere distinction between legal and extra-legal factors. A legal category of 'confession', 'risk', 'suitable for community service', 'youth' may be carriers of a variety of different meanings into the sentencing process. When translated into statistical categories, these meanings are lost. This socio-legal reality is well described in the Danish police as well as in Danish courts.[20] I will return to this below.

Rather than seeing the statistical causal model as a tool to determine the relevance of legal and extra-legal factors, we should see the model as *an irreversible translation of law into empirical social science*. Despite its claim, the model cannot conclude anything about the law or legal structure of sentencing, but only about its social practice. And it cannot contribute to a better understanding of how law matters and how different regulatory techniques matter.

There are several theoretical developments that can help to better understand the connection between a social scientific description and law or legality. The strongest ones include the theory of structuration by Giddens (see for example the work of Henham), the theory of autopietic systems theory and its variations by Luhmann and Teubner (see for example the work of Aviram and of Wandall), and the reflexive matrix of sociology of

[20] Holmberg, *Politiets skøn i retssociologisk belysning* (University of Copenhagen: 1999) and *Policing Stereotypes. A Qualitative Study of Police Work in Denmark* (Galda+Wilch Verlag 2003), Wandall 2004 and *Decisions to Imprison. Court Decision-Making Inside and Outside the Law*, book series: Advances in Criminology (Ashgate Publishing 2009).

law by Banakar.[21] It is only the aim here to mention their presence, not to discuss them. They are markedly different from one another, but do share an ability to understand – in different ways – the difference in discourse between a legal and a social scientific point of view and frame it in a theoretical approach. This involves accepting variable meaning structures in the process of legal decision-making in sentencing. Accordingly, sentencing is not only a matter of which factor or norm (offence severity, offender characteristics, confession, etc.), but also of what meanings these different norms and facts carry into the sentencing.

The meanings of 'severity', 'confession', of 'mitigating circumstances', or 'dangerous offender', may vary in decision-making while the norm remains the same. Every legal rule and every legal fact acquires its operational meaning in a given context and therefore varies. In the case of sentencing decision-making, meanings are constructed through the institutions and people who prepare the case, the prosecution, the court, in the dynamics of the courtroom, and the ethics of the local community. Descriptions of offence severity and personal circumstances are not given facts but are constructed in the process of investigation, prosecution, and court decision-making in the framework of a particular political, social and cultural context.[22] That is what provides a sufficient fluidity for empirical social scientific descriptions to tell one story about sentencing decision-making and the legal framework to uphold a different one. On this level of meaning structures there is an operation of sentencing that is invisible to the law, yet constitutive of how norms of legal sentencing decision-making operate. This is a perspective that allows us a more complex but also more reliable description of how law matters in sentencing – without simplifying law to a static norm and without denying law its normative character.

4 Sentencing as a process of constructing facts and law

The second challenge of the statistical causal model is that facts and law in sentencing decision-making are themselves products of the social constructions and institutional dynamics in the decision-making processes of the justice system. There is a longer and

21 Aviram, *Managing Disobedience as Crime: Legal and Extra-Legal Discourse in Addressing Unauthorized Absences and Conscientious Objection to Military Service in Israel* (University of California at Berkeley 2005), Banakar, *Merging Law and Sociology. Beyond the Dichotomies in Socio-Legal Research* (Galda+Wilch Verlag 2002), Giddens, *The Constitution of Society. Outline of a Theory of Structuration* (Polity Press 1984), Henham, Human Rights, Due Process, and Sentencing, *British Journal of Criminology* 38 (1998) and Problems of Theorizing Sentencing Research, *International Journal of Sociology of Law* 28 (2000), Luhmann, *Das Recht Der Gesellschaft* (Suhrkamp 1993), Teubner, *Law as an Autopoietic System* (Blackwell 1993), Wandall 2009.

22 Johansen, *Livshistorier i straffesagen. Vidensprocesser om sigtedes person* (University of Copenhagen 2012), Wandall, Resisting Risk Assessment? Pre-Sentence Reports and Individualized Sentencing in Denmark, *Punishment and Society. The International Journal of Penology* 12, no. 3 (2010).

established tradition for this wider approach to study court decision-making.[23] This particular approach shows that the legal rules and the facts that structure sentencing decision-making do not (only) derive their meanings from the law itself or from the facts as they are brought into the decision-making process, but (also) from the institutional, procedural and social context and dynamics of the legal decision-making. This is a complexity that the statistical causal model of sentencing decision-making cannot handle, but nevertheless a complexity that is unavoidable. There does exist a handful of such studies in Scandinavia, but the number remains small, and we continue to have limited knowledge of this aspect of sentencing decision-making.[24] In the following I will look at one recent major contribution to illustrate.

Johansen's 'Livshistorier i straffesagen'

Johansen studied the processes of constructing information about the individual offender in the criminal process.[25] The title of the study is 'Life stories in the criminal case. Knowledge processes about the defendant's person'.[26] Johansen uses the actor-network theory of Bruno Latour to show that facts about the individual offender are not merely established in the process as objective legal facts, but are integral parts of the networks of relations that exist between people, institutions, and knowledge in the decision-making processes leading to criminal sentencing.[27] There are several social constructivist approaches to this insight. Latour represents one of the most promising. According to his theory information gets translated and negotiated through the individual stages of the decision-making process and their internal and external dynamics. Facts are themselves resources of the internal dynamics and as such are also carriers of purposes in the pro-

23 See for example Bennet and Feldman, *Reconstructing Reality in the Courtroom. Justice and Judgement in American Culture* (Rutgers University Press 1984), Latour, *The Making of Law: An Ethnography of the Conseil D'etat* (Polity Press 2010), McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan 1981), Nelken, *The Limits of the Legal Process. A Study of Landlords, Law, and Crime* (Academic Press 1983), Rosen, *The Anthropology of Justice. Law as Culture in Islamic Society* (Cambridge University Press 1984) and *The Justice of Islam* (Oxford University Press 2000), Scheffer, Hannken-Illjes, and Kozin, *Criminal Defence and Procedure. Comparative Ethnographies in the United Kingdom, Germany, and the United States* (Palgrave MacMillan 2010).

24 Examples of related research in Scandinavia include Andenæs, ed., *Kommunikasjon og rettssikkerhet. Utlendingers og språklige minoriteters møte med politi og domstoler* (Unipub 2000), Diesen, Lernestedt, and Lindholm, *Liket inför lagen* (Natur och Kultur 2005), Hald, *Web without a Weaver: On the Becoming of Knowledge. A Study of Criminal Investigation in the Danish Police* (Aarhus University 2010), Jakobsen, *Legitimitetens logik, institutionelle dilemmaer i det sociale klagesystem* (University of Copenhagen 2004), Johansen 2012, Johansen and Stæhr, *Lige for loven: En pilotundersøgelse af behandlingen af etniske minoriteter i straffesager* (ICJ: 2007), Järvinen and Mik-Meyer, Indledning: at skabe en klient, in *At skabe en klient: institutionelle identiteter i socialt arbejde*, eds. Järvinen and Mik-Meyer (Hans Reitzels Forlag 2003), Kjus, *Sakens fakta: fortellingsstrategier i straffesaker* (Unipub, 2008), Wandall 2010.

25 Johansen 2012.

26 My translation. Title in Danish: 'Livshistorier i straffesagen. Vidensprocesser om sigtedes person'.

27 Latour 2010.

cess. The result is that sentencing decision-making cannot be understood in isolation from the agents and institutions involved in the processing of cases; most importantly the Department of Corrections, the police, the prosecution and the courts. In her empirical findings, Johansen shows how facts about the individual offender are constructed around different meanings of normality, integration, and suitability. In turn, these meanings are typically framed in a spectrum between the majority and minorities, between 'us' and 'them', and are tied to particular ways of looking at the relationship between the individual and society. Johansen describes how social and cultural distinctions take on central roles in defining these meaning-structures. For example, 'risk' is not just an evaluation of future crime, but also an evaluation of how normal the defendant is, as understood in the settings of the Danish networks and institutions under study. Johansen even shows how silence (cultural silence) allows meanings of cultural differences to enter the process of decision-making meaningfully.

What this and similar studies show is that law and fact, as meaningfully constructed in the process of sentencing, are tied to the dynamics of the processing, its actors and their interaction, and to the organisational, social and cultural context of the decision-making process. It is this fluidity of meanings of fact and law that the statistical causal model misses. In effect, the model can only represent one of many constructions of sentencing decision-making, leaving other ones undescribed. For example, an offender is not merely young or adult (+/- 18), but is within reach or not, morally immature or not, and there may be institutional interests in and cultural preferences for working with some youth and not others. Prior crime is not merely prior crime. It may convey different meanings for different offence categories and for different types of offenders, and it may be used for different strategic purposes during the criminal justice process.

Besides this general socio-legal consequence of this established insight, there are also specific Nordic consequences. Immigration has changed the cultural landscape and introduced a new uncertainty in the everyday practice of criminal sentencing.[28] The cultural homogeneity, comparatively so characteristic for Scandinavian countries, has been replaced by a cultural heterogeneity – yet without the institutional languages to go with it.[29] With this come the problems of language, shared meanings of facts and rules, as well as the procedural challenges of misunderstandings between the agents of the process. However, the more fundamental uncertainty is that cultural interpretations become part

[28] Højsgaard Andersen and Tranæs, *Etniske minoriteters overrepræsentation i strafferetlige domme* (Syddansk Universitetsforlag 2011), Sarnecki, Strukturell diskriminering i rättsväsendet på grund av etnisk och religiös tillhörighet. En introduktion och sammenfattning, in Är rättvisan rättvis? Tio perspectiv på diskriminering av etniska och religiösa minoriteter inom rättssystemet, ed. Sarnecki, *Utredningen om makt, integration och strukturell diskriminering* (Statens Offenliga Utredningar 2006).

[29] This description is not meant to disregard the already existing plurality of cultures in Norway, Sweden and Finland. However, comparatively speaking, and considering the culturally different immigration, which all Scandinavian countries have experienced in the last twenty years, it is clear that criminal justice institutions today have to deal with a culturally more heterogeneous group of people than before.

of the process. All agents do not share a common meaning of a 'confession'.[30] That kind of uncertainty separates those who hold different understandings from each other, introducing social and cultural differences as operational distinctions in the decision-making process. The most likely effect is that it reinforces the difference in identity between cultural and social groups of society, fuelling a cycle of partial distrust in the law and its institutions from those groups of people.[31] Again, the challenge is not so much to study *if* law governs, but *how* law governs the decision-making process to accommodate these different social and cultural meanings without distancing any of them. This brings us to the third and final social scientific perspective of sentencing decision-making that I want to address: the organisational framework of sentencing.

5 The formal organisation of sentencing

We know from decades of organisational research that courts in action, just like other legal and non-legal institutions, take on a nature of their own.[32] The actual social practices of courts, prosecution offices, and police offices will always differ from their formal ideal to some extent.[33] Following this line of insight brings two developments to our attention, both of which challenge the statistical causal model of sentencing decision-making.

First of all, while our legal scholarly focus continues to be the courts and in particularly the upper courts, sentencing is moving down and out into new organisational settings. More cases are handled in the lower courts and more cases are handled by administrative agencies. The public prosecution finishes more cases than ever before. The police is by far the most frequent authority to hand down fines, and other departments – anything from environmental offices to departments of animal safety or social security – are instrumental in the processing, conviction and sentencing of offenders. Moreover, correctional

30 Johansen and Stæhr 2007.

31 Jackson et al., Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions, *British Journal of Criminology* 52, no. 6 (2012), Jackson and Sunshine, Public Confidence in Policing. A Neo-Durkheimian Perspective, *British Journal of Criminology* 47 (2007), Tyler and Huo, *Trust in the Law. Encouraging Public Cooperation with the Police and Courts* (Russel Sage Foundation 2002).

32 Merton, The Unanticipated Consequences of Purposive Social Action, *American Sociological Review* 1, no. 6 (1936), Selznick, *Leadership in Administration* (University of California Press 1984). In the sociology of law the equivalent is championed by Roscoe Pound as a difference between the law in the book and law in action, and by Eugen Ehrlich as a difference between norms of decision and norms of conduct (living law).

33 Some of the more famous accounts of courts and sentencing include Church, Examining Local Legal Culture, *American Bar Foundation Research Journal* (1985), Eisenstein and Jacob, *Felony Justice* (Little Brown 1977), Feeley, *The Process Is the Punishment* (Russel Sage Foundation 1979), Nelken 1983, Rock, *The Social World of an English Crown Court. Witness and Professionals in the Crown Court Centre at Wood Green* (Clarendon Press 1993), Ulmer, *Social Worlds of Sentencing. Court Communities under Sentencing Guidelines* (State University of New York 1997). See also the Scandinavian examples: Holmberg 1999 and 2003, Johansen 2012, Kruize, *Beviskrav, ressourcer og opportunitet* (Djøfs Forlag 2004), Mathiesen, *Skjellig grunn til mistanke?* (Pax Forlag 1989), Wandall 2009.

departments – like earlier in the twentieth century – govern decisions about sanctioning that could otherwise have been handled by the courts. For example, community service in Sweden and electronic monitoring in Denmark. And perhaps most importantly, some cases are referred to alternative and semi-legal institutions, most significantly institutions for alternative dispute resolution. The current use of statistical causal models of sentencing shows little appreciation of these shifts in organisational frameworks and the changes in social practice that follow. Not only do we know too little about the institutional framework within which courts practice – we know even less about the framework in which sentencing is carried out in the many other places where it actually does take place.

Second, we know from many empirical studies that sentencing varies between courts and that it varies between judges.[34] Nevertheless, the statistical causal model assumes uniformity in sentencing practices between courts and judges. Furthermore, we know that sentencing actually reflects social norms in daily practices of courts, and yet these are never accounted for in any of the sources of typical statistical casual models. Instead, sources of variables are often guided by the practical availability of data and the modelling guided by the statistical need to reduce the number of variables and categories to increase the overall explanatory power of the statistical model. The result is a close connection between the formal organisation of sentencing and the choice and construction of variables in the model. For example, there is a rough variable for offence category corresponding to the formal category of offence severity; there are rough variables for age and prior crime, corresponding to the equivalent formal categories, and there may be a variable of confession, corresponding to the defendant's confession to the crime, as described in the final judgment. But if this is the original full confession – which it rarely is – is not considered in the model.

So, while it must be recognised that more and more sentencing law relates to empirically based policy work and more and more statistical studies are made of sentencing, it can be argued that the same empirical descriptions remain aligned with the existing formal legal framework of sentencing decision-making. The statistical causal models may be very useful for organisational planning and for alignment with existing legal frameworks, but the power of this statistical causal model to produce empirically reliable descriptions, and to confront and challenge formal assumptions of sentencing decision-making, lacks.

6 Conclusion

The still most widely used model to describe actual sentencing decision-making is that of a statistical causal model. The argument advanced in this article is that this model, its design and construction of variables, needs a stronger empirical foundation. Furthermore, the article argues for a more balanced use of other and different social scientific

[34] BRÅ 2000, von Eyben 1950, Wandall 2004.

methodologies to describe sentencing decision-making and the role of legal guidance in sentencing.

The statistical causal model needs to loosen its close ties with the formal construction of sentencing and instead look for a more empirically based design of its choice and construction of variables. Furthermore, descriptions of sentencing decision-making needs to be more open to the procedural aspects of how facts and law are constructed in the decision-making and should invite for a better understanding of the construction of meanings that takes place and that provide a significant framework for sentencing decision-making. The statistical causal model should come to terms with its inability to confront the legality of sentencing from a legal point of view and instead invite different models to provide a better grasp of the more complex relationship between empirical social scientific views of sentencing and a legal one. The increasing complex landscape of legal rules and regulatory standards of sentencing makes this all the more important. Moreover, the statistical causal model should reflect key institutional changes in the organisational framework of sentencing.

The statistical causal model has earlier provided a key platform for challenging how law described sentencing decision-making. The model continues to offer useful descriptions and analysis of a variety of perspectives of sentencing. Nevertheless, there are important aspects of sentencing that we cannot observe with the current widespread use of statistical causal modelling. A widening in methodology and in conceptualisation of sentencing decision-making would be a welcome development.

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Concordance between Actual Level of Punishment and Punishments suggested by Lay People – but with less use of Imprisonment

LEIF PETTER OLAUSSEN *

1 Introduction

Democratic ideals demand that offenders should be punished in accordance with standards shared by citizens. Implicitly, it is assumed that shared perceptions on moral wrongs are converted into positive (penal) law through the law making processes, and that equally shared perceptions of punishments are employed by the courts when they sentence people. In Norway the Supreme Court is the final appeal court for sentences, and it is assumed that its sentences have a decisive influence on the sentencing practices in lower courts. The intention is that the Supreme Court should be a decisive regulator of the actual level of punishment practiced by every court. Now and then, the Supreme Court argues that a sentence that is appealed is not in accordance with people's general sense of justice. When amending a sentence, the Supreme Court states implicitly, and sometimes even explicitly, that the new sentence is in agreement with people's sense of justice without having any kind of empirical evidence to sustain the claim.[1] As the Supreme Court only has professional judges, it is just possible that the court fixes a level of punishment that is not in accordance with penal attitudes in the population.

To implement a real influence of rank-and-file Norwegians on the courts' processing of criminal cases, and to monitor that the system would comply with ordinary people's sense of justice, lay judges are thought to be important members of our court system.[2] For

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1 For references to a selection of relevant Supreme Court sentences, see Stridbeck, Ytring, *Tidsskrift for strafferett* (2005) 3 pp. 207-209.

2 Every fourth year a pool of lay judges is established for each court by municipal boards within the court's jurisdiction. From this pool the courts selects randomly an equal number of judges of both sexes to each case.

more than a hundred years, lower courts have had two lay judges and one professional judge who on equal terms decide both verdict and sentence. Since 1995, the sentence in all cases heard by Norwegian courts of appeal (lagmannsretten) is always decided by four lay judges and three professional judges. In about 46 percent of cases where the verdict is tried by the court of appeal, it is decided by a ten-person jury.[3] In the rest of such cases the verdict is decided by four lay judges and three professional judges.

Although lay and professional judges formally are on an equal footing when deciding sentences, they are not equals when it comes to knowledge relevant for sentencing. When all judges meet to fix a sentence, lay judges can only evaluate a committed offence against moral standards, the prosecutor's interpretations of law and sentences suggested in court by the prosecutor and defence lawyer. Professional judges can in addition draw on their expert knowledge from their law studies and professional practice. In spite of these differences between lay and professional judges, we know from two studies of lower court sentencing that all three judges agree on sentences in about 95 percent of cases.[4] In a clear majority of the five percent of cases with a dissenting judgment, one of the lay judges wants a more *lenient* punishment than his fellow judges, or the professional judge wants a *harsher* punishment than the two lay judges. These studies do not, however, explain the very high degree of unanimity in sentencing. We don't know if the lay judges are persuaded or put under pressure by the professional judge, or whether the unanimity is an outcome of more or less spontaneous agreement. However, I don't know of any information indicating that lay judges feel that they are 'hostages' in the sentencing process in courts, only doing what the professional judges expect them to do. Only five percent of lay judges answered in a recent survey that they had experienced that a professional judge had tried in an unreasonable way to influence them to change their mind about a sentence.[5] I think that this indicates that there is a fairly high degree of unanimity in the Norwegian society about what is a fair sentence.

2 Research question

Since the late 1980s, Stortinget (the Norwegian parliament) has passed several law amendments that contribute to increasing harshness of punishments for several crimes, although Norway still is a country with a comparatively low level of prisoners.[6] In addition to serious white collar crimes, different kinds of drug crimes (smuggling, production, buying and selling) a wide spectrum of violent crimes are typical actions which now

3 NOU 2011: 13 p. 150.

4 Aubert, *Straff og lagdeling*. (Institutt for samfunnsforskning, Oslo 1963) and Olaussen, Folks tillit til og medvirkning i domstolene, *Tidsskrift for strafferett* (2005) 2 pp. 119-143.

5 NOU 2011: 13, p. 280 question 33 and p. 283 question 49. Question 47 at p. 283 shows that 5 percent give an equal answer related to the verdict.

6 See review of amendments 1980-2000 in NOU 2002: 4, kap. 3.4, at pp. 65-75.

are punished harsher than they used to be. So far, the last legislative enactment in line with this trend was in May 2009 when Stortinget decided to increase the punishment for fourteen types of violent actions including rape, sexual intercourse with children and spousal abuse.[7] All political parties agreed, and several representatives expressed their satisfaction for the unanimity to increase the punishments as they passed the last part of a new penal code for a new century. The minister of Justice said that the amendments generally would increase punishments with about one third, but would double punishments for rape. Members of Stortinget explicitly said that they expected that the courts immediately would start practicing this. However, in November 2009 the Supreme Court found it unconstitutional to do so because the enactment was part of the new penal code, which had not yet come into force.[8] Since it was expected that it could take a couple of years until the law would come into force, Stortinget in June 2010 passed the same penal law amendments, amending the penal law currently in force.[9] Now the courts had to increase punishments immediately.

There are no indications in the documents, which were the basis for the processes leading to the law amendments in 2009 and 2010, that members of Stortinget were concerned about what the people they represent in Stortinget thought about the amendments they discussed. Perhaps the politicians did not care about this, or maybe they either believed that their opinion was shared by the population, or that the amendments might be examples of what Bottoms called 'populist punitiveness' among politicians.[10] He explicitly mentioned drug crimes, sex related crimes and crimes of violence as types of crimes most prone to this.

However, was this tightening up of punishments in 2009-2010 in accordance with attitudes to punishment among ordinary citizens?

3 Study design

During autumn 2009, a comprehensive comparative study of citizen's attitudes to punishment was conducted in the five Nordic countries.[11] The general design of the study

7 28.05.2009. Besl.O.nr.88 (2008-2009), Amendment of Act 2005-05-20-28 (Straffeloven/Penal code 2005).

8 Rt. 2009 p. 1412 (Norway).

9 Act 2010-06-25-46.

10 Bottoms, The Philosophy and Politics of Punishment and Sentencing, in Clarkson and Morgan (red.). *The Politics of Sentencing Reform* (Clarendon Press. 1995) pp. 17-49, pp. 39-40.

11 Preliminary results for Denmark, Iceland, Norway and Sweden were presented at the 15. Nordiske kriminalistmøde i København (the 15th Nordic Congress of Criminalists, Copenhagen August 19th 2010), published in Nordic languages in *Nordisk Tidsskrift for Kriminalvidenskab* (2010) 3 pp. 232-250.

was a replication of a previous Danish study.[12] In each country, four internally connected studies were carried out (point 1 – 5 below).

1. Citizens' spontaneous and *general opinions* about level of punishment were explored in a nationwide telephone survey (N=1000).
2. Citizens' case related *penal attitudes* were explored in two studies with different designs. One was a post survey; the other was focus groups (see 3 and 4 below). Each of the designs gave unique information about the same phenomena, and the overlapping information from two independent sources represents an important possibility to control the validity of the study. Valid information from both should yield congruent portraits of citizens' attitudes to punishments.

The same research instrument, a questionnaire that included a description of six crimes, was used in both studies. Each case description covered a half to three quarters of a page (between 260 and 514 words), including some information about the perpetrator.[13] The only heading connected to each case was a number to avoid indication of (a legal) type of crime, and for the same reason all case descriptions were without legal terms. The cases will in the following be referred to by brief case labels indicating what the cases were about. They were presented in the following order in the questionnaire:

- *Spousal abuse*: a man commits violence against his wife in their home.
- *Heroin smuggling*: a person addicted to heroin smuggles 250 grams of heroin into Norway.
- *Kiosk robbery*: a man threatens an employee in a kiosk with a knife to give him the money in the safe, 16.000 NOK.
- *Rape*: a woman is raped in a hotel by a man whom she meets during a weekend seminar arranged by their employer.
- *Bank embezzlement*: a female bank employee commits aggravated embezzlement in the bank where she is employed.
- *Assault*: a man commits assault against another man outside a night open grill bar.

Respondents in the post survey and in the focus groups were asked to answer three questions for each of the six cases:

- Which punishment do you think *a court* would inflict?
- Which punishment would *you yourself* inflict?

12 Balvig, *Danskernes syn på straf* (Advokatsamfundet, København 2006).

13 The information about the perpetrator was systematically varied between questionnaires used in the post survey (a vignette design) to be able to explore if and how different aspect of perpetrator's background would influence punishments suggested by citizens. All together there were 48 variants of the six cases put together in 8 different questionnaires that were mailed to respondents.

- Which punishment do you think that *people in general* would inflict?

The respondents could choose their answers among 31 pre-coded alternative sanctions, including no sanction, listed at the back of each case description.[14] The tick off-list was (implicitly) partly ordered with more lenient sanctions at the top of the list. Respondents were allowed to answer each question by ticking off one or two sanctions.

3. Respondents for the post survey (N= 3000) were selected as a simple random sample, males and females age 18-74, from the national census register. The response rate was 31 percent, which is very low, lower than expected, and may produce biased results. However, the study design has a built-in possibility to reveal biases, because the post survey and the focus groups should give fairly equal results if the participants are unbiased samples of the population. Results based on data from both samples will therefore be reported.
4. Focus group respondents were obtained in Oslo. A market research institute (Opinion AS) recruited 120 participants through telephone interviews, and picked out participants according to specified criteria: equal representation of men and women and of three age groups (18-29 years, 30-49 years, 50-74 years).[15] People working in the criminal justice sector were not recruited, neither were people educated in law, criminology or psychology. In addition – and most important – the focus group participants' spontaneous and *general opinions* about level of punishment should be *equal to the opinions found in the nationwide telephone survey* (see 1 above). In this respect the focus group participants are a *matched sample* of adult citizens in the country.[16]

The focus group participants were assigned to 12 groups, which had one meeting each in the premises of the market research institute. These meetings were monitored by one of the institute's employees, and each group carried out five activities in sequential order: Participants

- answered the same questionnaire as respondents in the post survey.[17]
- watched a short (14-25 minutes) mock trial film of court proceeding of one of the cases in the questionnaire.[18]
- answered a questionnaire about punishment for the accused in the film.[19]

14 See questionnaire in Olaussen, *Hva synes folk om straffenivået? En empirisk undersøkelse*. (Novus forlag 2013) p. 217 ff.

15 117 persons participated because 3 did not come to their group.

16 See Olaussen 2013 tables 3.2 and 3.3 p. 58.

17 Only *one* variant of each case was used in the questionnaire in focus groups. Se *supra note 13*.

18 A mock trial film was made of *four* of the six cases: Heroin smuggling, kiosk robbery, rape, and assault.

19 The same pre coded categories as in the post survey.

- discussed punishment for the accused in the film for about one hour. They were asked to give their reasons for the punishment they would inflict, and their discussions were taped and later transcribed by the market research institute. They were informed that they were not expected to come to an agreement.
- answered a final questionnaire about punishment for the accused in the film.[20]

When answering the questionnaires, the focus group participants were supervised and not allowed to talk. Having completed a questionnaire, the participant put it in an envelope, closed it, and wrote a unique participant number on the envelope and put it in a box. The unique participant number made it possible to know if participants changed their mind about punishment during the group process. My only relation to the focus group participants was that I could watch and listen to the group activities from a neighbouring room through a one-way screen.

5. The *actual level of punishment* for the six cases in the questionnaire was set by experienced lower court judges (tingrettsdommere). They read all variants of the six case descriptions used in the survey questionnaire, and were asked to stipulate what the *punishment* would be if the cases were brought before the court, and they could of course choose any punishment available in penal law. This was done by two independent panels of three judges working in two different cities. Except for the robbery case, the punishments suggested by the panels were very similar and will be denoted as the actual level of punishment. It will be compared with the sanctions that lay citizens participating in the post survey and the focus groups would inflict.

4 Aggregate level analyses: concordance of punishments?

Although we wanted to know which punishment the respondents *themselves* would give in each case, respondents in the post survey could of course discuss the cases with family members, friends, or others before they answered the questions. They could phone anyone they considered to be an expert, or consult different sources on the Internet, for instance publicly available court decisions, and they could spend several weeks dwelling on the answers. Focus group participants were in a different situation. They had been phoned by a marketing research institute and asked to participate in a discussion about punishment, which they had accepted, but they did not receive any information about cases or the questionnaire before they arrived at the premises of the marketing research institute for the discussions. There they were asked to answer our questionnaire without talking to anyone else. Within half an hour they should read the questionnaire and figure out completely by their own if they would punish the perpetrators and by which punishment. The total frequencies of different kinds of sanctions suggested for all six cases by

[20] The same pre coded categories as in the post survey.

respondents in the post survey and by the focus group members are presented in table 1. In this table (and later Figure 1 and 2) data from the post survey only include data from a subgroup[21] of respondents who answered a questionnaire with case variants[22] *identical* to the variants used in the questionnaire for focus group participants.

Table 1: Frequency of sanctions which respondents in the focus groups and in the post survey themselves would impose – total for all six cases. (Weighted data.)

	Focus groups		**Post survey**[1)]	
Sanctions	**N**	**%**	**N**	**%**
No punishment	2	0	3	0
Conflict council mediation	30	4	25	4
Fine	41	6	21	3
Conditional imprisonment	154	22	156	26
Community punishment	70	10	53	9
Electronic ankle bracelet	22	3	18	3
Unconditional imprisonment	402	58	363	59
Treatment	175	25	110	18
Pay economic compensation	307	45	233	38
Sum	1203	173	982	160
Percent basis[*)]		689		611

1) Only case variants identical with those included in the questionnaire used in the focus groups are included.

*) Number of cases in all questionnaires which had a valid answer. (One questionnaire with valid answer to all cases counts as 6.) A few invalid cases/answers are not included.

Frequencies in table 1 include all sanctions, whether the respondent ticked off one or two sanctions. Because many ticked off two sanctions the sum of frequencies (1203 and 982) is higher than the total sum of cases in all questionnaires with a valid answer (689 and 611), in the focus group and post survey respectively. The tendency to tick off two sanctions was a bit more widespread among focus group participants than among survey participants. That is why the sum of percent frequencies is 173 for the first mentioned and 160 for the last. This difference between the two sets of data is due to two of the sanctions, treatment and payment of economic compensation to the victim, both being ticked off a bit more frequently by focus group participants than by survey participants. These sanctions were virtually always ticked off together with another sanction; mostly (uncon-

21 The size (N) of the sub groups varied across cases, from 106 to 122.

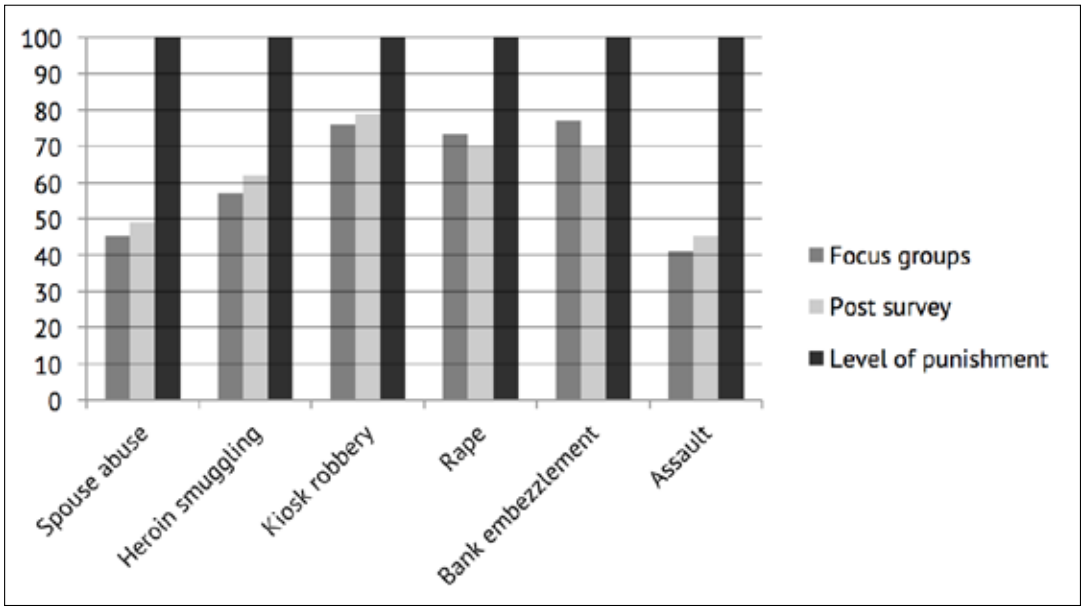
22 See supra note 13.

ditional) imprisonment. The fact that practically every participant in the two population studies suggested a sanction for the six perpetrators, indicates that the participants perceived the perpetrators' actions to be of such a serious character that he should be met with a sanction.

In table 1, there is a remarkable degree of consensus in answers across data sets in type of sanctions chosen by the respondents. Unconditional imprisonment is the punishment with the highest frequency both among respondents in the focus groups (58 percent) and in the post survey (59 percent), or about 60 percent if electronic ankle bracelet is included as a form punishment implying loss of freedom. Payment of economic compensation to the victim, treatment of the offender, and conditional imprisonment follow as the second, third, and fourth most chosen sanctions, with relatively small differences between data sets.

The unanimity in punishments suggested by the respondents compiled in table 1 might, however, hide divergent views on each of the six cases, and this table does not give any information about punishments suggested by citizens compared to level of punishment in courts. As the six professional judges who assessed the cases in the questionnaire agreed that the perpetrator in all cases would be sentenced to unconditional imprisonment, it might be quite informative to know whether the citizens who participated in the study shared the judges' opinion. Figure 1 shows the percent of focus group participants and participants in the post survey who would give the perpetrator unconditional imprisonment.

Figure 1: Percent of respondents in focus groups and post survey who themselves would impose unconditional imprisonment (incl. electronic ankle bracelets) as punishment. (Weighted data.)



The judges who stipulated the actual level of punishment for the six cases believed that a Norwegian court would give unconditional imprisonment in all cases, indicated with 100 percent in figure 1. The judges believed that the offender would get 2-5 months in two of the cases, spousal abuse and assault, between 3 and 5 years for heroin smuggling, between 2 and 3 years for kiosk robbery and rape, and five years or more for bank embezzlement. However, figure 1 shows that fairly large parts of respondents in the studies would *not* themselves give the perpetrator prison punishment. The lower tendency among study participants to suggest unconditional imprisonment is very similar across the studies for all six crimes. The differences in percentage that would give unconditional imprisonment between the population studies are relatively small. For assault and spousal abuse, between 41 and 49 percent would give imprisonment, around 60 percent for heroin smuggling, and between 76 and 79 percent for kiosk robbery, between 70 and 73 percent for rape, and between 70 and 77 percent for bank embezzlement. The percentages in the post survey are, however, a bit higher than among focus group participants in four of the six cases.

The fact that many respondents in both studies would *not* inflict imprisonment reflects that many Norwegians are reluctant to use this punishment, more reluctant than Norwegian courts are, even in cases considered as relatively serious. Scepticism against prison punishment was express by several focus group participants during their discussions, especially against long prison terms.

This reluctance to choose imprisonment in specific cases might seem to be contrary to answers from ordinary citizens in the representative, nationwide telephone survey conducted concurrently with the post survey. In the telephone survey 68 percent of interviewed persons agreed that punishments in Norway generally are too lenient, 53 percent agreed that prison conditions are too good, 'like a hotel', 63 percent agreed that prison terms should be longer, and 84 percent agreed that crimes of violence should be punished more harshly. The contrast between such *general* opinions about punishment expressed in the telephone survey and punishments that lay people would give in *specific cases* depicted in figure 1 is even more striking when keeping in mind that lay people participating in the focus groups were selected to match the *general* opinions about punishment expressed in this telephone survey. However, the answers in the telephone survey given to general questions about punishment are of course based on each informant's *beliefs* about actual level of punishment and prison condition.

But are people well informed about this?

Firstly, as the respondents in the post survey and focus groups were asked to indicate which punishment they believed that a court would inflict for each of the six cases, we know from both studies that Norwegian citizens *underestimate* the level of punishment: The percentage of focus group participants who answered that a court would inflict unconditional imprisonment was 36 for spousal abuse, 21 for heroin smuggling, 43 for kiosk robbery and for rape, 16 for bank embezzlement, and 36 for assault.[23] Corresponding percentages for the post survey were very much the same. This surely indicates that laypeople grossly underestimate the courts' use of unconditional imprisonment for serious crimes. These percentages also show that respondents' estimations about the courts' use of imprisonment are even lower than the percent of respondents who would have inflicted this punishment themselves. Secondly, the length of prison terms that respondents believed that a court would inflict was far below the sentences suggested by the professional judges. The *modus* for the study participants' imagined court sentences, was 6-11 months for heroin smuggling, kiosk robbery, and rape. It was one year less than the actual level of punishment for bank robbery. For spousal abuse and assault, the modus for imagined length of imprisonment given by courts equalled the actual level of punishment, but only a minority of study participants believed that a Norwegian court would inflict unconditional imprisonment in these cases.

Ordinary citizens' lack of knowledge of the actual level of punishment should not be surprising when considering that 30 percent of adult Norwegians don't know that laypeople participate as judges in Norwegian courts.[24] Many citizens are not familiar with what has been a basic fact about the court system for more than one hundred years, taught in schools in decennia, and frequently mentioned by mass media. Courts are remote insti-

23 Further details in Olaussen 2013 pp. 116-120.

24 Olaussen 2005.

tutions for most people. As they don't know which sentences the courts practice, many will tend to believe an assertion frequently suggested through mass media: *Punishments are too lenient* – as *the* answer to crime problems. People's underestimation of the actual level of punishment is probably echoing cries for harsher punishments forwarded by populist politicians and mass media that rarely publish critical voices.

One might, however, object to my presentation in figure 1 of punishments that study participants would inflict on the perpetrators, that I have only reported data for *one* of the sanctions that were ticked off. Very many of the respondents among focus group participants would inflict two sanctions: 99 percent for heroin smuggling, 83 percent for assault, 79 percent for spousal abuse, 78 percent for rape, 77 percent for bank embezzlement, and 72 percent for kiosk robbery. (Corresponding percentages for the post survey are very much the same.) When two sanctions were ticked off, one was often imprisonment. Therefore a true reporting of data about sanctions must include all sanctions the participants ticked off, not only imprisonment.

In addition I will also admit that figure 1 overstates the difference between actual level of punishment and laypeople's willingness to use unconditional imprisonment. The reason is that the questionnaires included two sanctions – treatment and economic compensation to the victim, which are not penal sanctions – leading to a deflation of lay people's tendency to tick off imprisonment. I have undertaken a post-test of the questionnaire, which shows that fewer respondents tick off unconditional imprisonment when these extra legal options are available in the questionnaire.[25] The post-test also indicates that the presence of those options tend to produce a slight decrease in prison terms ticked off.

A true and full reporting of sanctions ticked off by respondents does, however, create a measurement problem: How to 'add together' (measure) two different sanctions chosen by a respondent, for instance one year imprisonment and 100 hours community punishment? A solution presupposes that it is possible to use some kind of common measurement for all sanctions, and a kind of measurement that can be compared with the actual level of punishment. As the sanctions in the questionnaire are of different *types*, they can only be measured in a sense of *order* or *rank* of harshness. This is what is intended with the integers assigned to different sanctions in display 1. All 31 alternative answers in the questionnaire have been converted to ordinal scale values between 0 (no punishment) and 28 (five or more years imprisonment) on a punishment scale. Since the respondents were allowed to tick off maximum two sanctions per question, the sum of answers to each question will vary between 0 (no punishment) and 44 (unconditional imprisonment 5 years or more + more than 150 hours of community punishment). The integer scale values will later be called PS-values. The scale was established before the data collection was finished.

[25] Further details in Olaussen, De nordiske rettsbevissthetsundersøkelsene – noen metodekritiske betraktninger. *Nordisk Tidsskrift for kriminalvidenskab* (2011) 3 pp. 209-227, and Olaussen 2013 pp. 74-79.

Display 1: Punishment scale. Conversion of categorical answers in the questionnaire into ordinal penal scale values (PS-values):

No punishment	0	***Electronic ankle bracelets***	
Conflict council mediation	1	Less than 2 months	10
Fine		2 - 3 months	13
Maximum 1 month's net income	2	More than 3 months	16
2 - 5 month's net income	2	***Unconditional imprisonment***	
6 month's net income or more	3	Less than 2 months	10
Conditional imprisonment		2 - 5 months	13
Less than 2 months	4	6 - 11 months	16
2 - 5 months	4	1 - 1 year and 11 months	19
6 - 11 months	4	2 years - 2 years and 11 months	22
1 - 1 year and 11 months	5	3 years - 4 years and 11 months	25
2 years - 2 years and 11 months	5	5 years or more	28
3 years - 4 years and 11 months	6	***Treatment of perpetrator***	
5 years or more	6	Less than 2 months	2
Community punishment		Between 2 months and 1 year	3
Less than 50 hours	10	More than 1 year	5
50 - 150 hours	13	***Pay economic compensation to victim***	
More than 150 hours	16	Less than 50.000 NOK	2
		50.000 - 100.000 NOK	3
		More than 100.000 NOK	5

Conditional imprisonment

This prison sentence is not served, on the main condition that the sentenced person does not commit a new offence within a period (normally two years) after the sentence. If the sentenced person does not comply with the conditions set by the court, the convict must serve the conditional prison sentence in addition to the punishment for the new crime.

Community punishment

There is an official 'conversion equation' between this punishment and unconditional imprisonment to be used as a 'rule of thumb' by the court, which determines the sanction: 30 hours of unpaid community work, (which is the 'burden' of this punishment) equal to one month of imprisonment. Values for community sentence of different lengths in the display are tentatively based on this official conversion equation.

Electronic ankle bracelet

A law amendment in 2007 made it possible to serve i) a short unconditional prison sentence; or ii) the last few months of a longer unconditional prison sentence; at home, controlled by an electronic ankle bracelet.[26] This has been the basis for fixing values for electronic ankle bracelets.

Treatment of perpetrator and payment of economic compensation

It is very difficult to translate the options that could be ticked off for these sanctions into numerical scale values. Comparing both with *fines* and *conditional imprisonment* values have been set to the best of my judgement.

The numbers assigned to sanctions only inform about *rank*, not size. They say for example that imprisonment is more burdensome (harsher) than fines, and 2-3 years imprisonment is harsher than 'less than 2 months' in prison. But the integer 22 assigned to 2-3 years imprisonment does *not* say that this punishment is about twice as harsh as 'less than 2 months' in prison, since 10 has been assigned to this punishment. I do not intend to measure the amount or degree of harshness of sanctions. That would demand (at least) an interval level of measurement of sanctions, which I don't think is possible. The size of a numeric difference or proportion between two PS-values is not supposed to give any valid information.

Applying PS-values to two sanctions ticked off by respondents and adding the values, will of course increase the PS-value of sanctions for these respondents. The only valid information the increased PS-value gives is that the penal 'burden' (harshness) of both sanctions is higher than any of the two sanctions separately. Because of this, use of the PS-values might also compensate the deflation of respondents' tendency to choose unconditional imprisonment, as mentioned above. The post-test of the questionnaire that I have undertaken indicates that application of PS-values compensates for the deflationary effect, as the median PS-values were equal for respondents who were allowed to choose treatment and economic compensation, and those who were not.[27]

As the PS-values only indicate the relative *rank* of different sanctions, the only available statistical measure for central tendency that can be used to compare actual level of punishment with questionnaire data of this kind, is the *median* of PS-values. Balvig used the same procedures as I have.[28] In a similar way Rossi, Berk, and Campbell compared seriousness scale values of crimes in federal guidelines with medians of ordinal scale values indicating seriousness of crimes in a US survey study.[29]

[26] Act 2007-06-29-84.

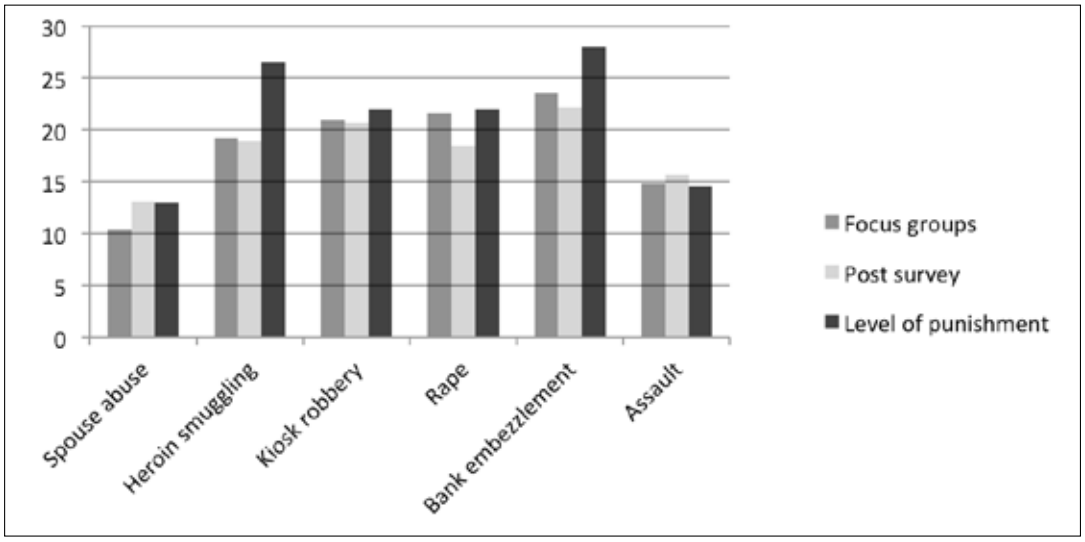
[27] See Olaussen 2013 pp. 74-79.

[28] Balvig 2006 and his *Danskernes retsfølelse og retsfornuft – et forspil* (2010) http://www.nyheder.ku.dk/alle_nyheder/2010/2010.8/danskerne_faengselsstraffe.pdf/.

[29] Rossi, Berk and Campbell, Just Punishments: Guideline Sentences and Normative Consensus. *Journal of Quantitative Criminology* (1997) 13(4) pp. 267-290.

But what information does the median convey? For each of the six crimes, the median of PS-values will split the respondents in two groups of equal size, one with PS-values below the median and other with PS-values above the median. Because the median is exactly in the middle of the distribution of PS-values, it is suitable as a measurement to be compared with actual level of punishment. It tells where the 'point of gravity' in the distribution is, and it reminds us that an equal number of respondents are distributed above and below the median.

Figure 2: Median for PS-values for all sanctions which the respondents themselves would impose on the perpetrator in each case - and actual level of punishment. (Weighted data.)



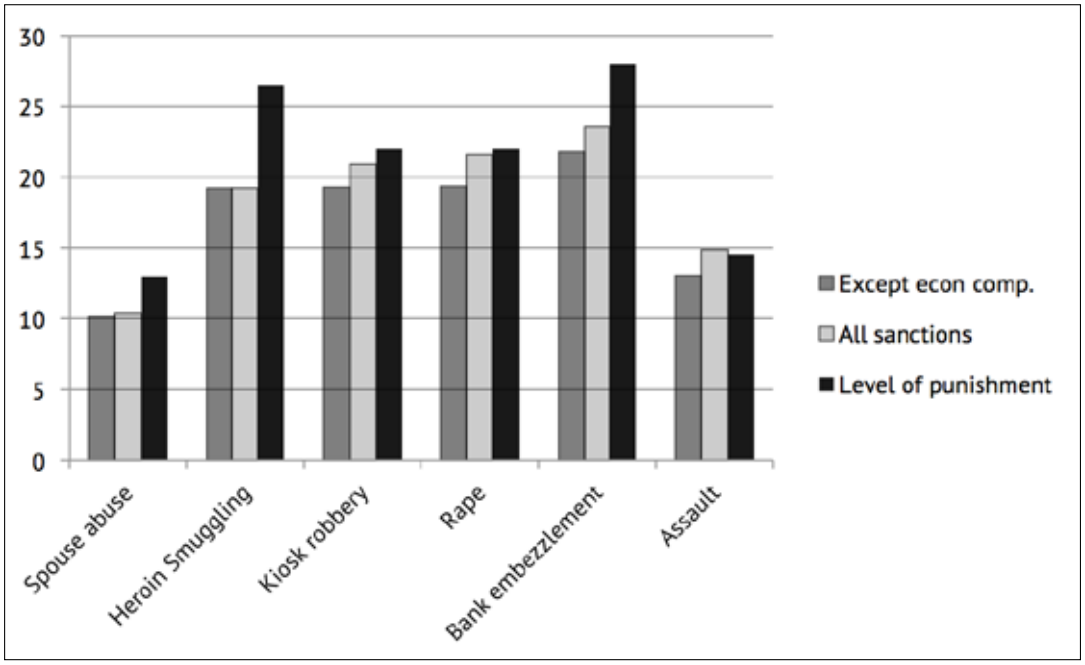
In this figure data from the post survey only include questionnaires with case variants identical with those included in the questionnaire used in the focus groups.

Figure 2 displays the median PS-value for all six cases for both the post survey and the focus groups. The actual level of punishment for the cases suggested by the judges, was also converted to PS-values according to display 1 and is shown in figure 2. Comparing the columns for each crime brings forward two results. Firstly, the medians for the focus group participants and for the post survey are very much equal in size, except for rape and spousal abuse. On average, the respondents inflict the most lenient punishments for spousal abuse, then in ascending order: assault, rape, heroin smuggling, kiosk robbery and the harshest punishments for bank embezzlement. Respondents in both data sets seem to agree very much. Secondly, when comparing median PS-values for all ticked off sanctions (and not only unconditional imprisonment, as in table 1) there also seems to be a fairly good fit between the actual level of punishment and medians for PS-values in the two data sets, except for heroin smuggling and bank embezzlement. According to median PS-values, about fifty percent of Norwegian citizens would inflict sanctions

with higher PS-values than the PS-value of actual penal level, and about fifty percent of citizens would inflict sanctions with lower PS-values than the PS-value of the actual penal level. In this sense there is a fairly good agreement between sanctions chosen by respondents and the actual penal level. This is not because the participants in my studies are very well informed about the level of punishments practiced by the courts. In section six, I will present and argue for an alternative explanation. But first I will address a couple of questions that might be asked about my use of PS-values in figure 2.

One may object to the comparisons in figure 2 that a Norwegian court most probably would have sentenced the perpetrator to pay the victim an economic compensation in all cases except heroin smuggling and perhaps the kiosk robbery. However, the judges were unfortunately not asked to stipulate economic compensation to the victim. One way to correct for this lack of information about a sanction that judges would have inflicted is to exclude economic compensation from the calculations of total PS-values for the respondents and then recalculate medians for all cases. This has been done, and the median value of the PS-values *excluded* economic compensation for focus group participants are presented in figure 3, together with the medians for all sanctions and the actual penal level (like in figure 2).

Figure 3: Median of PS-values for all sanctions which focus group members would impose on the perpetrator in each case, for all sanctions except economic compensation, and for actual level of punishment. (Weighted data.)



Exclusion of economic compensation from respondent data decreases the median value of PS-values for all crimes except spousal abuse and heroin smuggling, because very few ticked off economic compensation for spousal abuse and only one for heroin smuggling. An additional reason why the median of sanctions decreases after exclusion of economic compensation, is that respondents deflate their tendency to choose unconditional imprisonment when economic compensation is available to them, because they consider this as a punishment that is really felt for a very long time, some of the focus groups participants argued. But although economic compensation was the second most ticked off sanction (see table 1), exclusion of it does not reduce the median values very much. After exclusion there is still a fairly good concordance between medians for respondents and the actual level of punishment.

Figure 3 can also be used to address another question: Would the results be very different if I had chosen different PS-values than the ones in display 1? Results will to some extent depend on numeric values assigned to different sanctions, and this is why I chose to assign other values than the ones used by Balvig in his analysis of comparable Danish data.[30] I have justified the scale values I chose and discussed the differences between his PS-scale and mine,[31] and I consider the results in figure 2 to be robust if one sticks to one basic rule: PS-values should reflect that a sanction considered as harsher than another should be assigned a higher value. That was the rule I tried to follow when choosing the numeric values in display 1, and which Balvig did not follow. Figure 3 illustrate that medians of PS-values are fairly robust even for exclusion of sanction, which was very frequently chosen by respondents. Sanctions chosen by very few respondents (fines, electronic ankle bracelet, and conflict council mediation) can only influence the median marginally and should not cause any worry. An important reason for the robustness is the fact that unconditional imprisonment was most frequently ticked off, and the *modus* of the distribution of unconditional imprisonment ticked off concord with the actual penal level for each of the six crimes.

5 Individual disagreements about punishment

Although medians of PS-values for punishments that citizens would inflict on perpetrators show a high degree of concordance across respondent groups, and they comply reasonably well with actual level of punishment, this does *not* indicate that penal attitudes at an *individual* level are highly unanimous among respondents. There are considerable disagreements among respondents about which punishment they would inflict on the perpetrator.

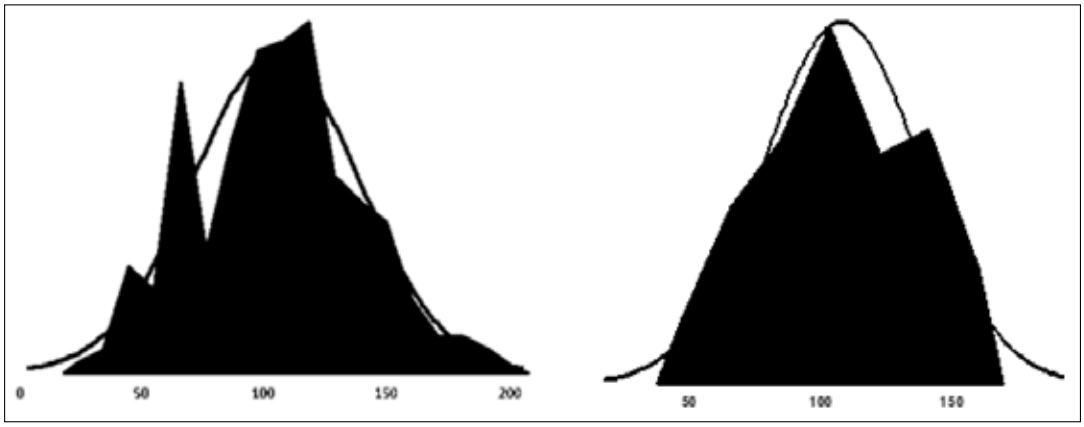
To be able to analyse and map the respondents' individual level tendencies to punish, the PS-values (in display 1) for all sanctions each respondent ticked off in the six cases

30 Balvig 2006 and 2010.

31 Olaussen 2011.

were summed to a *total* PS-value for each respondent in both data sets. There were valid answers for all six cases from 113 respondents in the focus groups and 556 in the post survey. In this section the analysis is based on these subjects. The total PS-value measures each respondent's tendency to inflict (hard) punishments. Theoretically the total penal scale value for the six cases could vary between 0 and 264. Comparison across respondents in both data sets shows that the total PS-value varies greatly across respondents, from minimum 37 to maximum 169 with a median of 106.25 for focus group participants. For the post survey, the minimum was 15, maximum 204 and the median 102.17. This indicates that respondents in both data sets systematically used different parts of the 30 available punishments when they ticked off punishments for the cases. Some used only the more lenient part, while some preferred punishments at the harsher end, and others chose punishments more of a middle range. The distribution of the total scale value for the two data sets in figure 4 shows that both distributions are symmetrical around the median, not too different from the normal curve added as a comparison. The symmetry of the curves confirms that the use of median in figure 2 is a reasonably fair average measurement for the sanctions the respondents would inflict.

Figure 4: Distributions of total PS-value for respondents in post survey (N=556) to the left, and for focus group participants (N=113) to the right.



The main difference between the distributions of total PS-values in figure 4 is that the distribution for the post survey is a bit wider than for the focus group participants. A possible reason might be that the focus group participants were recruited to participate in group discussions about punishments. This might have introduced an unforeseen exclusion process either by the recruiters in the market research institute or by those who were invited to participate in discussions, leaving out from the focus groups people who have either extremely lenient or harsh attitudes to punishment. There is, however, no reason to believe that there are any significant differences between respondents from all

over the country in the post survey and respondents from Oslo in the focus groups, in their tendency to punish the perpetrator in the six cases. Since Black[32] took it that use of penal sanctions (law) would be positively correlated with degree of urbanisation, post survey data was analysed across six levels of urbanisation for the respondents' living area without finding any systematic differences in tendency to punish.[33] His theory was not confirmed.

The big individual differences in tendency to punish make it reasonable to ask if there are systematic differences in tendency between subgroups in the data sets. Because respondents were asked very few background questions because we feared that it might influence their choices of punishment, there are few possibilities to check for subgroup differences. Respondents' age and sex are the only ones, and both data sets have been checked to see if these variables are correlated with PS-value. The respondents were divided into four groups according to size of total PS-value for the six cases. The respondent's tendency to inflict harsh punishments might be characterized as weak, fairly weak, fairly strong, and strong according to size of total PS-value for the respondent, relative to the sample distribution of the data set that the respondent belongs to, thus:

Weak tendency	- total PS-value less than or equal to 1. quartile.
Fairly weak tendency	- total PS-value between 1. quartile and median.
Fairly strong tendency	- total PS-value between median and 3. quartile.
Strong tendency	- total PS-value equal to or higher than 3. quartile.

Table 2: Percent distribution of focus group participants according to total PS-value for punishments they would give themselves in six cases. (weighted data)

Tendency to punish (harshly)	*Participant's sex*		*Participant's age*			
	Male	**Female**	**18-29ys**	**30-49ys**	**50-74ys**	**Sum**
Weak	26.6	22.2	27,0	23,.8	23.7	23.0
Fairly weak	22.9	28.3	32.0	19.2	26.2	26.5
Fairly strong	27.5	23.7	23.8	26.2	26.2	24.3
Strong	25.0	25.8	17.1	30.8	24.0	26.2
	100.0 N=58.7	100.0 N=54.7	100.0 N=24	100.0 N=47.9	100.0 N=41.4	100.0 N=113.4
Significance:	Chi=1.025; P=0.7952; df=3		Chi=2.531; P=0.8661; df=6			

[32] Black, *The Behavior of Law* (Academic Press 1976) at p. 146.

[33] See Olaussen 2013 at pp. 144-146.

Table 2 shows that there are no significant differences between males and females in the focus groups in their tendency to punish, neither are there between age groups. Combining sex and age makes no difference.[34] The same is true also for post survey data.

Discussions in the focus groups about punishments in four of the cases (rape, kiosk robbery, assault and heroin smuggling) elicit important information about why individual differences in tendency to punish (harshly) are as big as indicated in figure 4. The focus group moderators' opening question to the participants was something like: *Do all of you agree that the offender in the film should be punished?* In the questionnaire that participants had answered a few minutes before this question all respondents had ticked off one or two reactions they would inflict on the offender. This indicates that everybody thought that something had to be done. Although the majority of focus group participants nodded or said yes to the moderator's question some reacted by saying something like 'I don't like the word *punishment*', or 'yes, I would give him a sanction.' Such remarks about denotation signal that group participants had different conceptions of what they did a few minutes earlier as they answered the questionnaire. Many participants had distributed 'punishments'; others had distributed 'sanctions'.

The focus group participants who were reluctant to the moderator's use of the word punishment, were among those who would not give the offender prison punishment or they would only inflict a very short term in prison. Instead they argued for individualised sanctions and tended to give conditional imprisonment or community punishment, frequently in combination with treatment of the offender or economic compensation to the victim. They argued that the sanction should fit the problem that the offender seemed to have, and which possibly was the reason for his criminal action. They tended to search for a remedy or cure that 'modern rational minds' (Max Weber) find more effective and efficient than imprisonment, which they argued would be detrimental for the offender's future life. In other words, their sanctioning philosophy was *problem-oriented*. These focus group participants would try to solve the offender's assumed problem. As a consequence, that would lead to less crime in coming years. However, other participants who let the moderator's denotation pass, would more readily give the offender prison punishment, quite often combined with treatment or economic compensation or something else. For them, possible effects of the sanction on future crime or on the perpetrator's future seemed to be of lesser interest. The penal system is there to be used whether it has this or that unintended effect. Their approach was primarily preoccupied with the wrong action, its moral character, and its consequences for the victim and society. They seemed to be committed to punish the perpetrator for his action, and their sanctioning philosophy might be called *retribution-oriented*. The problem- and retribution-orient-

[34] See Olaussen 2013 table 6.2 at p. 141.

ed orientations are parallel to treatment and punitive norms, which Aubert claimed would create strain when they are combined in criminal justice systems.[35]

A probable reason why such conflicting normative orientations prevailed among focus group participants when they argued for sanctions against crimes is that the orientations reflect a general dilemma in human thinking about punishment, exemplified in Plato's dialogue Protagoras more than 2300 years ago. *Protagora*s, who asks Socrates to consider what it means to punish somebody, argued that 'rational punishment' is inflicted to teach virtue and prevent wrongs in the future.[36] One must 'have regard to the future' (look *ahead*), Protagoras says, and not retaliate for a past wrong which cannot be undone. Protagoras claims that

> [t]his is the notion of all who retaliate upon others either privately or publicly. And the Athenians, too, your own citizens, like other men, punish and take vengeance on all whom they regard as evil doers; and hence, we may infer them to be of the number of those who think that virtue may be acquired and taught

The retaliation or vengeance he accepts as rational, obviously is a response for a wrong, a past action, so Protagoras advises to look *back* to what was done. But *only* doing that would be to punish 'under the notion, or for the reason, that he has done wrong – only the unreasonable fury of a beast acts in that manner,' Protagoras says. His double perspective, that a rational punishment inflicted on the evildoer reprobates the wrong action, but with regard for future effects of the punishment, is easily recognised both in focus group participants' arguments, and in Andenæs' theory of punishment that he denoted a 'modified utility theory'.[37]

My understanding of the focus group participants' stated reasons for sanctions they would give the perpetrator in the case they discussed, is that their approach to sanctioning might be described as an individually varying mixture of two orientations, a retribution-oriented and a problem-oriented approach. Most participants promoted or accepted arguments reflecting both orientations. However, some participants were mainly 'looking back' to the committed action and its consequences while others mainly were 'looking ahead', considering future effects of the sanctions. And this is what is reflected in the form of the distributions in figure 4. Those who were very reluctant to or against use of imprisonment, because it would not solve the perpetrator's problems, but rather be detrimental for him and for society, have the lowest total PS-values. The highest total PS-values are found among those who are most oriented towards retribution, and would

35 Aubert, Legal justice and mental health, *Psychiatry: Journal for the Study of Interpersonal Processes* (1958) pp. 101-113.

36 This and the following quotes are from: Plato: *Protagoras*. (Translated by Benjamin Jowett). Available at: *http://www.gutenberg.org/1/5/9/1591/*

37 Andenæs, *Alminnelig strafferett*, 2nd rev. ed.(Universitetsforlaget 1974b) at p. 75.

give unconditional imprisonment for the committed action. Around the peak in the middle of the curves in figure 4 are the very many participants whose total PS-values are a result of different mixtures of the two orientations.

6 A common normative basis: Sanctions according to the principle of proportionality

Individually, lay people differ in their orientations to what is most important when choosing sanctions for committed crimes. But in spite of the *disagreements* among respondents in both samples about which punishment they would inflict on the perpetrator, lay people in both samples – unequal in size and established by totally different procedures – give surprisingly equal results (table 1, figure 1) on an *aggregate* level, and figure 2 and 3 indicate that there is a fairly good fit between actual level of punishment and medians for PS-values for the punishments that the respondents would inflict.

How is this – individual level disagreement and aggregate level concordance – possible?

Although participants in the two studies underestimate the courts' use of imprisonment, figure 2 indicates that a common standard probably might be at work when professional judges mete out punishments and people choose sanctions for the same crimes. It is as if both judges' and lay people's selections of sanctions are guided by an 'invisible hand' – which I will suggest is a common fundamental normative standard.

However, I find it unreasonable to suppose that lay peoples' choices of sanctions are based on knowledge of penal law. Since normative questions are involved in any process where actions are evaluated and sanctions considered, I take it that the study participants have acted normatively, guided by simple moral principles, when they read and evaluated the cases and chose sanctions they would inflict. I further suggest that these processes are intuitive, generally not based on conscious protracted deliberations. While watching some of the focus groups through a one-way screen when the participants answered the questionnaire, I was struck by how rapidly they made up their minds about sanctions. Completing the questionnaire during half an hour did not leave much time for pondering, but the focus group participants did not seem to be frustrated, and they did not complain or ask for more time. The focus group participants had three possibilities to choose sanctions for the perpetrator in one of the six cases they discussed. Analysis of these data shows an astonishing degree of stability in choices of sanctions, in spite of one hours' discussion of punishments.[38] That indicates that the ticked off sanctions are

[38] After discussions participants who had chosen sanctions in the first questionnaire that give exceptionally low or high total PS-values tended, however, to choose other sanctions after the discussions. The PS-values of these sanctions brought their total PS-value closer to the median. This shows that participants who experienced during group discussions that they were real "deviants" in their group 'normalised' their choices of sanctions.

fairly robust choices, even if they were done rapidly. Participants in the post survey could spend three months to answer the same questionnaire, and they could consult anyone or use any other kind of help, but they gave practically the same answers as the focus group participants' intuitively based answers. Time at disposal beyond half an hour to answer the questionnaire apparently does not influence the result.

The questionnaire studies leave no doubt that lay people find it legitimate to sanction the perpetrators for the actions described in the questionnaire, as they could freely choose sanctions they intuitively found most just or appropriate. An important aspect of justice is to treat equal cases equally and unequal cases unequally. For reasons of justice, actions deserving unequal disapproval should be sanctioned unequally, and I think that any reasonable person would find it unjust to sanction an action deserving little disapproval harder than an action deserving more reprimand. I think that we all feel intuitively that it must be the other way around. This is what the normative principle of proportionality between blameworthiness of an action and the sanction for it is about. This principle is of vital importance in penal sentencing, and I take it that it is a reasonable candidate as the 'invisible hand' producing the observed concordances in figure 2 about sanctions for crimes.

Robinson and Darley suggest that people share a common moral basis, which is relevant for evaluation of a perpetrator's blameworthiness and for determination of punishments.[39] I agree with this and with their later suggestion that there might be a strong and widely accepted tendency among people to apply relatively simple moral principles that serious wrongs should be punished, and that the punishment should be *proportional* to the perpetrator's blameworthiness.[40]

The reason why the actual level of punishment corresponds fairly well with medians of PS-values in four of six cases in both data sets might be that both laypeople and judges determine penal sanctions in accordance with the principle of proportionality. There is no doubt that the principle of proportionality is a fundamental principle in Norwegian penal law. This is a fundamental principle for meting out punishments whether one subscribes to the philosophy of retribution or to more utility-oriented philosophies of punishments.[41] Commitment to justice is always vital when determining punishment, Andenæs claims, and 'punishment cannot be so harsh that it is not fairly proportional to the crime' even if the goal is of a preventive kind.[42] Because of this he denoted his theory of punishment a 'modified utility theory' in which the principle of proportionality will *curtail* punishments motivated by utility reasons. In a study of arguments sustaining

39 Robinson and Darley, *JUSTICE, LIABILITY & BLAME. Community Views and the Criminal Law* (Westview Press 1995).

40 Robinson and Darley, Intuition of Justice: Implications for Criminal Law and Justice Policy, *Southern California Law Review*, (2007) 81(1) pp. 1-67.

41 Andenæs 1974b pp. 73-75.

42 Andenæs 1974b p. 75.

amendments in statutory penal law and reasons given by the Norwegian Supreme Court for changing lower court sentences, it was found that the principle of proportionality was referred to very frequently.[43] In more general policy discussions about punishment in Norway, politicians also frequently refer to shared intuitional standards for just punishments. A very clear and explicit example can be found in the first ever White Paper to Stortinget about criminal justice policy.[44] The White Paper discussed different general theories legitimising punishment and concluded that the principle of proportionality – 'generally accepted as a social reality' in the Norwegian society – was both a safer *reason* for punishment than utility theories, and also a principle of justice which *limit* the use of punishment:

> Justice does not only limit the use of punishment. A claim for justice is also a reason in itself for punishing and for determination of punishment. The notion that certain norm violations should be countered with a proportional sanction is in itself a social reality and is generally accepted. It is a social reality that the claim for justice is a safer reason for punishment than theories founded on punishment as a means to obtain other goals. Even if theories of the last type should not be valid, there is good reason to believe that punishment as a sanction against undesirable actions will be maintained for reasons of justice.45

Eskeland considers the principle of proportionality as one of the fundamental cultural values of the penal justice system.[46] It both frames the political freedom to make statutory penal law and the courts' discretion to use their power to punish. And he argues that the principle of proportionality should limit the weight of preventive purposes in decision processes about punishments.[47] Likewise Aall argues that the principle of proportionality is a basic principle also in penal procedure.[48] I think that this indicates that both politicians and lawyers consider that this argument is both just, generally well understood and accepted among people. Shortly, it is a basic principle with high degree of legitimacy. But Eskeland correctly observes that wishes to protect society might grow so strong that the principle of proportionality is sidelined – like what happened when punishments for drug related crimes were steadily increased between 1964 and 1984.[49] That brought our use of punishment beyond what is a rational approach to drug problems according

43 Strandbakken and Matningsdal, Straffenivå og straffeteorier i norsk strafferett anno 2001, *Jussens venner* (2004) 1 pp. 1 – 17.

44 St. meld. nr. 104 (1977-78) Om kriminalpolitikken (Justis og Politidepartementet).

45 St. meld. nr. 104 (1977-78) pp. 30-31 (my translation).

46 Eskeland, *Strafferett* (Cappelen Akademisk forlag 2000) p. 52.

47 Eskeland 2000 p. 54.

48 Aall, Prosessuelle garantier og forholdsmessighet i straffeprosessen, *Jussens Venner* (2013) pp. 227-258.

49 Eskeland 2000 p. 55.

to Andenæs, even if he thought that the threat of punishment had contributed to more negative attitudes toward drugs in the population.[50]

I will briefly add some other reasons why I think it is reasonable to suggest that general commitment to the principle of proportionality among lay people might produce an outcome like shown in figure 2.[51] Firstly, the principle of proportionality seems to be generally applied in social life. If you buy lots of something, you accept to pay more than if you only buy a little. Most people find it reasonable to pay more for high quality than for low quality, and we give presents as marks of regard for favours from someone, paying attention to value or symbolic balance between present and favours. If A frequently invites B for dinner, B expects to be invited to A, etc. Applying the principle of proportionality to determine sanctions for crimes will only be a specific application of a widely applied social norm. Secondly, the principle of proportionality is known and has been applied to cases of violence in the Norwegian society since the early Middle Ages when laws stipulated detailed guidelines for wound fines[52] to be paid, according to circumstances, how the victim was attacked, and how badly injured he was:

> If a man wounds another, he shall pay the wound fine to the one whom he injured: an ora if [the weapon] touched [him]; an ora if it cut the flesh; an ora if the edge strikes the leg; an ora for every [bit of] bone that has to be removed if the silver rings in the scales [i.e. if the money is ready for payment]; an ora for every place that is burned in dressing [a wound], unless there is proud flesh [to remove]; an ora for every time the lips twitch [in pain]; an ora for every tear in the clothing an ora if the man was sitting alone [in private when he was attacked]; an ora if he was just rising from bed; an ora for every cut that has to be made [in dressing the wound], if the cut bleeds; half a mark for a wound in the chest or the abdomen; half a mark if the wound goes in to the marrow; an ora if the weapon comes out [on the other side]. And [let men] appraise the scar and [other] external blemishes, defects, or disabilities. Now, the one who caused the wound shall pay for the leech and the remedies and provide the injured man with victuals, a month's food of both kinds [i.e. butter and meal]. If a man cuts [a bit of] flesh off another and it drops to the ground, he shall pay a compensation of six oras, and six oras if rough scars form on the head. The wounded man shall have witnesses, if the other man denies that joints of the size claimed were [actually] broken. Wounds on the breast shall all be inspected [and valued], and wounds on the back [shall be] twice as dear as those on the breast. If a man is present at a fight and does not try to separate the men or give aid to either side, he shall pay twelve oras to the king as a baug for torpid indifference.53

The quoted section doubles the fines to be paid for wounds on the back. That communicates the moral judgment that attacks from behind are much worse than frontal attacks

50 Andenæs, *Straffen som problem*. 2nd rev. ed. (Exil Forlag 1996) pp. 79-83.

51 More details are available in Olaussen (2013) pp. 156 -175.

52 Wound fine was only one of several fines to be paid in such cases.

53 *The Earliest Norwegian Laws Being the Gulathing Law and the Frostathing Law.* Translated from the Old Norwegian by Laurence M. Larson (Columbia University Press MCMXXXV [1935]) section 185.

are, i.e. the quoted law was not only concerned with *injuries* caused by actions, but also with *wrongs*, the moral quality of actions which depends on the actors mind, on his or her spirit and reason for which the action was done.[54] Many parallels between moral blameworthiness and guilt in criminal cases were discussed by the Norwegian philosopher Knut Erik Tranøy,[55] who referred to Joel Fienberg's monumental four-volume *The Moral Limits of the Criminal Law*, and asserted that penal law presumably has taken over and imbedded distinctions in general moral thinking.

Thirdly, Robinson, Kurzban and Jones referred to eighteen studies documented by Robinson and Darley[56] and reviewed further studies to sustain their conclusion that a 'wide variety of empirical studies indicate that people broadly share intuitions that serious wrongdoing should be punished and also share intuitions about the relative blameworthiness of different transgressions'.[57] Lerner emphasises that we have a tendency to react angrily if confronted with situations we interpret as unjust and emotionally arousing.[58] We tend to respond with sanctions that we feel are suitable to re-establish a just situation. The actions described in the questionnaire might very well have evoked emotional arousing bringing about incentives for sanctions able to re-establish justice.

Fourthly, a precondition for the principle of proportionality to produce results like those in figure 2 is that people tend to rank the actions described in the questionnaire equally according to their blameworthiness. I cannot prove that my respondents would agree on rank between the six cases, but several American studies have documented that there is an amazing degree of agreement across different social groups about the rank *order* (but not degree) of seriousness of as many as 141 actions used in some of the studies.[59] I don't find any reason to believe that there would be more disagreement about rankings based on actions' blameworthiness in Norway, which is a culturally more homogenous society than the American. Fifthly, there are also studies that have documented a relationship between crime seriousness as evaluated by laypeople and their suggested punishments for the crimes. Warr, Meyer and Ericksson found that seriousness of crime was

54 Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) at p. 119.

55 Tranøy, *Det åpne sinn. Moral og etikk mot et nytt årtusen* (Universitetsforlaget, Oslo 2001) at pp. 88-94.

56 Robinson and Darley (1995).

57 Robinson, Kurzban and Jones, The Origins of Shared Intuitions of Justice, *Vanderbilt Law Review* (2007) 60(6) pp. 1633-1688, p. 1636.

58 Lerner, The Justice Motive: Where Social Psychologists Found It, How they Lost It, and Why They May Not Find It Again, *Personality and Social Psychology Review* (2003) 7(4) pp. 388-399.

59 Sellin and Wolfgang, *The Measurement of Delinquency* (John Wiley 1964), Velez-Diaz and Megargee, An investigation of differences in value judgments between youthful offenders and non-offenders in Puerto Rico, *The Journal of Criminal Law, Criminology and Police Science* (1970) 61(4) pp. 549-553, Figlio, The seriousness of offences: An evaluation by offenders and non-offenders, *The Journal of Criminal law & Criminology* (1975) 66(2) pp. 189-200, and Pontell, Granite, Keenan and Geis, Seriousness of Crimes: A Survey of the Nation's Chiefs of Police, *Journal of Criminal Justice* (1985) 13(1) pp. 1-13.

the key (probably the only) criterion for respondents' selection of punishment.[60] Rossi, Berk and Campbell, who conducted an extensive continental US interview study to evaluate the federal guidelines for punishments, found a moderate individual level correlation (.59) between the guidelines' ranking of crimes according to seriousness and that of the respondents.[61] On the aggregate level they found a very high correlation (.87) between medians for punishments suggested by study respondents and the guideline punishments based on seriousness of actions. Jacoby and Cullen, who explicitly tested the importance of the principle of proportionality in a national sample of adults, found that people disagreed very much about which punishment they would inflict (like they did in the Norwegian study).[62] In spite of that, the analysis led them to conclude that: 'Consensus exists on punishing crimes according to relative degrees of harm, but little consensus exists on absolute amounts of punishment'.[63] This is precisely what I suggest as an apt interpretation of Norwegian data presented above.

So far all arguments have been connected to *punishment*, to an approach I denoted retribution-oriented. But a problem-oriented approach to sanctioning was prevailing among a significant number of focus group participants. Which principles did they follow when they selected sanctions for the perpetrators?

Paying regard to the offender's future or hoping that the sanction will serve to rehabilitate the offender does not entail that the principle of proportionality is irrelevant; on the contrary. If the assumed causes of his wrong action or his criminal way of life are not so deeply entrenched, the dose of a correcting sanction or treatment does not need to be as big as when causes are deeply entrenched. For example, because the heroin smuggler had been a drug addict for about ten years according to what he said in the mock film, 76 percent of focus groups participants would sentence him to treatment while the comparable percentage was 37 for the kiosk robber who said that he only used drugs in weekends.[64] For these perpetrators it was also argued that imprisonment would be detrimental because of easily available drugs in prisons. Further, only 19 percent would sentence the man who committed assault to treatment and 13 percent the rapist; obviously because these perpetrators did not seem have any kind of problem for which there is a treatment. The treatment term which focus group members would give, tend to be long: 81 percent

60 Warr, Meier and Ericksson, Norms, Theories of Punishment, and Publicly Preferred Penalties, *The Sociological Quarterly* (1983) 24(1) pp. 75-91.

61 Rossi, Berk and Campbell, Just Punishments: Guideline Sentences and Normative Consensus. *Journal of Quantitative Criminology*, (1997) 13(4), pp. 267-290.

62 Jacoby and Cullen, The Structure of Punishment Norms: Allying the Rossi-Berk Model, *The Journal of Criminal Law & Criminology* (1999) 89(1) pp. 245-312.

63 Jacoby and Cullen 1999 p. 296.

64 All percentages here refer to sanctions focus group participants ticked off in the questionnaire after discussion.

was one year or more for the four cases discussed, and longest for the heroin smuggler who had the most serious drug problems.

Community punishment is another sanction claimed by some of the focus group participants to be a more effective rehabilitating sanction – or at least less detrimental – than imprisonment. This sanction too seems to be meted out according to the degree of the offender's problem. However, relatively few ticked off this sanction, so the pattern is less clear than for treatment. Economic compensation to the victim was to some degree ticked off both by participants who were retribution-oriented and those who were problem-oriented, and it was ticked off more frequently than treatment and community punishment. Arguments for giving economic compensation were not only to compensate the victim for the harm, but also to punish the perpetrator; to remind him every month for years about his offence. Some argued that this would be a more just punishment than imprisonment for harms that reduce the victim's quality of life a very long period, perhaps the victim's whole lifetime. Not surprisingly, the size of the economic compensation ticked off varies from case to case. Thirty three percent of focus group participants would sentence the offender in the robbery case to pay compensation to the kiosk assistant who was threatened with a knife but not physically injured. Nearly half of these compensations were less than 50.000 NOK. About 70 percent of respondents would give economic compensation in the rape and assault cases. However, while 57 percent of compensations were 100.000 NOK or more in the rape case, the comparable percentage was five percent for assault. In this case 68 percent of economic compensations were 50.000 – 100.000 NOK. No doubt, focus group participants distributed payment of compensation according to the principle of proportionality, a principle applied in Norwegian (penal and tort) law already in the early Middle Ages.

An interview study conducted by Christie among 98 homeless alcoholics and persons charged for property crimes in pretrial custody confirms that this group of Norwegians found the proportionality principle to be just.[65] They were interviewed about their expectations and attitudes to the punishment they believed that the court would give them. Christie found that both respondent groups believed that the principle of retribution was dominating in the courts, and that general deterrence was barely mentioned by his respondents. Their arguments for the sanction they would have given themselves clustered around justice and proportionality: This and that offence would lead to this and that punishment. What was considered as *most just* was that society should retaliate proportionately to the offence.

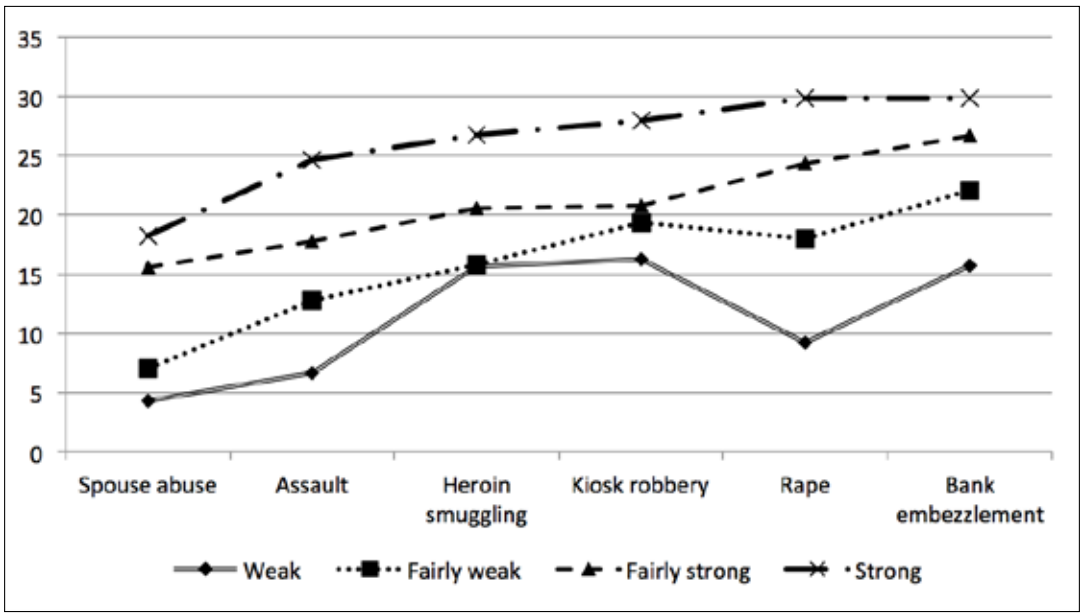
The arguments mentioned above summarise why I think that the principle of proportionality is of crucial importance for lay Norwegians' selection of sanctions as responses to the actions described in the questionnaire. Independent of each informant's tendency

[65] Christie, Varetekstsfangers forventninger og innstillinger til straff, *Nordisk Tidsskrift for Kriminalvidenskab*, (1955) pp. 210-232.

to punish (harshly), I suggest that all of them applied the principle of proportionality (unconsciously) when they chose sanctions for the perpetrators in the six cases. It was applied because it leaves a feeling of having acted in a just way.

There is a way to test whether the Norwegian participants apply equal standards when they suggest punishments for the perpetrators: Consider the four groups in table 2 as subgroups with different tendencies to punish harshly (weak, fairly weak, fairly strong and strong). Then calculate the median of PS-values for each crime for every subgroup and use the 24 calculated medians to draw separate curves for each subgroup. This has been done for both data sets and the results for focus group data are displayed in figure 5.

Figure 5: Medians of punishments which focus group respondents themselves would impose for each of the six cases depending on the respondent's tendency to punish harshly. (Weighted data.)



If the hypothesis that participants apply a common standard in all four subgroup is correct, the curves connecting the medians should run parallel to each other. These curves in figure 5 are sufficiently parallel to conclude that they sustain the hypothesis, except the curve for focus group participants with a *weak* tendency to punish (harshly), the lowest curve.[66] The main reason why this curve is *not* parallel with the other three curves is connected to two cases, heroin smuggling and kiosk robbery. Respondents who have a *weak* tendency (are least inclined) to give harsh sanctions, would give far harsher sanctions

[66] The corresponding diagram for participants in the post survey, see Olaussen (2013), figure 7.3 at p. 182 does *not* show a deviant pattern for heroin smuggling and kiosk robbery.

than expected for heroin smuggling and kiosk robbery. Why these deviations? Common for the two cases is that the perpetrators were using drugs and their actions were planned. The attempted heroin smuggling was committed by a person who had been addicted to heroin many years, and the young man who committed kiosk robbery used cocaine and amphetamine now and then (during weekends). I know from discussions in the focus groups that some participants thought that use of drugs was the reason why the man committed the kiosk robbery. The argued that he owed lots of money for drugs he had bought from unspecified "friends", who demanded him to pay. Since drug use and drug related crimes often are considered as very serious and blameworthy actions in the Norwegian society, this was possibly also the view among relatively many focus group participants who did not tend to punish the perpetrator in the other cases very harshly. An additional reason for harsh sanctions for the two crimes might be that the actions were planned, committed with premeditation (malice aforethought), which is a morally aggravating circumstance untypical for the rest of the cases.

Figure 2 shows that the actual level of punishment for bank embezzlement and heroin smuggling were significantly higher than medians for PS-values that study participants would give. The two crimes stand out as deviations in an ordered pattern of correspondence between the actual level of punishment and sanctions that the respondents in both studies would inflict. Don't these deviations falsify my simple, general model of compliance between lay people's thinking about crime and punishment and basic principles in penal law? I don't think so. The deviations that bank embezzlement and heroin smuggling represent in figure 2 might very well be a result of a professional sentencing ideology which deviates from moral intuitions about proportionality applied by lay people. The most likely reason why the actual level of punishment is significantly higher than the median for PS-values for heroin smuggling and bank embezzlement is faith in *deterrence* theory. It is an important theory also in Norwegian penal philosophy[67] and it is a 'standard wisdom' among prosecutors and judges when they give reasons for sentences for certain crimes. General deterrence has often been a decisive argument for harsher punishments for drug crimes, including heroin smuggling,[68] and the very harsh punishments for drug crimes in Norway is to a large extent based on belief in deterrence effects of imprisonment. In addition, heroin smuggling is an act outside the core of crimes (often called *mala in se*, wrongs *an sich*), constituted of attacks on people or their belongings. Some might not feel intuitively that it is wrong to smuggle heroin and commit bank embezzlement *in the same sense* as it is wrong to attack directly another person, which was done in the other four cases. This difference might have contributed to reduce harshness

[67] See Andenæs, *Punishment and Deterrence* (University of Ann Arbor Press 1974a) and his General Prevention revisited: research and policy implications, *Journal of Criminal Law and Criminology* (1975) 66 (3) pp. 338-365.

[68] See NOU 1982: 25 pp. 8-9.

of punishments that lay people would inflict for heroin smuggling and for bank embezzlement.

Faith in deterrence effects among politician, prosecutors and judges might also contribute to more severe penal sanctions for different kinds of white-collar crime, like the case about bank embezzlement, because such crimes normally are committed by rational and planning actors, who presumably will be deterred by harsh sanctions. In addition, such sanctions might be considered necessary to sustain trust in vital social institutions like banks. Deterrence arguments are not equally convincing for cases like spousal abuse, rape, and assault, where aroused emotions seem to play an important role. Weaker relevance of deterrence arguments in these cases probably is a reason why there is high degree of concordance between judges and lay people. Maybe lay people's intuitive choice of sanctions is only marginally influenced by thoughts typical for rational penal theory? Having reviewed lots of studies, Robinson states that

> '[l]aypersons do not intuitively apply principles of deterrence, incapacitation, and rehabilitation when they assess criminal liability and punishment. To the contrary, the studies suggest that lay assessments of criminal liability and punishment conflict with, rather than track, coercive crime control strategies'.69

In a more restricted sense, this is true also for focus group participants who discussed punishments. Very few of them used deterrence or incapacitation arguments. But Robinson's claim is not generally true, especially not for rehabilitation, which is an argument in accordance with Max Weber's assertion that rational purposive thinking is deeply engraved in modern minds. This is probably why this way of thinking often is considered as legitimate, also when punishments are considered.

7 Concluding remarks

The population studies undertaken the autumn 2009 indicate strongly that amendments in penal law passed by Stortinget in 2009-2010 leading to significantly harsher punishments for violent crimes, including rape, was not an outcome of claims among ordinary citizens for harder punishments. The only data in the study that appear to sustain the enactments are answers given in the telephone survey, but these answers are given by people who don't know the actual level of punishment, and underestimate it. The legitimacy of imprisonment is weaker among ordinary citizens than among Norwegian politicians because many think that this punishment is not conducive as a means to reduce recidivism. It might rather give it a boost.

69 Robinson, Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control, *Virginia Law Review* (2000) 86(8) pp. 1839-1869, p. 1858.

Before the amendments, there seems to have been a fairly good concordance between the actual level of punishment practiced by courts and the median of punishments that lay people would in inflict for specific criminal actions. The probable reason for this is that both professional judges and lay people agree that punishments should be determined according to the principle of proportionality. Lack of concordance between lay people's suggested punishment and the actual penal level of punishment for heroin smuggling and bank embezzlement probably indicates that the actual level of punishment in these cases is inflated by professional and political faith in general deterrence.

The disagreements among lay people about punishment for specific actions are not incompatible with our knowledge that professional and lay judges agree in 95 percent of sentences in real criminal cases, even though I don't think that this unanimity is due to professional judges' pressure or persuasive powers over lay judges. At the closure of ordinary court hearings of cases, the prosecutor and defence attorney frequently indicate the punishment they think is appropriate and just. However, this kind of advice was not given to respondents in the population studies. If we had included information about actual penal level in the final questionnaire answered after the group discussions, we would have known more about how this might influence lay people's considerations of just punishments.

Because the respondents did not have information about actual penal level, they were spared a question relevant for any judge in a real court case: Is it just to give *this* person a punishment which differs from what is normal in cases of the same kind? I strongly believe that also lay judges intuitively feel that justice demands the application of the norm of 'equal sanctions for equal misdeeds', and that very few intuitively feel that it is just to deviate from this norm that agrees nicely with the principle of proportionality.

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The Nordic Criminal Law Doctrine in a European Setting – Challenges and Potential

DAN FRÄNDE *

1 Introduction

This brief article is based on personal experience from teaching and developing Finnish criminal law doctrine. At the same time some comparison will be made with other Nordic states, as the situation in these is somewhat similar. The point of view in this article is internal, which can be described with the following metaphor: I participate in the game of football, but also expect there to be other players and spectators that are interested in the game.

I should here point out, that my remarks regarding the research on criminal law do not necessarily apply for the research on criminal procedural law. In the field of Finnish legal science and legislation, the Swedish legislation development and legal science are closely followed. For example the German discussion on criminal procedural law is barely taken into account at all. Unfortunately, the legal development in Norway and Denmark is not that focused upon in Finnish legislation development either. It is unclear how much the other Nordic states are influenced by each other as regards criminal procedural law. It can further be noted that the Finnish civil procedural law is equally inspired by the Swedish situation, as is the case for criminal procedure.

2 What is the aim of criminal law doctrine?

The purpose of criminal law doctrine is to make criminal law systems more rational and predictable.[1] I primarily refer to the efforts of researchers to systematise the law and to construct a general part.[2] The general part of criminal law is what would in German be

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1 On the character of legal dogmatics, see Jareborg, Rättsdogmatik som vetenskap, *Svensk Juristtidning* 2004 pp. 1-10.

2 A strong position for system thinking within legal science is given by Pawlik, *Das Unrecht des Bürgers* (Tübingen 2012) especially pp. 1-23.

called 'Allgemeine Lehren'. All researchers within the field of criminal law do not need to publish books on issues relating to the general part, but what they do need, is a good understanding of the system as a whole. A strong awareness of the system is required for an understanding of how the system functions.

The research actually conducted in the Nordic countries does not solely focus on systematisation. Naturally researchers also interpret the law.

The formation of various concepts is a central task assigned to researchers in criminal law. Effective and well-reasoned concepts are vital both in relation to the systematisation and the interpretation of law. I regard them mainly as tools. And as we know, some tools are better than others.

3 The limits of a fully national criminal law doctrine

There is, at least in principle, nothing that prevents us, as researchers in criminal law, to stick to our national legal system. This might to some extent be justified if the general part of criminal law has recently been revised, as is the case in Finland.[3] In Norway, new rules will also enter into force some day.[4]

The temptation to take a very narrow view and only focus on the national legal system is considerable, if the researcher has participated in drafting the rules that form the new general part of criminal law.

This type of isolated approach, with a focus only on national law, can be seen as practically oriented. It does not fulfil the criteria of 'jurisprudence' (*Rechtswissenschaft*); or at least it does not fulfil the requirements set forth by the University of Helsinki. According to our criteria, a thesis has to make reference to – and I quote – 'a sufficient expertise in the research field'. The problem in Finland is that we do not have enough experts in criminal law.[5]

Consequently, it is not possible to write a PhD thesis of that nature in Finland. The situation is different in larger countries, such as Germany. This becomes obvious when studying German PhD dissertations and habilitations.

Research can be conducted on specific crimes, as for example tax offences, insider trading, offences against bankruptcy laws, money laundering etc. However – and I really want to emphasise this – the research needs to be based on solid knowledge of the general part of criminal law.

3 See e.g. *Matikkala,* Om slutskakning – den finska strafflagsrevisionens sista fas, in Laitinen(ed.): *Nordisk Workshop för Straffrätt* (Rovaniemi 2007) pp. 101-110.

4 The amended Norwegian Criminal Code, Lov om straff (straffeloven) Act 20. May 2005 has yet not entered into force.

5 The personal gallery of the Finnish criminal law science has been thoroughly dealt with in Finnish by Lahti, Rikosoikeustiede ja rikosoikeuden yleiset opit – kehityssuuntia 1960-luvulta 2010-luvulle, in Lahti (ed.) *Rikosoikeuden muutos 1960-luvulta 2010-luvulle. Pekka Koskisen (1943-2011) muistojulkaisu* (Helsinki 2013), pp. 53-68.

The criminal law doctrine is in other words based on other sources than national preparatory works and case law. This is a view that we, as researchers, should have as a starting point.

The criminal law doctrine is developed within a jurisprudence that defines its own rules. The jurisprudence also differentiates between good and poor research. There are potentially differences between the Nordic countries in how the rules are defined. Today I will not discuss further to what extent this would be the case.

What I proclaim, is that the Nordic scientific criminal law doctrine utilises sources of foreign origin. For example, in Finland it is common for the authors to turn to Nordic sources. In my experience there is a similar trend among PhD students in other Nordic countries. They refer to Nordic legislation and statements in the doctrine. The decision to write in Finnish will make it more difficult for the author to take part in the scientific discussion.

The problem we face today is not so much related to the availability of sources. On the contrary, we struggle because of the great number and variety of sources.

Nowadays, most PhD theses in criminal law and criminal procedural law have several links to international sources. Both international conventions and material produced by the EU have an effect on this field of law. For example, it would be impossible to write a Nordic PhD thesis on insider trading, without taking notice of the numerous conventions and EU norms on the basis of which the rules in the Finnish Penal Code have been stipulated.[6] These are sources of law that need to be taken into consideration in a scientific text. In contrast, it would be normal for a Finnish judge to only read the preparatory works when applying rules that are based on EU norms. They rarely study the directive or the framework decision that has been adopted on EU level.

In my opinion, texts on the general part of criminal law have a similar status. The 'grammar' of criminal law is universal. Hence, researchers are forced to pay regard to texts written outside the Nordic countries. An analogy could perhaps be made to the rules on evidence: the best evidence should always be noted. Taking this analogy further, we recall that rational models and patterns of thought are of relevance when analysing the rules on evidence. These patterns of thought can normally be found in judicial systems of larger countries. Nowadays these countries would mainly be Germany and the Anglo-Saxon countries, like England, Wales and the US. The discussion on the legitimation of criminal legislative acts has been most active in the Anglo-Saxon countries, whereas the German doctrine has focused more on the concept of crime and its components.

6 The Finnish Criminal Code, Strafflagen 1889/39.

4 Can Europe learn from the Nordic criminal law doctrine?

We are well justified in presuming that the Nordic criminal law doctrine, with scientific ambitions, also makes use of European sources. This type of Nordic research can only participate in the debate on European level by publishing in English or German.

It is obviously hard for the researchers to avoid the national judicial system if they focus on the general part of criminal law. In that case, the research will consequently be of less interest for the international academic community.

Worth noticing is that e.g. Jareborg published research on the objective requirements of negligence in English.[7] He was able to make a thorough analysis, without discussing the Swedish national judicial system too extensively.

Research on questions relating to criminal law philosophy will not share these challenges. The link to a national judicial system is almost irrelevant. This would be the case for example when dealing with theory on criminalisation or the general legitimation of criminal law.

5 Is a criminal law doctrine with European influence of any practical relevance?

I can immediately come to think of one way that the doctrine has a large impact. Namely, it will affect the education in criminal law that is offered to students. Many researchers that tackle fundamental questions in their work give lectures at universities. Naturally, they will present their ideas during those lectures. In the long run we may expect this to initiate changes and that this will result in better case law.

Sometimes concrete cases linked to the general part of criminal law need to be solved through case law. Does the academic discussion have any significance under such circumstances? Is there a genuine dialogue between science and praxis?

I don't have any clear cut answers to these questions. However, I should mention two phenomena.

The first relates to criminal intent. We could start with the Finnish model. For several decades students could read in the leading Finnish textbook that *dolus eventualis* in crimes where the harm is actually realised requires that the suspect is aware of a possible consequence and is at least indifferent toward this consequence. The Supreme Court of Finland was, however, reluctant to accept this.[8]

The change came in 1978 when a type of 'probability intent' was introduced by the Supreme Court in a few judgements, without providing any real justification for this model. There had been no interaction between the court and the research community.

7 See Jareborg, *Essays in Criminal Law* (Uppsala 1988).

8 Frände, *Allmän straffrätt* (4 edition, Helsingfors 2012) pp. 122-127.

A discussion on these issues had not taken place in the academic world at that time and apparently there was resistance to the use of foreign sources.

The research would increase radically in the 80's and the problems related to the use of a model based on 'probability intent' were revealed. Later, a committee was established in order to prepare a thorough reform of the general part of criminal law in Finland. The committee, led by professor Pekka Koskinen, put forward a proposal, that did not only accept the concept of 'probability intent', but also introduced the concept of 'intent of acceptation'. Koskinen had excellent knowledge of foreign criminal law systems and could therefore base the proposal on comparative law analysis.

In a statement on the proposal, the Supreme Court decided not to engage itself in a scientific discussion on intent. Instead the court claimed that it had been presented with no arguments that would justify the 'intent of acceptation'. The Parliament accepted the reasoning of the Supreme Court. Hence, we still only have 'probability intent' mentioned in the legislation.[9]

Personally, I regard this as no more than a stubborn attempt to stick to an old tradition dating back to 1978. In my opinion the Supreme Court ignored the results of legal research. These results had mainly been obtained through the analysis of foreign sources. There appears to be some twisted nationalism, which may have affected the manner in which the Supreme Court decided to handle the question of intent.

The legal science did not give up and the discussion has continued. The Supreme Court has not amended its position and sticks to the old 'probability intent'. This has been the case, despite the fact that the Parliament in relation to other components than consequences did not rule out the possibility to apply 'intent of acceptation'. The Supreme Court appears to fight a round of shadowboxing against the doctrine.

The Swedish version of dolus eventualis was the target of criticism during many years in Sweden. Dolus eventualis was called hypothetical eventual intent. The Supreme Court of Sweden confronted the issue in two important judgements in 2002 and 2004.[10] The court solved the cases with the help of a type of 'intent of indifference'. I will not go into detail about the exact structure of this model.[11] What is of interest is that the Supreme Court of Sweden in a sense participates in the doctrinal discussion. The court listens to the discussion in the criminal law doctrine and then, with its status as an authority, delivers an answer. Naturally, this will not silence the discussion in the doctrine but case law has to adapt to the new guidelines.

9 More detailed on Finnish intent, see e.g. Frände 2012 pp. 107-134.

10 These judgements are referred to as NJA 2002 s. 449 and NJA 2004 s. 176.

11 See foremost Asp, Ulväng and Jareborg, *Kriminalrättens grunder* (Uppsala 2010) pp. 310-325.

The second example I would like to present concerns culpa of fault, or in German: objektive Zurechnung.[12] The discussion in Finland was very much influenced by Jareborg's ideas in 'Two Faces of Culpa'.[13] Initially, when writing my thesis in 1989, I expressed my scepticism. However, by 1994, when publishing a textbook, I had already become a true believer and supported the ideas of Jareborg.[14] The model has been intensively discussed in the Finnish criminal law doctrine. The debate reached its peak in 1996, with the publication of a thesis on punishable negligence by Nuutila.[15]

Concepts such as permissible and unauthorised risk as well as culpa of fault are mentioned in the preparatory works in relation to the rules on negligence in chapter 3 section 7 in the Finnish Penal Code. In contrast, the Supreme Court of Finland has deemed it sufficient to work with the concept of predictability. However, nothing indicates that the court would find culpa of fault to be relevant. Naturally, we feel intrigued to speculate on the reasons behind this. Personally, I believe that the Finnish tort law has had its influence. When determining the limitations of liability, the predictability of the damage is of vital importance. Most Finnish judges will take on both civil and criminal cases. Hence, they probably see no reason to divert from the theory on predictability as they turn to a criminal case. It seems like 'objective Zurechnung' will not be applied in Finnish courts as long as the objective and the subjective aspects are not differentiated in tort law.

I do not dear to comment on the attitude of the Swedish Supreme Court toward the doctrine of culpa of fault.

All in all, I wish to emphasise that the Nordic criminal law research is heavily dependent on European sources. To what extent Nordic researchers might influence the rest of Europe is a trickier question.

It appears that at least in Finland the case law is fairly immune against impulses from the criminal law doctrine.

12 Frände, Objektive Zurechnung - nichts für Finnland, in Freund, Murmann, Bloy and Perron (eds.) *Grundlagen und Dogmatik des gesamten Strafrechtssystems Festschrift für Wolfgang Frisch zum 70. Geburtstag* (Ducker & Humblot 2013) pp. 271-280.

13 See Jareborg 1988.

14 See Frände, *Den straffrättsliga legalitetsprincipen* (Ekenäs 1989) p. 196 and Frände, *Allmän straffrätt* (Helsingfors 1994) pp. 103-116.

15 See Nuutila, *Rikosoikeudellinen huolimattomuus* (Vantaa 1996). On the thesis in Swedish, see Frände in JFT (Juridisk Tidskrift published by Juridiska Föreningen in Finland) 1997 pp. 213-222.