QCSLAN QLD CHILD SAFETY LEGISLATION ACTION NETWORK

"Protecting the rights of our children & keeping them safe in our communities"

"In justice anywhere is a threat to Justice everywhere."

Crime Inquiry 2014
Submission 046

Mr Ian Berry,
Chairperson, Legal Affairs and community Safety Committee,
Parliament House,
George Street,
Brisbane Qld 4000.
Dear Sir,

Re: Inquiry on strategies to prevent and reduce criminal activity in Queensland.

Thank you for the opportunity to respond to this very important and timely Inquiry. Congratulations to the Queensland Government on this initiative that I trust will deliver in time, safer communities in our State of Queensland.
QCSLAN (Queensland Child Safety Legislation Action Network) was formed in recent years to respond to a need to have amendments to a certain section of the Criminal Code impacting on Child Safety. It also introduced new Legislation into the Act. Since that time we have continued to be proactive in working towards safe communities, especially in protection of children. Personally it is my passion to have a generation of children raised in communities where they are safe and are able to enjoy and develop in and through their childhood years, through adolescence and into adult who will be community and business leaders and builders of the future.
I feel I have many years of experience in the community in Child protection, from initially fostering abused children, working with abused and marginalised youth, working in high schools with students at risk, and over many years with the community Domestic Violence network. During this time I have regularly interacted with Police through cases and also the Criminal Justice System. Particularly in the areas of Child Protection and Domestic Violence I have observed and been involved first hand with the inequities, the failures of the Courts in delivering both justice and compensation to victims in many cases.

It is a privilege to submit to this Inquiry to both prevent and reduce criminal activity in communities.
The terms of Reference and key aspects certainly cover the key issues towards delivering safer communities.
In response I have included and attached several documents. One of these a Paper I have written on building safer communities through bridging the gap between the Judicial and the Community. There is a level of distrust between the Judiciary and the community both as a result of lack of procedural knowledge on the part of the community and perceived lack of responsibility on the part of Judiciary in failure to implement appropriate sentencing, care for the victims adequately and understand community needs and impacts.

My experience with crime in the community covers both personal issues and the impact on our business a few years ago. While community crime may not always impact personally on every member of a community, in a broader way, it certainly does impact the community as a whole, for when one sector is hurting, this invariably has a flow on impact. In business it was the stealing of cash and handbags from our business and then in later years, the failure to care for and compensate a victim.

I have worked extensively with youth over the years both in High Schools and in the community and it is my strong belief that often the bad behaviour that develops into criminal activity over time, may well have been prevented had these youth been subjected to good parenting skills and setting of boundaries. Our youth need to feel secure and listened too. There needs to be a learning of reciprocal respect between youth and their peers and authorities. They also need to know and understand to live within boundaries and discipline and to suffer the consequences of law-breaking when they do so.

While drugs and alcohol have emerged as key determining factors in youth crime, often the drug and alcohol are a part of their response to their insecurities and the turbulent years of adolescence. It is said that the 3 plagues of human society are loneliness, helplessness and boredom.
Insecure, lonely and bored youth easily succumb to drugs, and idle hands make way for petty crime.
So in developing safe commutes, intervention programmes will form part of a major part of any strategy.

In the areas of Child abuse and Domestic Violence, it is often it is often a combination of the above and the failure of the much needed support for families coming from a community that is consumed with its own individual personal concerns. Too many of us live in our own little silos! We not only don't know what goes on behind closed doors, but many of us don't want to! Of course there are the paedophiles who chose the pathway they are on and approach un-suspecting families and the rest is awful history. There is but one way of dealing with these!! And that is NOT in the community.
Although it may sound a little naive in today's world, I have to say that intervention is the only strategy that will deliver real and long term change, reducing and preventing criminal activity in communities. You could call this "fighting crime another way." We could never build sufficient jails to accommodate the rising criminal activity but we MUST fighter from 'higher ground".. That is the ground of intervention, of education, teaching parenting, setting boundaries and very much that of connecting with our communities, embracing families in their needs, of de-mystifying the judicial system. The law is given to make communities safe. It must fulfil this role if we are to build safer communities.

One of the overseas websites that seems to have quite useful information is http://www.clinks.org/criminal-justice-policy-and-practice
On this site is a graphic of the Criminal Justice System that encompasses some of the strategy ides I have used . This could be quite useful as a starting point for the future strategy.
http://www.clinks.org/sites/default/files/clinks_the-criminal-justice-system-at-a-glance.jpg

Thank you for listening,

Yours Sincerely
Beryl.

Beryl Spencer

Beryl J Spencer,
QCSLAN QLD Child Safety Legislation Action Network
108 Spencer Road, PO Box 129,
KILKIVAN Q 4600
E: billyjs@bigpond.com
M: 0411351824
P: 07 54841909
"Injustice anywhere is a threat to Justice Everywhere"

Summary of Submission and some final comments:

1. Crime Impacts and responsibilities
2. Information Paper
3. Cover letter to Mr Berry
4. Supporting Documents

I have responded to your key aspects within these documents.
Again I would stress while all four of your aspects are important and integral points to a strategy, early intervention is the key and therefore needs to attract key funding initiatives. While the early intervention strategies are being implemented, all other aspects would need to be followed.
Reinvestment in justice could include the "bridging the gap or community judges" that I have include, perhaps some funding to initiate the community collaboration.
The areas that I have lived in over many years include Gympie and Wide bay areas. However as I am networked through a large region of South East Qld and the Regional and Remote areas though various involvements, I am aware that though Gympie area appears to experience a higher rate of domestic violence and child abuse, these issues are common across most areas.
The incidence appears to move with the lower socio-economic population but of course this is not always the case. From the Caboolture area through to, perhaps as far north as Bundaberg, seem to be areas that would need most attention, and then the far north
In some more remote rural areas, though there may not be figures to support this, there is quite a level of abuse that is not recorded and will in time lead to increase health costs to the State, particularly in the mental health and depression areas.

"QUEENSLAND AND Community Judges" by Beryl Spencer

IN Martin Luther King's famous speech of 50 years ago, "I have a Dream", he made a challenging statement re Justice in the US: "I refuse to believe That the bank of Justice is bankrupt. Now is the time to make Justice a reality for all of God's children. It would be fatal for our Nation to overlook the urgency for a moment."

As the clock ticks.. A child somewhere is being abused!! .. a crime is being perpetrated! What is our bank in Queensland? Could it be crammed with determination for justice? Now I am going to be brave and say "I DO have a dream, a vision for our state & nation where:

- Every child can grow up in safety. NO MORE CHILD ABUSE. (PHYSICAL (including health), SEXUAL, EMOTIONAL) This IS their BIRTHRIGHT!
- Where women will not face the awful rigors of domestic violence in all its' insidious forms.
- Where communities do not suffer the impacts of criminal activity across their financial, physical and emotional lives.
- Where the culture of our Court Systems actually upholds the Legislation of our land
- Where the Judicial system has an understanding and relationship with the community and sees it's role as central to the safety and ongoing healthy capacity of each community.
- where THE VEIL OF SILENCE AND INJUSTICE ARE no longer SCARS on the EMOTIONAL landscape of our beautiful sunburnt country!

So is this a dream too far away? I believe not. In fact, as I talk with the public, I believe it is embodied on the lips of most and in simplicity the desire of everyone. People from children, to those with disability, to the ageing ALL want to be able to feel safe to walk in their streets and parks, to go shopping and particularly in their homes*. It is, in fact our right in this State and Nation!*

I have been so challenged by the media reports of recent weeks on both the behaviour of the "Bikies" and the "need to keep paedophiles in a safe place from the community. (realise that the impact of the implementation of the Bikie laws is already contributing to safer communities, in the long term more intervention in these area must be on-going.)

IN recent years there appears to have been an escalation of crime from that which is often regarded as petty to violence and murder I our beautiful State of Queensland.

Since the early European settlement of Australia, the judiciary of our Nation has had a relationship with law reform, but have these various attempts actually delivered justice for all and safe communities to raise families?

In the past this reform was traditionally delivered by judges for judges, magistrates, and lawyers. Outside the judicial system there was little or no input. This MUST change for the safety of our communities.

Shift in community mood: I believe there has been a shift in the community mood and it demands that this is the time for change in the judicial system. Much of this mood, I believe centres around the need for accountability, transparency taking responsibility for leniency and its impact on the victim and the community. This rising demand for change of the culture of the Judicial system is simply a cry for justice from ordinary people that make up our communities. These demands could be in response to:

- the perceived escalation of crime and the impact of media reporting,
- impact on communities,(ordinary people often on the receiving end of crime for no more reason than they were there gong about their business on that unfortunate day)
- in the fact that many don't feel safe in their own homes at times.
- the escalation of serious Crime shows on TV. May be creating a pseudo awareness of crime and the implications of police involvement.
- personal knowledge of respondents and victims.
- lack of understanding of the law/legislation an sentencing requirements. (In other words, how the Court system works)

Some of these correlations may seem small but may be significant in the overall picture.

History :

In pursuing research of Crime in different countries to prepare of this paper, I found a comment by Judge Benjamin Cardozo who regarded as intellectual grandfather to these new agencies. As early as 1921, Cardozo proposed the establishment of a law reform agency, to be named the "Ministry of Justice", to mediate between courts in the United States and the legislative branch. Cardozo wrote:[1]

"The courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped is because there is no one whose business it is to give warning that help is needed. …To-day courts and legislature work in separation and aloofness. … On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labours bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them. This task of mediation is that of a ministry of justice." Cardozo's ideas in this regard were influential in the United States, the United Kingdom, and ultimately elsewhere in the common law world.

In 1965 Lord Gardner (UK) said: "the hallmark of civilized society is not that jaws are just, but up to date, accessible and intelligible. (Community understands in principle)

Effective Law reform is not simply about implementing such law/legislation in a punitive way, but holds as far wider impact in that of delivering safe communities. Therefore this delivery of real and effective law reform will *come* :

[1] Judge B N Cardozo "A Ministry of Justice" (1921) 35 Harvard Law Review 113 at pp 113-4

- *from understanding the operation of the law and its requirements*
- *through consultation with those affected by the law, including the community*
- *through outreach into communities*
- *through education in the terms of law (must be intelligible) and*
    - *Increased desire to live safely within the jurisdiction of the law.*
    - *Therefore may increase community participation in reducing crime and delivering safer communities. (breaking the law is not tolerated in this community)*
    - *Reform will also support and protect moral and social values.*

Bridging the gap between the judiciary and the community is a key to effective law establishment and delivery: (Quote from a paper on " The work of Judges – Tough on Crime advocates all rise" by Dr Kate Rossmainth Macquarie University.)[i]

(Re a particular case) "it occurred to me that, when it comes to sentencing, a judge's job is at once analytical, ceremonial and personal. Judges assess crimes in relation to the law. They must also sit opposite people and decide who they are and what to do with them.
At stake is the idea of wisdom: what we think it is, and what we want it to do. I'd want a wise person to sit in judgement of me, someone with experience, intellectual honesty, ethics and compassion. But complex sentencing procedures in New South Wales *inhibit the wisdom of judges*. *They impede the very quality we most need in our courts: the capacity of judges to gently weigh the unquantifiable circumstances of wrongdoing, broken lives, and that most ungraspable of things – the human soul – so that they might reach just decisions.*

*So delivery of justice for all in today's world may be somewhat cahallenging but must also be approached in every possible way for the sake of our obligation to society and our communities that every child has the right to live and grow up in a safe space****. I believe that key point in this is that of demystifying law and legislation to ordinary people.***

Possibilities and comparative Models from other countries:

1. **UK Models** Diversity and Community Relations Judiciary (DCRJ) [ii] .

The main role of a DCRJ is:

- to act as a point of reference within the courts
- to facilitate and promote dialogue and understanding with diverse communities and minorities, and
- To help, together with the court administrators, to develop links with harder to reach communities and minority groups who would otherwise have very limited knowledge of the court process.

In this capacity, these judges have tried to encourage more community involvement through participation, for example by ensuring proper minority representation on juries, promoting

the magistracy, and championing equal employment opportunities within the courts and the justice system generally.

Other activities have included inviting leaders of community groups and organisations to visit the courts and meet the judges and important civic officials such as the Mayor and Sheriff of the county, to discuss pressing issues or concerns. Judges have also visited local religious and community groups.

DCRJs also visit schools and universities to talk to students about the justice system, and to encourage them to seek employment in it. They invite pupils from local schools to their courts, so that they can get an "insider's" view of the process.

2. **U.S. Red Hook Community and possible outcomes:**
    I. **Reduced Incarceration**: The Justice Center has reduced the use of jail at arraignment in misdemeanour cases by 50 percent.
    II. **Accountability**: Compliance rates with court orders average 75 percent–a 50 percent improvement on the standard at comparable courts.
    III. **Public Trust**: Approval ratings of police, prosecutors and judges have increased three-fold since the Justice Center opened.
    IV. **Public Support**: A door-to-door survey revealed that 94 percent of local residents support the community court. Before the Justice Center opened, only 12 percent of local residents rated local courts favourably.
    V. **Reduced Fear**: Since 1999, the percentage of Red Hook residents who say they are afraid to go to the parks or subway at night has dropped 42 percent.
    VI. **Fairness**: More than 85 percent of criminal defendants report that their cases were handled fairly by the Justice Center–results that were consistent regardless of defendant background (e.g. race, sex, education) or case outcome.

3. **Big Judges & Community Justice** Courts ... CLiNKS

Unlike the other European jurisdictions, the arrangements for decisions about conditional release from prison do not involve judges, other than in an advisory capacity. The responsibility for authorising release on post-license supervision lies with civil servants who are subject to the authority of the Parole Unit. In Germany, Austria, and The Netherlands it is the judiciary (often the sentencing judge) that have the authority to conditionally release offenders, and to varying degrees they also have a role in decisions around the management of the supervision period.

Community Justice:

The first of these was the North Liverpool Community Justice Centre (NLCJC) which opened in 2005. This was followed soon after by the Salford Community Justice Initiative. The NLCJC is the most comprehensively resourced and most closely conforms to the model developed at the RedHook Community Justice Centre. There are a number of key features of the NLCJC including:

a. a dedicated circuit judge who presides in the overwhelming majority of cases and hears all of the review cases of those offenders placed on community orders. The position was unique in that there was a recruitment process for the post and two members of the local community were included on the interview panel.

b. the community justice centre is sited in a converted school in the local community and was designed to provide office space to co-locate a wide range of court and welfare agency personnel. There is also an adjacent 'job cafe' which delivers a range of services for unemployed people in the local community including those appearing before the NLCJC.

c. as noted previously, there are staff from a number of agencies based at the court and available to deliver assessments and services to defendants appearing before the court. It should be noted that these services are also available to the citizens of the local community as well.

d. court processes have been streamlined to facilitate swift administration of justice in many cases. Again this is supported by the co-location of police, CPS, and court administrators as well as the probation service and Youth Offending Service.

e. there are established mechanisms for the local community to identify the types of crimes and misdemeanours that are causing current concern, as well as providing information about opportunities for useful reparation to the community through the agency of Unpaid Work requirements as part of a community order.

4. **Netherlands** "Bridging the gap between judges and the public? A multi-method study and "The citizen as the Judge" Documents attached

Abstract: The article examines the gap between Dutch judges and the public in terms of preferred severity of sentences. It focuses on one particular explanation usually given for the gap; lack of case-specific, detailed information on the part of the public. (findings detail in study attached)

- A survey among a sample from the Dutch population
- a sentencing experiment with judges in Dutch criminal courts
- a sentencing experiment with judges, using the same case materials as the judges, but now with a sample from the Dutch population.

Results show that providing the public with detailed case information reduces the severity of sentences preferred, whereas those given unbalanced newspaper reports only, preferred much harsher sentences. **Despite such reduction in punitiveness as a result of information, the public's preferred sentences remain much more punitive than judges' sentences pertaining to exactly the same cases.**

The concept of the punitiveness gap is based on public opinion surveys (Netherlands) which show consistently that this is indeed, a wide gap between judges and public in terms of preferred sentences. The real gap in sentencing may lie between the punitiveness of the public in response to crime and their perception of Judges maxims in pronouncing judgements. (too much leniency) This may well prove to be a challenge in reducing this gap, if at all! While this research may not be 100% conclusive on the impact of Community Judges, it certainly poses the opportunity for possible change.

A summary of this presentation:

- provision of complete information on the criminal court to the general public may not bridge the gap with respect to severity of sentence.
- the public generally is more punitive
- lay people will not reach the same sentencing decisions as judges
- the public generally have a misconception of judges' punitiveness, and overestimated the sentences for a particular crime.

[i] www.themonthly.com.au/issue/2012/September/135407489/kate-rossmainth

[ii] http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/judiciary-within-the-community/diversity-and-community-relations-judiciary .

Citizens as Judges [i]:

Key Points:

- *Communities taking responsibility*
- Communities and early intervention practises:
    - Community collaboration. Local Government /Business/School/Churches/ Youth Groups/Sporting bodies/Seniors Groups to formulate specific regional responses.(These would vary by region)
    - Judicial be invited to educate and inform community on crime/response/sentencing/court procedure (possible involvement of JP and Magistrates)
    - Network and support victim, families impacted by crime through various sector groups.
    - Support parents in raising children(sport recreation etc)
    - Embrace and create intergenerational connections to bridge the gaps in these relationships. (Older people sharing their expertise on trades, life skills, home economics, craft and sport etc)

- Response to Crime(Community and Judiciary):
    - The "Broken Windows" scenario of New York and other cities where damaged property was quickly repaired so it had less social impact on the attitudes of the community, particularly youth. (If you want to get rid of the "smell" of rats and rubbish, you exterminate the rats. They don't operate in clean areas!!) I feel to a degree, Qld Government has commenced this process where "Bikies" are concerned.
- Judicial*:*
    - Implement legislation and less use of discretionary options.
    - Take responsibility for the consequences of their decisions & judgements. (NB know paedophiles, sexual abusers released to re-offend, sometimes increasing their crimes to murder.)
    - Understanding crime and the outcomes of Judicial decisions from the community perspective.
    - Understanding the needs of victims (compensation/support/counselling) as priority

Key issues and level of crime in communities:

1. *Juvenile Crime:*
    - Community apathy (if not impacted...not my problem)
    - Failure of parenting and setting boundaries (consequences of actions and bad behaviour)
    - Need to "nip juvenile crime in the bud" Appropriate sentences on first time crime
    - Parents to take responsibility and make restitution
    - Some community service may be valuable and effective in working with youth.
    - Initial short stays in watch house/jail also special youth detention camps that include hard work and discipline.

- Avoid incarceration in adult jails but maintain punishment that fits the crime.
- Punitive response and Restorative justice: Rather than being seen as contrary, should work together. Restorative justice should always be the focal point for youth, seen as an opportunity to move youth from crime, but NOT as a 'soft option".

2. Adult Crime:
    - Less adult crime if youth crime dealt with appropriately in most cases
    - In the case of sexual abuse, rape, paedophilia, these are often crimes that escalate as the person reaches adulthood should be judged harshly and mandatory sentencing.
    - Robberies and crimes such as wilful damage to property damaging need to be treated appropriately but always to include restitution or work towards restitution if un-employed. (Road work/councils BUT Please don't ever place these adult criminals to work in parks, schools around children)

[i] A gap between judiciary and public. Excerpt from "Social Psychology of punishment of Crime" Margot E Oswald, Steffen Boeneck, Jorg Hupfeld-Heinemann (Also attached as PDF)
Bridging the gap between judges and the public?
A multi-method study. Jan W. de Keijser & Peter J. van Koppen & Henk Elffers (Attached)
http://www.clinks.org/criminal-justice-policy-and-practice

ESSAY

THE WORK OF JUDGES

Tough-on-crime advocates all rise

Kate Rossmanith
SEPTEMBER, 2012

Medium length read *5300 words*

Supreme Court Judges

in full regalia. © Penny Stephens/Fairfax Syndication

Why wisdom matters, and sentencing by numbers is selling justice short.

A couple of years ago, as I waited outside Courtroom 3 of the NSW Supreme Court in King Street, Sydney, I got chatting to an elderly man, a retiree, who told me he routinely visited the courts because he liked "seeing the justice system in action". Along with 40 others, we were attending the sentencing of a 39-year-old woman who had been found guilty of murder. She had deliberately run over a young man with her car and killed him. As we filed into the courtroom, I asked my companion if he thought that the woman felt remorseful.

"She has seemed very down," he said. "But it's hard to say whether it's for herself or for what she's done. The judge will be able to tell."

"How?" I asked.

"He's had so much experience. He knows character."

The judge, dressed like Santa in scarlet robes, entered and delivered his judgement. It took more than 30 minutes. He told us that he was required to use a "stepped approach" to reach the sentence, that there were "different categories of murder" and that he must consider the "objective seriousness of the offence". He spoke of "aggravating" and "mitigating" factors, and of the "statutory ratio between the non-parole period and the total term". He announced it was a murder of mid-level range – being neither planned nor wholly spontaneous – and sentenced the woman to 25 years in prison. He reduced the standard non-parole period from 20 years to 18 years and nine months because of the offender's "immediate and continuing remorse".

The judge stood, we stood and he exited. The retiree turned to me. "We have excellent judges," he said. "They get things right 95% of the time."

I didn't know how His Honour had arrived at the sentence, nor precisely what had convinced him of the woman's remorse, and it occurred to me that, when it comes to sentencing, a judge's job is at once analytical, ceremonial and personal. Judges assess crimes in relation to the law. They must also sit opposite people and decide who they are and what to do with them.

At stake is the idea of wisdom: what we think it is, and what we want it to do. I'd want a wise person to sit in judgement of me, someone with experience, intellectual honesty, ethics and compassion. But complex sentencing procedures in New South Wales inhibit the wisdom of judges. They impede the very quality we most need in our courts: the capacity of judges to gently weigh the unquantifiable circumstances of wrongdoing, broken lives, and that most ungraspable of things – the human soul – so that they might reach just decisions.

*

The NSW State Coroner's Court in Glebe is a short, flat building that stretches for a third of a block on Parramatta Road in Sydney's inner west. On a Wednesday afternoon I meet Magistrate Hugh Dillon in his office, where a glass wall looks out to a small foliage-filled courtyard. Dillon was a public prosecutor until he became a magistrate in 1996, and in 2008 he was appointed Deputy State Coroner. He is softly spoken and reflective, and reminds me of an old-world moral philosopher.

Before he began presiding over inquests into deaths – witnessing doctors confront grieving families whose babies had died; consoling widows of traumatised policemen who had taken their own lives – Dillon worked in the local court sentencing people. "I don't pretend to speak for all magistrates or judges or our courts, but I think that the process is unnecessarily complex and intellectually turgid, overladen with all sorts of rules and guidelines," he says. "Sentencing has become an abstract, Byzantine dance of words. It's Hermann Hesse's *The Glass Bead Game*."

For judges and magistrates in the NSW criminal justice system, the number of prescribed matters that they must take into account when sentencing someone, and the accompanying algorithms applying to discounts and aggravation, has grown so vast that the process has become worryingly esoteric. Since the 1980s, successive NSW state governments have introduced legislation curbing judicial discretion. It was the result of a "law-and-order auction", as critics put it, as governments and oppositions vied for the tougher-on-crime mantle. In the late 1990s, the Carr government introduced 'guideline judgements': model cases that reflected a sentencing scale in commonly encountered situations. Judges were told that if they departed from the guideline case when arriving at a sentence they were required to give a reason. In 2002, standard non-parole periods for some offences were introduced (40% of the maximum sentence for some offences, 80% for others), and a mandate to judicial officers that, should they wish to depart from these standard

minimums, they were required to give one or more reasons drawn from a formal list. There are also "sentencing discounts", where offenders are eligible for a reduced sentence if they plead guilty at an early stage, and further discounts if they assist police. The thinking is that guilty pleas save the court time and money, and save victims from having to give evidence. An offender who pleads guilty before being committed to trial is eligible for a 25% reduction; an offender who pleads guilty after committal gets up to 12.5% off.

The government's rationale was that the legislation would achieve greater consistency in the sentencing process, and render it more transparent to the public. It's not clear whether either goal has been achieved. Meanwhile, the changes have increased the actual labour of judicial officers, who must write more elaborate and often mind-boggling judgements if they are to withstand the scrutiny of the appeals courts.

"When I first went into practice, we used to talk about the 'tariff'," Hugh Dillon says. "The tariff was the range within which a particular offence would fall. In a drug importation case, for example, everyone understood that a certain amount of heroin imported by a courier with no previous criminal history in Australia would attract a tariff of three to five years' jail. Judges could work out the exact sentence by going up and down the scale between three and five years, depending on the subjective factors, but they would stay within that range. A sentence hearing might last an hour. These days it might last three or four."

The term 'intuitive synthesis' is used to describe the process whereby a judge considers the penalty range of an offence together with a mass of subjective information to settle on a sentence. For instance, two men might commit an armed robbery at a convenience store. Superficially it would seem that both men should receive the same sentence. However, the older man has a long criminal record and a history of violence while the younger man has no criminal record, was co-opted into the offence, confessed to police, expressed deep remorse and assisted in apprehending his accomplice. In arriving at the two sentences, a judge must also consider the "objective seriousness" of the offence. Were guns, knives, baseball bats or syringes used? How much cash was stolen? What property was taken? Was the victim threatened, beaten or shot? Judges and magistrates draw on their deep knowledge of case law, and their experience of people, to arrive at a sentence that sits in an appropriate range.

The problem is that current processes do not suit this 'synthesised' approach but instead implicitly encourage a sort of phoney science. As Dillon tells me: "Some judges try to place a mathematical range on the kinds of discounts that offenders receive. When sentencing a person, they sit there and think, 'OK, this sentence ought to be four years,' and then they turn to a formal list of aggravating and mitigating factors and add and subtract all these little bits and pieces before arriving at three years and eight months – 'OK, I've not only got to give him a discount for the early plea, but I've got to nominate a number. He pleaded guilty a month after being charged, so I might give him 15%. What's 15% off three years and eight months?' – and they go and work that out on an abacus or something. It's fake mathematics because not only are there no set numbers for these factors, but the original starting point is discretionary. One judge might have had the original number as four and a half years, while another might have three and a half."

Even those judges who rigorously adopt an intuitive synthesis approach now also keep a calculator on their desks. One judge has 'Intuitive Synthesiser' written on his calculator. A NSW District Court judge, Andrew Haesler, tells me: "You can have logical, coherent sentencing with *some* mathematical elements, but too much maths skews the process. If we want robots to sentence people, then employ robots. But it won't be fair and it won't be just." Another District Court judge describes the legislation as "a matrix, a labyrinth that you've got to work your way through". A magistrate tells me that the process is "a puzzle with all these little bits and pieces. If you leave out a piece, your sentence will be appealed."

Since the legislation was introduced, there has indeed been a spike in the number of appeals. There have been issues of 'double-counting', for example, where judges are deemed to have accidentally counted a particular factor twice. A more pressing issue concerns standard non-parole periods. In a recent landmark ruling, High Court judges found that a key

case, *R. v. Way*, used by NSW judges to apply standard non-parole provisions, had been wrongly decided in 2004. The maths made no sense. Now Legal Aid NSW is considering a review of the cases of offenders sentenced on the basis of this case. The NSW Attorney-General, Greg Smith, a former public prosecutor, recognises what he calls the "ridiculous complexity" of NSW sentencing legislation. In September last year, five months after coming into office, he ordered the NSW Law Reform Commission to review the NSW *Crimes (Sentencing Procedure) Act 1999*. The report is due out next month.

In the criminal justice system, the labour of judgement is not reserved solely for the judiciary. Judges and magistrates write sentences but they don't administer them – that work is left to others. The NSW State Parole Authority, for example, makes more than 10,000 decisions a year regarding inmates' parole.

It is 9 am at a private meeting of the Authority. Seven of us sit in a sunny boardroom that has an Aboriginal dot painting, a large, limp Australian flag, and a detailed map of New South Wales sticky-taped to the wall. The State Parole Authority offices are in Parramatta, Western Sydney, and are part of the Justice Precinct: a collection of glass-walled buildings and pathways that exudes happy order. The landscaped gardens include thick bushes of mint and lavender, clumps of chives and luminous lemon trees. Twenty people are on the parole board – four judicial officers, 12 community members, and four official members (representatives from Community Offender Services NSW and the police force) – but only five members sit at any given time. Around the table today are two university professors, a young, friendly parole officer whose handwriting is neat and fat like a primary school teacher's, a former undercover policeman with tattoos who once worked "in the drug scene", and Ian Pike, chairman of the Authority. Pike, the former NSW Chief Magistrate, is a smart, compassionate man much liked by his peers. In his home town of Junee, a street has been named in his honour.

At this meeting, the Authority must decide when to allow people to serve the remainder of their sentences in the community, as well as set the conditions of release. Unlike the complex work of the judiciary, with its baffling sentencing legislation, the job of the Authority is administrative. When people are given a custodial sentence, they usually receive a non-parole period from a judge or magistrate, meaning that they are unable to apply for parole until a set date. If a person's sentence is less than three years, the court automatically issues a parole order; for sentences of three years or more, parole is decided by the parole board. Almost all inmates' sentences are finite. Parole is crucial as it's in the public interest to have offenders supervised in the community before their sentence expires. The Authority must also decide whether or not to revoke parole when parole orders are breached.

I scribble snippets of conversation: "He's still only young."

"He made the big time early as a serious offender."

The board makes a parole order for an inmate: "We'll use conditions 4 and 17."

"Your 4 might be covered by 18."

"So just leave it at 15 and 16?"

"Yes."

A parolee has tried to evade a mandatory urine test by substituting his own urine with a sample of animal pee (he took it from his pet cat): "At least he's not pregnant," someone jokes.

A parolee has died: "It's immensely tragic."

"The man overdosed in his bathroom. His 15-year-old daughter found him." On his file they write "Parolee Deceased".

The board revokes a parolee's parole and issues a warrant for the man's arrest: "I had A, B and D."

"Me too."

"I had A, B, D and K."

"We don't need K."

Pike turns to me: "We use so many mnemonics, it's crazy." The secretary has 23 stamps on her desk and, like a bureaucratic pipe organist, she listens to the voices around her while her hands open, punch, close and stack files. During this three-hour meeting, 70 matters are decided upon. On average, each matter is given less than three minutes of discussion.

The rapid pace is made possible by board members reading their thick piles of documents beforehand. For each inmate, parole board members receive the judge's sentencing remarks, a probation and parole report, and the inmate's criminal history. They might also receive letters from the inmate's family or from the victim or victim's family, and, in the case of an offender who has received a non-parole custodial sentence of 12 or more years, a report from the Serious Offenders Review Council.

As parole board members read the material, they make notes and recommendations, translating the mass of documents into a few letters and numbers. For example, a member might want to refuse the person's parole on the basis of 'C19' ("Needs to participate in therapeutic program to address violence") and 'J46' ("Unconfirmed post-release accommodation"). Then they compare notes. Sometimes discussions are heated and a vote is taken. ("On the board there used to be a feminist medical doctor and a chauvinist high school teacher and there was nearly blood on the floor," one member tells me.) But most often there is good-natured agreement.

Sometimes the board grants an inmate a public parole hearing. These hearings take place in the Sydney West Trial Courts building, also in the Parramatta Justice Precinct. In Courtroom 4.07, five parole board members sit at the judge's bench, hear the submission made by the inmate's lawyer, and speak with the inmate directly. All parolees and inmates who've had their parole revoked or refused are eligible to present further information at a hearing. New South Wales is the only jurisdiction in the Asia–Pacific region to have public hearings. Ian Pike is proud of this transparency; visitors to the court are approached by a smiling staffer offering information booklets.

Inmates used to appear in person at public hearings, but now they appear via an audiovisual link from one of 27 videoconferencing studios in 22 correctional centres across New South Wales. It is a cost-effective means of having inmates 'in' court, and Pike makes a point of speaking to offenders. Still, Legal Aid lawyers have concerns that the AV contact is not enough. One told me that inmates just stare at the split-screen monitor, unsure of what's going on. "It's much harder to lock someone up if they're standing right in front of you," he said. "But the AV link is better than nothing." On screens around the courtroom, we see the expressionless faces of men sitting at small tables with hands clasped in front of them, and wretched handwritten signs ('Silverwater'; 'Long Bay') stuck to walls behind them showing which jail we've beamed into. Whenever an inmate ceremoniously stands for the court, the camera framing has the unfortunate effect of beheading him.

Sometimes a wife or a mother might come and wave forlornly at her husband or son on the monitors (men comprise more than 90% of the prison population in New South Wales), but typically the public seating is deserted. At one hearing I attended, a ten-member family – the inmate's wife and three little boys, his mother, his brothers and sisters-in-law – filled the first two rows. After the man's lawyer had argued his client's case, and after the parole board had left the courtroom to deliberate over lunch, the man's two youngest sons crept over to the microphone and began speaking to their father.

“Hi Dad,” the youngest boy said, grinning into the camera.

“Can’t wait to see you, bubba,” the man gushed. “You’re getting big!”

“I love you,” said the other boy.

“I love you, I miss you,” said their dad.

The tiny conversation was on loudspeaker and the man’s face filled screens on the walls and desks. The third boy, the eldest, didn’t follow his brothers to the camera. He clung to his mother’s leg and wept. During lunch I joined the parole board members. Shaken, I told them what I’d seen, and suggested they release this man.

“You can’t catch crooks with sooks,” a former police detective told me.

“He’s an armed robber!” the others said. “He’s had 61 prior convictions!”

Sometimes it’s the victims’ families who come to court. Ian Pike always asks them if they wish to be acknowledged and, if so, he publicly thanks them for being there. The parents of a homicide victim came to another hearing I attended. Their 21-year-old daughter had been raped and killed at a party. The male perpetrator was applying to be released from jail. The girl’s parents sat quietly in the courtroom in a special spot spared from the cameras.

*

New South Wales’ present sentencing legislation was enacted partly in response to community perceptions, beaten up by radio jocks and the rest of the tabloid media, that sentences were too lenient and disparate. Perhaps something primal in us feels that judgement belongs to the victims. When a criminal act tears at our society, we don’t want procedures; we want vengeance. But we also know that we need legal processes, and that victims don’t own the conflict. Unlike the civil courts, the criminal courts don’t set plaintiff against offender; it’s the offender against the judge. Technically, a crime is committed against the state.

Perhaps politicians needn’t worry about public concern over supposed judicial inconsistency and ‘soft’ sentencing. Most judges and magistrates arrive at sentences within a similar range. Those who impose unduly lenient or astonishingly punitive sentences leave themselves open to having their decisions overturned on appeal. As for soft sentencing, such as non-custodial and community-based sentences, research has indicated that when members of the public are given material relevant to a case – information about sentencing, an account of the case facts, the circumstances of the offender, a statement from the victim – people’s desire to punish drops dramatically and they often settle on more lenient sentences than a judge would have imposed.

Judges can never know the inner life of another person, and yet the task of judgement requires them to try. When I asked the Supreme Court judge praised by the retiree how he was sure that the woman who’d murdered the man with her car was remorseful, and why he’d given her a lesser non-parole period because of it, he told me the story: on the night of the incident, right after she’d struck the man, she leapt out of the car and tried to lift it off him. She was hysterical: a nurse found her on the side of the road pulling her hair out. Prison authorities, including psychologists and the chaplain, attested to her constant anguish. The judge looked at me and said: “But part of it, too, was that she was a mother. She had a son whom she loved, and yet she’d killed somebody else’s son. I have no doubt that there was real remorse.”

*

At another private meeting of the NSW State Parole Authority, board members process the list of parolees who have breached their parole orders, and they reach the case of Samuel Connor.*

Six and a half years ago, on the day of his 21st birthday, Connor was drunk and high when he sped down a road on the outskirts of his home town in inland New South Wales, and struck a pole. He killed three friends and seriously injured a fourth. Connor woke up in hospital with fractured ribs, a punctured lung and a broken hip. He pleaded guilty to three counts of manslaughter, and one count of dangerous driving causing grievous bodily harm. He was sentenced to eight years in jail, with a non-parole period of four years. He was granted parole a few months ago.

"I want to give him a slap," says a female parole officer. Connor has breached the conditions of his parole order. He's not allowed to consume alcohol, but he keeps getting caught drinking at his local pub. He's already been given a warning.

"He's saying we've ruined his social life. I want to give him more than a warning; I want to call him up," the woman says.

"Yes, there are concerns there," says someone else.

"Just his *attitude*," she continues. "And it's in the area where the victims' families live. Can you imagine if your son was killed and you saw this guy at the pub?"

"In the pre-release report it states that he's devastated he had to kill his friends in order to learn a lesson. But he *hasn't learnt*. He's *not sorry*," says another member.

"In those country towns there isn't a lot to do. He doesn't have the ability to expand his horizons beyond the pub," says someone else.

They decide to give him a face-to-face warning – a "sound warning", says the young woman – and set a date for a public parole hearing, where Connor will present evidence as to why he should be allowed to continue to serve the remainder of his sentence in the community. Connor will travel the five hours to Parramatta.

Eight weeks later, early on a Tuesday morning, I arrive at the Justice Precinct to find a 20-person film crew outside the Sydney West Trial Courts. They're filming *Crownies*, an ABC TV legal drama. The actors are tanned and trim, nothing like the people who frequent the courts, and when a handsome 'solicitor' turns his back to me I see comically large safety pins bunching together folds of suit fabric. The costume doesn't fit him and this is wardrobe's shortcut.

Upstairs from the make-believe, three men stand in the public seating section at the back of Courtroom 4.07. It's Connor, with his father and his lawyer, David Drysdale.

Tap tap. "All rise." Five parole board members file in, sit at the judge's bench, and survey the room. Connor has refused to sit next to his dad and is slumped behind him as Drysdale sits up front in a swivel chair. Connor is clean-shaven with tattoos and polished shoes. His hair, doubtless bushy when dry, has been firmly slicked down. His father is wan and weather-beaten with old jeans that sit low on his hips. He rests his sunnies, cigarettes and a lighter on the bench in front of him.

Connor is called to sit next to his lawyer. Community Offender Services is now seeking more than another warning; it wants a revocation. Connor was caught at the pub again last week.

Judge Pike explains: "I must tell you, Mr Drysdale, it's not looking good for your client."

"I'm trying to convince my client that parole is mostly in the interest of the public, not the parolee," says Drysdale.

Pike commences by calling Connor to give evidence. Connor drags himself to the witness box, elects to take an affirmation rather than an oath by omitting "almighty God", and sits. Slouching, he lifts his head to answer Drysdale's questions, most of which require 'yes' or 'no' answers. We learn that he is 27 and that he works at the local mines.

"Your mother passed away two years ago of cancer?" asks the lawyer.

"Yes," replies Connor. He begins to sob. He grabs tissues and someone gets him a glass of water. "Mate, there's a lot of regrets there," he croaks. His father rushes from the room.

Connor swallows the tears and continues. His dad steadies himself and returns to his seat. We learn that the father's a pensioner, that they live together, and that in his town people work and people drink and if Connor wants friendships he has to go to the pub. We learn that he once had a serious drug and alcohol problem, but that he has not used drugs since being in jail.

Drysdale explains to Connor that he must respect the fact that locals are still grieving.

"I *do*, mate. It's something I gotta live with for the rest of my life."

Drysdale asks him if there's anything else he wishes to say about his behaviour on parole.

"At times, I'm easily led. I should think more before I act. I've stuffed up and I've got to deal with the consequences," comes the reply.

It's the parole board's turn. Some are moist-eyed. This man, they realise, is not petulant. He's grief-stricken. Pike gently talks to him about alcoholism, that it is a disease that can and should be treated, and about not socialising at the pub.

"Isn't this a small price to pay for reparation to the community for the crime you committed?"

Connor agrees: "You don't have to explain to someone that they've done the wrong thing and killed three of their mates in a car accident. There might be some people that shrug it off, but —"

"We have not the slightest doubt that you feel it very much, but it is a fact and it can't be wiped out," says Pike.

"No, it can't," says Connor quietly.

Someone asks Connor whether he can remember what happened the night his friends were killed. He's crying. He says that his memory is muddled and that he has bad dreams.

A female board member asks if he's receiving counselling.

He says, "Everything revolves around work. It's just get up, get to the mine, and get fed."

She tells him that there are two things in his favour: his ongoing employment and his father's support. Connor sobs harder at the mention of his dad.

Asked if he thinks he has an alcohol problem, Connor says his idea of an alcoholic is a person who "wakes up and cracks one".

"My problem is that I think I'm dealing with things, and then I'm not," he says. "Where I come from, you are just an effing goose on the piss, if you know what I mean. Blokes say, 'He's an effing goose on the piss.'"

Connor can leave the stand. The parole board hears from Connor's parole officer before leaving the courtroom to deliberate. Fifteen minutes later they're back. If parole is revoked, Connor will return to jail for 12 months before he can apply for release again. Pike asks him to stand, and takes 10 minutes to read the board's decision aloud. He announces, "It is clear ... that Mr Connor feels very deeply about the harm he caused to his friends and to the public by the commission of such serious offences." Then to Connor: "We feel compassion for you for the recent loss of your mother." Connor can't stop crying. Pike continues: "We hope there's been something of a breakthrough in your thinking today."

They're not going to revoke. Instead the board will make Connor attend Alcoholics Anonymous meetings and grief counselling. And then, by way of absolution, Judge Pike says to him: "You're a *young man*. You're entitled to be *much happier* than you are today."

Outside the courtroom, Connor is flush-faced. There are no hugs or handshakes, just male mumblings drenched with relief. The three men exit the glass door downstairs and step into the sunlight. Drysdale slips on a Panama hat as dad and son light ciggies. Huddled together they walk slowly across the makeshift film set, past actor-cops in smooth costumes, and they stay close and tight for as far as I can see them.

**The names of people relating to this case have been changed.*

Kate Rossmanith

Kate Rossmanith is a non-fiction writer and lecturer in cultural studies at Macquarie University. She has been published in *Best Australian Essays 2007*.

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Editorial Offices
The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, UK
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CHAPTER FOUR

Punitive public attitudes: a threat to the legitimacy of the criminal justice system?[1]

Jan W. de Keijser and Henk Elffers

Introduction

This chapter examines the discrepancy between what the criminal justice system delivers and what the general public expects from it, and explores how this connects to the legitimacy of the criminal justice system. The chapter is the product of integrating a number of studies that the authors and colleagues have conducted in recent years on mutual perceptions, expectations and interaction between judges and the general public in the Netherlands.[2]

For a long time, judges in Western jurisdictions were not much bothered by the pressures of public opinion. The legitimacy of independent legal judgment used to be self-evident. The authority of the justice system was based on the assumption that only judges knew the just and correct application of the law in each and every case. Today this has changed dramatically. In the Netherlands, for instance, De Roos (2000) described current public perception of the judiciary and criminal justice as one characterized by a "deeply rooted unease."

Legitimacy has been described as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just" (Tyler, 2006, p.375). It reflects a feeling of responsibility to defer to an authority (Sunshine & Tyler, 2003). Maintaining legitimacy is thus obviously critical to any system of authority in order to continue to count on support for and compliance with its rules and decisions, and thereby to operate effectively (Roberts & Hough, 2005). Nonet and Selznick (1978) discussed a development in Western societies where legitimacy is increasingly served by responsiveness to societal developments and public opinion. A

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responsive institution, Nonet and Selznick (1978, p.77) argue, "perceives social pressures as sources of knowledge and opportunities for self-correction." To date, it is generally believed that persistent discrepancies between public opinion and what the justice system produces will affect public support for and legitimacy of the criminal justice system (cf. Van Koppen, 2003).

A gap between the judiciary and the general public is a cause of concern. A public outcry for harsher sentences than what the courts deliver has been linked to a lack of trust in the courts (Hough & Roberts, 1999). Any indication of a discrepancy between what the public desires or expects and what the criminal justice system delivers should thus, prima facie, be taken seriously. We argue that taking it seriously implies at least three courses of action. First, if there is an indication of a discrepancy or gap, before beginning to consider its meaning, implications and remedies, that particular gap should be specified and established in a methodologically optimal way. Second, if a discrepancy is established in a sound manner, it should be further established whether, how and to what extent it is truly and directly detrimental to the legitimacy of the criminal justice system. In case the previous two steps indicate a gap which truly threatens legitimacy, the third course of action would then be to devise suitable remedies to close the gap, if that is considered feasible.

Our contribution here aims to address the first two of these courses of action. We will focus our attention on one particular type of discrepancy, namely, the gap between judges and the public in terms of preferred severity of sentences, called the punitiveness gap. We will briefly examine and describe this gap as it consistently emerges from survey research. After a concise discussion of the problems associated with survey measurement of public punitive preferences, we continue to discuss findings of our own empirical studies designed to scrutinize and specify the punitiveness gap in more depth and in a methodologically defensible manner. After exploring some hasty attempts at closing the gap, we will proceed to consider how much of a threat the punitiveness gap actually poses to the legitimacy of the Dutch penal system.

Public discontent with levels of sentences

When considering discrepancies between what the justice system delivers and what the general public expects from it, discussions quickly tend to focus on severity of sanctions imposed on offenders. Indeed, there are many studies that indicate a deeply rooted disagreement on the appropriate severity of punishment for criminals between judges in criminal courts and the general public. This has been a consistent finding in much survey research (see Cullen, Fisher & Applegate, 2000, and Roberts & Hough, 2005, for reviews). It is usually based on the public's response to quite straightforward survey statements or questions, examples of which are "In general, sentences for crimes in the Netherlands are too lenient" (Sociaal en Cultureel Planbureau, 2002, 2005), or "In general, do you think the courts in this area deal too harshly or not harshly enough with criminals?" (General Social Survey, in Maguire & Pastore, 1998).

In the Netherlands, public opinion regarding the severity of sentences seems crystal clear and stable over time. Typically, between 80 and 90% of the public in the Netherlands agree with the statement that sentences are too lenient. Based on such data, it is difficult not to conclude that there is a wide gap between judges and the public in terms of punitiveness. Such survey findings in the Netherlands are comparable to those in other Western nations (cf. Barber & Doob, 2004; Hough & Roberts, 1998; Hutton, 2005; Maguire & Pastore, 1998; Mattinson & Mirrlees-Black, 2000; Roberts & Hough, 2002).

The apparent public discontent with levels of sentences has been associated with a "punitive turn" that occurred in many countries in the past few decades (Hutton, 2005). One of the mechanisms through which public opinion is believed to establish and continue to sustain such a punitive turn is called "populist punitiveness" (Bottoms, 1995) or "penal populism" (Roberts *et al.*, 2003). It is driven by the notion that the call for harsher sentences is associated with a lack of confidence in the criminal justice system (Hough & Roberts, 1999; Van Koppen, 2003). While harsher sentences may not at all be the solution to the crime problem, politicians' focus on electoral gain and criminal judges' felt need to be responsive to public opinion are ingredients for ever-increasing punitiveness.

Harsher sentencing practices may not truly address public opinion. A critical view on whether a punitiveness gap can indeed be concluded from traditional survey data is necessary. In recent years, much research has accumulated building a very strong case against the validity of survey measurement of public opinion on criminal justice using the types of questions described above. The argument is that due to methodological flaws, survey findings portray a distorted picture of public punitive attitudes. More sophisticated methods for measuring public opinion would produce results approximating actual judges' decisions much more closely than "unreflecting views" as they are produced by the usual survey methodologies (Hough & Park, 2002).

How to establish punitive public opinion

It has been argued that the overwhelmingly punitive public opinion that consistently results from large surveys is an artefact of the methodology applied (Hough & Roberts, 1999; Hutton, 2005). Outcomes of penal attitude measurements are sensitive to questioning technique and context (cf. Durham, 1993; Green, 2006; Hutton, 2005; Roberts & Hough, 2005; Roberts *et al.*, 2003; Stalans, 2002; Tonry, 2004). The specific method of inquiry, on the one hand, and the type and degree of information that is provided to respondents on the other hand, are two of the crucial factors that determine what exactly is being measured in terms of punitiveness.

Public *opinion* is what is measured off the top of people's heads without prior deliberation or opportunity to evaluate concrete information; that is what surveys do (Applegate *et al.*, 1996; Yankelovich, 1991; Zaller, 1992). Global questions used in surveys tap into superficial attitudes primarily based on biased, stereotypical and readily available media reporting on crime (Stalans, 1993, 2002).

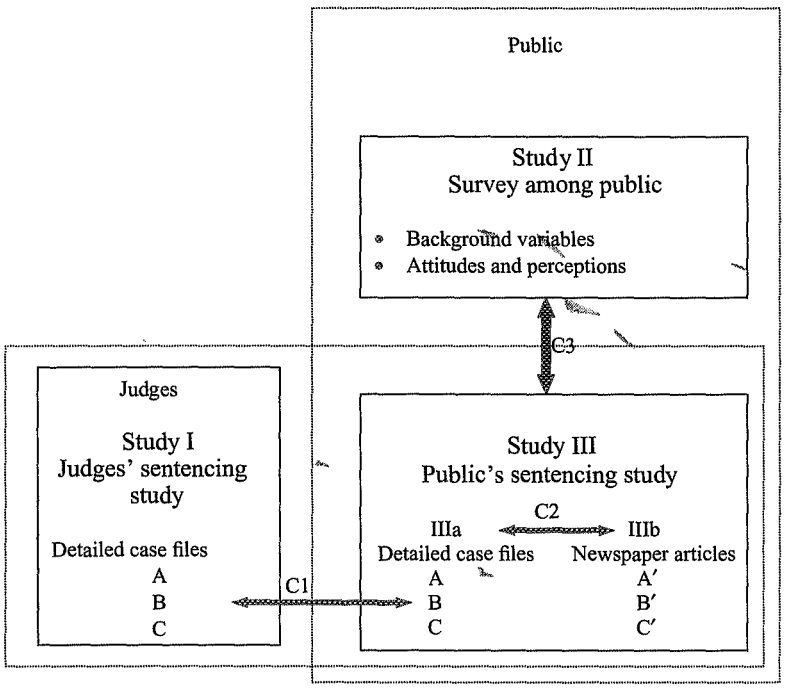

Figure 4.1 Overall design with three connected studies.

The abridged versions were in the form of short and rather one-sided newspaper articles. Figure 4.1 illustrates the relationship between the three studies.

The overall design integrating these distinct studies enabled three focused comparisons.

Comparison C1: sentencing decisions compared between members of the public and judges when presented with the same detailed case files (comparing Study I with Study IIIa).

Comparison C2: sentencing decisions compared between members of the public presented with a detailed case file and members of the public presented with a newspaper article based on the same case (comparison within Study III, i.e. comparing Study IIIa with Study IIIb).

Comparison C3: answers to general survey questions posed to members of the public compared to *the same* persons' sentencing decisions within the context of concrete cases (Study II compared with Study III).

The survey methodology applied in Study II was expected to reproduce the usual finding, namely, that members of the public are dissatisfied with the severity of sentences in the Netherlands. However, within the context of realistic case files that contain detailed and specific information, the same dissatisfied persons

were expected to prefer sentences similar to judges' sentences as obtained from Study I. In contrast, focusing further on effects of information, when members of the public are presented with short, one-sided newspaper articles based on the same case files, sentences were expected to be more severe. The design in Figure 4.1 further enabled within-subject comparisons of survey responses with responses to the experimental case materials. This allowed investigation of relationships between people's sentencing preferences, their general punitive attitudes and a number of other crime and justice-related attitudes.

Study I: sentencing study among judges

In the Netherlands, cases are tried exclusively by professional judges. Criminal procedure and decision making rely to a very large extent on the official written records which must be produced for all that is relevant to the case. During trial, all courtroom interaction focuses on evaluation of the written records as clustered in the case file.

For our sentencing study, we constructed three detailed and realistic case files. As Dutch judges rely so much on the case files, using such materials implied a close approximation of the reality of Dutch legal decision making. The case files pertained to an aggravated assault, a simple assault and an aggravated burglary. In the aggravated assault, the offender kicked the body of the victim, but also his head, resulting in permanent loss of powers of speech as well as irreparable paralysis from the waist down. In the less serious assault case, only the victim's body was kicked, resulting in no permanent injuries. The aggravated burglary case was, within its own legal qualification, also a serious case, and was constructed as a non-violent contrast to the other cases. It involved an aged widower who was burgled at night. The loot had high monetary and emotional value.

The three dossiers included all documents that judges would expect to find in a criminal case file, such as police affidavits of witness statements, victim statements and statements by the accused, forensic experts' and medical examiners' reports, prosecutor's indictment and *requisitoir* (summing up), psychological reports on the accused and criminal records of the accused. Leaving out the abundance of redundant information that is usually present in case files, our materials were relatively compact and each comprised about 20 pages of written reports. The unavoidable lack of a real trial in a paper experiment such as this one was compensated by a final sheet attached to the case files in which a short description of the hypothetical trial was provided (see De Keijser & Van Koppen, 2007, and De Keijser *et al.*, 2007b, for detailed descriptions of case file materials, procedure and data collection).

In October 2003, the three case files were randomly distributed over all judges and justices who, at that time, worked in the criminal law divisions of the 19 district courts and 5 courts of appeal. We gathered sentencing decisions from 180 participating magistrates. This constitutes 29% of the population of criminal

Table 4.1 Sentencing Decisions by Dutch Judges, Months of Imprisonment ($N = 177$)

		Months of imprisonment[a]	
Case	N	Mean	SD
Aggravated assault	61	29.7	9.6
Simple assault	63	2.5	1.0
Aggravated burglary	53	5.3	1.6

[a]Three outliers were excluded from analyses involving relatively extreme sentences (3+ SDs from their respective means): one in the aggravated assault case (72 mo), one in the simple assault case (8 mo) and one in the aggravated burglary case.
SD = standard deviation.

judges (628) at that time.[3] Overall representativeness on available background variables turned out to be quite satisfactory.

Judges' sentencing decisions

Almost all judges specified straightforward prison sentences. The vast majority of these were completely unsuspended prison terms (74% in the aggravated assault case, 70% in the simple assault case, 83% in the burglary case). Table 4.1 gives the sentencing decisions for each of our three cases.

The aggravated assault produced an average prison sentence of almost 30 months. The accused in the less serious assault case received an average sentence of 2.5 months imprisonment, and the burglar was sentenced to a little over 5 months imprisonment. While the focus here is on these average sentences, it must be noted that behind them lie substantial differences between judges who were handed identical case files, as can be seen in Table 4.1 (final column). However, it is only fair to note that these differences most likely overestimate differences between judges in real cases in Dutch courts because serious cases such as these are dealt with by panels of three judges who deliberate on their decisions.

Before comparing judges' sentencing decisions to the public's reactions given the same cases, we need to briefly discuss the general attitudinal patterns as they emerged from the survey that we conducted.

Study II: survey about the general punitive patterns

We conducted our survey in November 2004. Participants were drawn from a large panel maintained by a Dutch marketing research bureau (TNS-NIPO). They responded to a self-administered (*capi*) questionnaire. The representative sample consisted of 2155 Dutch persons of 18 years and older.

Mostly in the same wording as in previous survey research, our questionnaire covered attitudes to sentencing, attitudes towards judges, concern over and

perceptions of crime and law enforcement, and knowledge of and interest in crime and law enforcement. In addition, a number of background variables were available, including sex, age, level of education, vocation, political preference and media consumption. At this point, we only discuss main findings of the survey and will return to some other aspects later on in the chapter.

General dissatisfaction with level of sentences

We asked participants to respond to the statement "In general, sentences for crimes in the Netherlands are too lenient." It was no surprise that the vast majority of our sample stated that sentences are too lenient. No less than 84% agreed. Only 5% disagreed. We also asked participants about their own sentencing behavior in the hypothetical situation that they would have the opportunity to be in the judge's chair for a while. How would their sentences compare to those of real judges? Over 80% expected to be harsher than a real judge; almost one-fifth (19%) expected to have a similar level of severity as a real judge, and less than 1% expected to be more lenient than a real judge.

As was expected, the level of public punitiveness, measured through usual survey methodology in our study, was high and completely in line with previous research discussed above.

Concern over and perceptions of crime and law enforcement

Also in line with previous survey research are the findings regarding concerns over and perceptions of crime and law enforcement. In the current sample, 86% agreed with the statement "Crime is a problem that causes me great concern." When further asked about perceived trends in crime rates, over two-thirds believed that crime rates had gone up strongly in recent years. Only 7% believed that crime rates have remained stable over the past years, and no more than 1%, correctly, thought that crime rates have dropped. When asked about perceived trends in sentencing, only 13%, correctly, thought that nowadays sentences are harsher than 10 years ago. One-third of the sample believed that sentences have become more lenient than 10 years ago.

Punitive attitudes within a coherent pattern

We regressed responses to the statement about sentences being too lenient in the Netherlands on the relevant predictors available from our survey. These included sex, age, level of education, interest in news about crime, concern over crime, attitude towards judges, perceived trend in crime rates, perceived trend in sentencing severity, watching various news shows on TV, general knowledge about the criminal justice system and political preference. Our regression analysis revealed 29% explained variance in punitive attitudes as measured by the typical survey question (Table 4.2).

Table 4.2 Punitive Attitude Regressed: Standardized Coefficients of Background Characteristics, Perceptions and Attitudes ($N = 2127$)

Dependent variable: "In general, sentences for crimes in the Netherlands are too lenient"	β	ΔR^2
Concerned about crime	0.24**	
Perceived trend crime rates (increase)	0.18**	
Perceived trend sentencing (more lenient)	0.15**	0.23
Vote Green party (GroenLinks)	−0.10**	
Education (higher)	−0.09**	
Vote right nationalist (Wilders)	0.07**	
Age (higher)	−0.07**	
Watch TV news show *Hart van Nederland*	0.07**	
Watch TV news show *Actienieuws*	0.06**	
Vote liberal democrats (D66)	−0.05**	
Interested in news on crime	0.04*	0.06
Total $F(11, 2116) = 77.7$, $p < 0.001$	Total $R^2 = 0.29$	

*$p < 0.05$;
**$p < 0.01$.
Note: Variables sex, knowledge, judge perceived as independent and unbiased, all other television news shows and all other political parties had no significant (level 5%) contribution to the regression analysis and have been dropped in this table.

Demographics, political preference and TV news consumption display minor significant effects, but Table 4.2 shows that punitive attitudes are dominated by three predictors. People who are worried about crime (standardized regression coefficient $\beta = 0.24$), who perceive crime rates as rising ($\beta = 0.18$) and who believe that sentencing severity has dropped over the past years ($\beta = 0.15$) are more likely to express a punitive penal attitude. A principal components analysis with being worried about crime, perceived trend in crime rates and perceived trend in sentencing resulted in a single principal component, summarizing 51% of the variance shared by these variables.[4] In our interpretation, this factor represents a *general concern over crime*, GCC in short. Scoring high on this GCC factor equals being worried about crime, perceiving that crime rates have risen while sentencing patterns have become more lenient. Against the backdrop of the GCC factor, the public's desire for harsher sentences may be better understood as a general concern about crime and law enforcement, rather than a concrete wish for increased severity of sentences as such. We will return to this issue below.

Study III: sentencing study among the public

For the sentencing study among the general public, a random subsample was drawn from the panel participants in our 2004 survey study. From the 2155 persons who participated in the survey, 1200 were approached again 6 months

later, in April 2005. The study enabled direct comparison with judges' sentences because exactly the same case files were used. The study further incorporated an experimental between-subjects factor. One part of the sample was given the detailed case files identical to those used in the judges' sentencing study; the other part of the sample was given abridged versions in the format of newspaper articles. These newspaper articles were written by a court journalist working for a Dutch national daily newspaper, based on the case files. The three newspaper articles were concise (about 300 words each) and, as expected, rather one sided, reflecting mainly the seriousness of the crimes, the consequences for the victims and only negative aspects relating to the offender.

The case materials (three case files, three newspaper articles) were randomly distributed through regular mail. Since we were concerned about low response rates among those who were given the detailed case file, we oversampled the case file group. The participants were requested to respond using a self-administered *capi at home* questionnaire. Response rates for the case file subsample turned out similar to the newspaper subsample. The overall response was 76% ($N = 917$) (see De Keijser *et al.*, 2007b, for more details).

The public's sentencing decisions

In this section, we limit the discussion to the open and unrestricted punishment question: "What punishment do you personally find appropriate in this case and how severe should it be? Please write this down concisely."

Only two participants chose to impose the death penalty (for the aggravated assault case). For each case, a small number of respondents, never more than 10, imposed a life prison sentence. Combinations of sanctions were rare. Table 4.3 describes the public's sentencing decisions, focusing on the prison sentences. The table shows that for all cases, almost all respondents opted for a straightforward prison sentence. For the case file versions as well as for the newspaper articles, more than 9 out of 10 respondents sentenced the offender to prison. The final column of Table 4.3 shows the average length of the prison sentences specified by the public.

Sentencing decisions pertaining to case files compared to newspaper articles

Table 4.3 enables us to evaluate the effect of information on levels of punitiveness within the context of concrete criminal cases. For each of the three types of cases (aggravated assault, simple assault and aggravated burglary), this is done by comparing the mean prison sentences between the detailed case file versions and the newspaper article versions.

Both in the aggravated assault case and in the burglary case substantive and significant effects can be observed.[5] Participants who were handed the news-

was 19 months, whereas judges' average for this case was 5 months. Table 4.3 (column 3) further shows that the gap that we demonstrate here cannot be attributed to distortions underlying the averages such as small groups of punitive extremes. In every case, a clear and overwhelming majority of the general public preferred a harsher sentence than the judges' average.

The inevitable conclusion is that a real and large punitiveness gap between the public and judges is present in the Netherlands. It has been shown that information does indeed play a role of significance in determining levels of punitiveness among the public. In two out of three cases, the provision of detailed (case file) information had a strong mitigating effect on severity as compared to responses given the newspaper articles. However, despite the magnitude of that effect, it did not at all suffice to bridge the gap between judges and the public. Before addressing implications of the gap, we will briefly examine it using the attitudinal information as measured in our survey study (i.e. Study II).

The attitudinal perspective

Four out of five respondents agreed with the statement that sentences in the Netherlands are too lenient. The same proportion expected to be harsher than a real judge (if given the opportunity), while one-fifth expected not to be harsher than a real judge. How do these groups differ in their sentencing decisions in concrete cases, and how do they differ from judges? We linked responses of the persons in our sample who participated at both times (the survey and, half a year later, the sentencing experiment). It became evident that those who had claimed in the survey not to be harsher than a real judge were indeed significantly more lenient than respondents who expressed a more punitive general attitude in the survey.[6] However, even the more lenient respondents were much more punitive than judges. The general punitive attitude as expressed earlier in the survey is thus indicative of relative punitiveness within the context of concrete cases.

In a similar vein, we related our participants' positions on the previously constructed score of attitudes showing general concern over crime (GCC factor) to their punitive choices in the sentencing study. In Table 4.4, sentencing decisions are compared between those who score relatively high, average or low on this factor. The higher the GCC score, the more one believes that crime rates have risen while sentencing has become more lenient, and the more one is worried about crime. The table shows that respondents with high scores on the GCC factor preferred harsher sentences compared with respondents with lower scores on this attitudinal complex. For instance, in the burglary case, the average prison sentence increases from 16 months up to 27 months with increasing scores on the GCC factor. Correspondingly, the gap with judges widens. However, although the punitiveness gap between judges and the public widens with increasing levels of general concern over crime, it remains of considerable size for all groups.

Table 4.3 Public Sentencing Preferences: Percentages Preferring Prison Sentence, Proportion Harsher than Judges and Average Sentence Length

Case	% Prison	% Harsher than judges	Average prison sentence in months[a] (mean rank)
Aggravated assault (judges' mean sentence = 29.7 mo)			
Case file ($N = 150$)	95	91	60.9 (104)
Newspaper report ($N = 73$)	92	93	78.7 (139)
Simple assault (judges' mean sentence = 2.5 mo)			
Case file ($N = 136$)	91	84	12.1 (119)
Newspaper report ($N = 97$)	93	82	10.8 (122)
Burglary (judges' mean sentence = 5.3 mo)			
Case file ($N = 145$)	97	96	18.8 (101)
Newspaper report ($N = 94$)	97	99	62.4 (161)

[a] Excluded "life imprisonment" and "unspecified." Means are trimmed at the high end by 2.5% (three to six respondents, depending on the case).

paper article of the aggravated assault specified an average prison sentence of 79 months as compared to 61 months in the detailed case file for the same criminal case. For the burglary, a large effect can be seen where the newspaper article resulted in an average of 62 months' imprisonment. However, when given the extensive case file, the other part of the sample preferred an average sentence of 19 months imprisonment. The simple assault case showed no statistically significant differences between newspaper and case file. Nevertheless, with two out of the three cases, we have shown the enormous potential impact of information on public sentencing preference under experimentally controlled conditions.

Establishing and exploring the punitiveness gap between judges and the public

The gap between judges and the Dutch public in terms of preferred severity of punishment can now be established accurately for the three cases of interest here. If there are no true normative differences of punitive opinion between magistrates and the public, both groups should prefer the same level of severity within the context of a concrete criminal case *and* when both are provided with abundant and detailed information.

Table 4.3 shows that this hypothesis is to be rejected. For the aggravated assault, the judges' average sentence was 30 months imprisonment. The average prison sentence preferred by the public given exactly the same case file was 30 months harsher (i.e. 61 months). For the simple assault, lay persons sentenced almost five times more harshly than judges. The public's average for the burglary

Table 4.4 General Concern over Crime (GCC) Factor and Punitiveness

Subgroups	Aggravated assault (judges: 29.7 mo)	Simple assault (judges: 2.5 mo)	Burglary (judges: 5.3 mo)
Subgroup with highest scores on GCC factor (24%)			
Months of imprisonment[a]	71.3	19.4	27.2
Gap in months	41.6	16.9	21.9
N	24	30	32
Subgroup with middle scores on GCC factor (42%)			
Months of imprisonment[a]	63.6	9.7	16.5
Gap in months	33.9	7.2	11.2
N	71	64	62
Subgroup with lowest scores on GCC factor (34%)			
Months of imprisonment[a]	53.3	10.6	16.2
Gap in months	23.6	8.1	10.9
N	54	42	51

Note: Non-parametric tests show significant differences at $p < 0.05$ between GCC groups, both for sentences preferred and for gaps in the cases of simple assault and of burglary, but not for aggravated assault.
[a]Two and a half per cent trimmed from highest sentences; see Table 4.3.

Hasty reactions

In the previous sections, we have established that a punitiveness gap exists in the Netherlands: Members of the general public do prefer considerably more severe sentences than criminal court judges. In the present section, we review some of the proposed solutions for a punitiveness gap. As discussed in the introduction, the presumed existence of a gap has been indicated by various authors as a threat to public support for and legitimacy of the criminal justice system. Consequently, various incisive solutions have been proposed for narrowing or closing the gap, with an eye on the legitimacy problem. Some of these proposals affect the backbone of the Dutch criminal law system.

Usual proposals to narrow the gap

Judiciaries tend to look for solutions for closing the gap by getting the public down to the actual level of sentencing severity in the criminal courts. They usually propose schemes that involve providing more and balanced information about sentencing and criminal justice to the public. Proponents of this approach interpret the level of punitiveness of judges as the *proper* one, and they hope to convince the public to accept and adopt the same position. They think it could be useful to better motivate verdicts, step up the activity of special press relationship judges (press judges) and employ communication specialists at the courts in order to support judges in their external communication.

On the other hand, politicians frequently promote the opposite and try to force the judiciary to accept the necessity for harsher punishment. Proposals in this line argue for mandatory minimum sentences, increased maximum penalties, mandatory recidivism premiums, abolition of early release policies or, in the case of the Netherlands, the introduction of various forms of lay participation in criminal justice (e.g. lay judges or juries). In this line of reasoning, solutions try to bring judges closer to punitive public opinion by restricting judges' discretionary powers.

Arguing for tougher sentencing policies is by no means a new (political) strategy. The "punitive turn" that occurred in many countries in the past few decades (Hutton, 2005) resulted in rising prison populations and the politization of crime and punishment (Beyens, Snacken & Eliaerts, 1993; Hutton, 2005). In the Netherlands, a punitive turn has also taken place. For a long time, it was known as a country with an exceptionally mild (humane) sentencing climate (cf. Downes, 1993). However, during the past decades Dutch courts have indeed rendered more severe sentences, and more offenders are being sent to prison (cf. Bijleveld & Smit, 2004; Van Tulder, 2005). Dutch imprisonment rates increased from 33 per 100 000 inhabitants in 1985 to 123 per 100 000 in 2004 (Aebi & Stadnic, 2007). Dutch imprisonment rates now far exceed the European average (Downes & van Swaaningen, 2007).

Will such reactions close the gap?

It is clear that each of the above "solutions" will face many difficulties. For instance, whether more and more balanced information through the media will indeed close the gap is a hypothesis for which the evidence is not promising at all. Ditton and colleagues (2004, p. 595) summarized the literature on media coverage and fear of crime as follows: "Respondents' perceptions and interpretations are more important than the frequency of media consumption and/or any objective characteristics of the media material." There is evidence that the same is true with respect to media coverage and sentence preference. Feilzer and Young (2006; cf. also Feilzer, 2007) report a carefully designed experimental study in which a UK regional newspaper published a regular column by a criminologist who set out to write very nuanced comments on various aspects of crime, offenders, police, courts and punishment. The authors could not find any effect of this treatment among the readers of that newspaper. Also, Elffers *et al.* (2007) report on a quasi-experimental treatment–control group study in which panels of subscribers of a Dutch regional newspaper attended court proceedings and were interviewed about their opinions on the treatment of the case and on preferred sentences. These interviews resulted in newspaper articles. These were indeed rather positive about judges' comportment, but did not produce a change in attitudes with respect to punishment and preferred sentence severity among the general readership of the newspaper.

At the other side of the spectrum, it is by no means clear that the proposed solutions for increasing actual sentence severity would be effective. The existence

of maximum penalties for every concrete offence presently does not work as a constraint, as judges almost always impose sentences that are well below the legal maxima. Whether the introduction of lay elements in the (Dutch) judicial system would drive sentence severity up can be doubted, as, according to the research quoted in the introduction, a punitiveness gap also exists in many jurisdictions with various modes of lay involvement. The introduction of mandatory minimum sentences or an increased recidivism premium would increase the (average) severity of sentences, but would that narrow the gap? We have to express our doubts, observing that in our survey (Study II), 75% of the general public agrees that "in the eyes of the general public, judges' sentences will never be harsh enough." Further, such measures would require fundamental changes in the nature of our criminal law system, and it is not at all clear that parliament would favour these measures, especially with an eye on the fierce opposition to be expected from the judiciary (De Keijser, Elffers & Van de Bunt, 2007a). Moreover, the punitive turn that has occurred in the Netherlands over the past decades has obviously not solved the particular problem of a punitiveness gap between judges and the general public.

Closing the gap will thus by no means be an easy or even feasible job. Before considering rather radical measures in the style outlined above, we propose to rethink the necessity of closing the gap.

Is the gap a threat to the legitimacy of the criminal justice system?

Does the legitimacy of the judicial system really crumble as a direct result of the gap? We will argue that a gap is both inevitable and, to some extent, not a problem at all. Our survey results enable us to explore whether the existing gap should indeed be seen as a threat to the legitimacy of the criminal justice system. The evidence for the gap as a direct threat to legitimacy is thin and, in fact, almost non-existent. It is largely based on the *theoretical* proposition that the public will not stand a large difference between what it likes and what it gets, and therefore will condemn and alter what is going on. *Empirical* evidence seems to point out differently. First, we observe that although the punishment gap is not a new phenomenon, public confidence in Dutch courts has in fact remained stable for quite some time (Dekker & van der Meer, 2007). Moreover, time and again in Dutch studies in which general evaluations of the judiciary as well as opinions about sentencing are elicited, a negative opinion on severity of sentences does not necessarily imply a negative overall evaluation of the courts. In fact, overall evaluations of the courts are mostly positive. For instance, Elffers *et al.* (2007) demonstrated a satisfactory overall evaluation of judges (about 7 on a 10-point scale) alongside a strong public desire for harsher sentences. Indeed, in the same newspaper panel study, it was shown that the panel members themselves (on average) increased their ratings of judges over time, while their punitive preference remained stable (Van Haeringen, 2006). Also, Study II (above) shows comparable findings: respondents marked judges' performance with almost a 7

(on a scale of 1–10), while holding a negative opinion about severity of sentences in the Netherlands.

A demand for harsher punishment should therefore not be interpreted as implying a wholesale condemnation of judges as a professional group. Moreover, consider the following. Elffers and De Keijser (2007) asked members of the public what qualities they thought to be the most important for a criminal judge. Respondents were requested to rank order 10 typical traits that a criminal judge may be supposed to have. The result was quite clear: *being severe* is not on top, not even near, rating only as number 9 in the list of 10 (only 22% of respondents mentioned this quality among the five most important ones; only 3% specified it as *the* most important one). Favourite characteristics are *just* (91% among the most important five, 42% as the most important), *impartial* (82%/22%) and *independent* (71%/14%). In that same study, the majority of the sample endorsed the notion that in high-profile cases, in order to safeguard their independence, judges ought to isolate themselves from public opinion (72%). The public also agreed with the idea that judges should focus on the characteristics of the case itself rather than on public opinion (71%). The public recognizes that a certain lack of public understanding for sentences is inevitable (76%) and that a judge should not punish more severely in individual cases where the public is outraged (56%). All this goes, again, alongside the opinion that judges too often take unacceptable decisions (61%) and that sentences for crimes in the Netherlands are too lenient (83%).

The expression of concern about leniency of sentences apparently does not dominate the evaluation of the judge in general. According to the public, a judge must first and foremost be an independent, impartial and fair evaluator. In the eyes of the Dutch public, he is. In Study II (above), over 90% of the Dutch public endorsed the statement that an accused in the Netherlands may reckon that the judge will treat him in an independent and unbiased way. The Dutch general public appears to have no difficulty in accepting the fact that a punitiveness gap exists.

What does the demand for harsh punishment mean?

How then can we explain the expression of concern about lenient punishment? Consider, once again, some of the results of our survey study reported in Table 4.2. As shown there, it happens to be the case that feeling most concerned about crime, perceiving – incorrectly – that crime rates are rising, and perceiving – incorrectly – that sentencing severity is decreasing are the most powerful predictors in our analysis for the opinion that sentences are too lenient. Likewise, as was illustrated in Table 4.4, the GCC factor (a weighted sum of the above variables) is clearly associated with the actual size of the gap between the preferred sentence in the experimental setting and the average sentence of the judges. So it is especially those who feel deeply concerned about crime and how society handles it who utter the loudest call for harsher punishment, in both the experimental and survey approaches to establishing a gap.

We are inclined to interpret this as an expression of powerlessness: people feel that they themselves and society in general are in danger, and they call for effective measures. In a rather commonsense approach towards the problem, they feel that a serious problem calls for strong measures. In their perception, current measures clearly do not solve the problems as they perceive or experience them, which calls for further measures. Punishment is perhaps the only measure they can envisage. Conceived in this way, the demand for harsher punishment should in effect not be seen as a demand for more punishment as such, but as a demand for an effective approach towards the crime problem. Support for this view may be derived from Hessing, de Keijser and Elffers (2003), who found that in the Netherlands, support for capital punishment (although abolished a long time ago) is related first and foremost to the GCC factor. In this line of thought, the call for harsher punishment is, after all, not really addressed to the judiciary; it is in fact addressed to society as a whole, or to politicians. It is an expression of a deeper concern about crime and law enforcement, an expression that happens to be projected on the severity of sentences.

A research agenda considering the gap and legitimacy

Our conclusion is that the size of the punitiveness gap as such seems not to be a direct threat to the legitimacy of the criminal justice system in the Netherlands. The public perceives a gap, but appears ready to accept it as an inevitable fact of (judicial) life. We do not know, however, up to what point the public is ready to accept the gap. The theoretical argument that a huge gap will, in the long run, not be sustainable and will threaten legitimacy is, of course, a strong and plausible one. So the questions the research community faces are no longer "Is there a gap?" (yes, there is) and "Is the existing gap a threat to legitimacy?" (no, not necessarily), but rather "What is the maximum size of a gap that the public will tolerate?" and "What are the preconditions for the public's acceptance of a gap?"

The arguments outlined above are, to some extent, rather indirect. We have constructed our view by combining results from several studies focusing on various aspects of the problem. This calls for modesty and a plea for a more direct research effort in order to systematically address the topic of the relation between the size of a punitiveness gap acceptable to the public and a possible threat to legitimacy. This should simultaneously include a more focused and improved measurement of the intricate concept of legitimacy.

Notes

1 We thank Danielle Reynald, an anonymous reviewer and the editors for their valuable comments.

2 Findings and discussions thereof are drawn from De Keijser, van Koppen and Elffers (2007b), Elffers *et al.* (2007), and Elffers and De Keijser (2007).

3 This is a selection of a larger set of case files and sentencing decisions that were gathered for another study with focus on psychological pitfalls in judges' decision making. See De Keijser and Van Koppen (2007).
4 This was the only principal component with eigenvalue λ larger than 1 ($\lambda = 1.54$). Component loadings: perceived trend in crime rates 0.78; concern over crime 0.73; perceived trend in sentencing 0.62.
5 Non-parametric two-sample tests (Wilcoxon's W) were used for differences between mean ranks in Table 4.3.
6 Differences in terms of sentencing in the three cases between "harsher" and "not harsher" groups as identified in the survey: 15 months in the aggravated assault, 6 months in the simple assault and 11 months in the burglary.

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Cross-Jurisdictional Differences in Punitive Public Attitudes?

Jan W. de Keijser · Henk Elffers

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Abstract With more information the Dutch public becomes less punitive. However, recent studies showed a remaining punitiveness gap between the general public and judges, despite the provision of detailed case information. Moreover, it has been demonstrated that the Dutch public overestimates the courts' punitiveness. This is not in line with studies abroad. These contradictions raise questions, on the one hand, about the possibility of actual cross jurisdictional differences, on the other hand, about methodological explanations. A limited set of survey questions from studies abroad was therefore replicated with a new Dutch public sample. It focused on questions and methodologies that produced findings most directly at odds with earlier studies in the Netherlands. Using the same measurement approach, findings abroad were reproduced with the new Dutch sample for perceptions of punitiveness of judges and the courts. Thus using a different methodology new findings support conclusions that are opposite to our earlier conclusions. On the other hand, also with methodologies that have produced opposite conclusions abroad, the Dutch public does remain more punitive than judges. In the discussion it is argued that some of the remaining contradictions may be perfectly reconcilable, as long as conclusions are stated in a qualified manner.

Keywords Punitiveness · Public attitudes · Sentencing · Measurement approach · International differences

Introduction

In this article we focus on some remarkable differences between public punitive attitudes as measured in the Netherlands in contrast to study outcomes abroad. One important difficulty in interpreting such different, and sometimes contradicting findings lies in the variety of methodologies applied across jurisdictions. Below we will discuss the results of a new Dutch

J. W. de Keijser (✉)
Netherlands Institute for the Study of Crime and Law Enforcement (NSCR), Amsterdam, The Netherlands
e-mail: JdeKeijser@nscr.nl

H. Elffers
Netherlands Institute for the Study of Crime and Law Enforcement (NSCR), Amsterdam, The Netherlands

H. Elffers
Department of Criminology of Vrije Universiteit Amsterdam, Amsterdam, The Netherlands

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survey in which a number of core questions related to perceptions of punitiveness from studies abroad were replicated. Here, we will first sketch the relevant background and developments relating to empirical research into public punitiveness, and then proceed to outline the structure of this article.

Public attitudes towards punishment and public perceptions of sentencing practice have been of high interest for many years to researchers, politicians and criminal justice officials alike. For a long time the common assumption, and in a way also the common research finding, has been that the criminal justice system does not deliver what the general public expects from it. While this involves a variety of issues, such as the effectiveness of the criminal justice system to apprehend offenders and bring them to justice, and feelings of safety in the public domain, most would agree that the focal point of discussions on the gap between the public and the criminal justice system has always been the severity of punishment. In contemporary Western jurisdictions, it is generally believed that persistent discrepancies between public opinion and what the criminal justice system produces will have a detrimental effect on public support for and legitimacy of that system (cf. Van Koppen 2003). Moreover, maintaining legitimacy is critical to support for and compliance with rules and decisions, and thus for the system to operate effectively (Roberts and Hough 2005a). Any gap between the public and the judiciary is therefore, in principle, a cause for concern.

A discrepancy between the courts and the public in terms of punitiveness is, however, not the exclusive causal factor determining the legitimacy of the criminal justice system. Elsewhere, we have demonstrated that negative public attitudes towards severity of sentencing by the courts may very well go hand in hand with overall positive evaluations of criminal judges (Elffers et al. 2007; De Keijser and Elffers 2009; Elffers and De Keijser 2007; see also Roberts et al. 2007 for similar findings in Canada). The vast majority of Dutch people who claim that sentences are much too lenient also claim that judges should keep their distance from popular opinion when dealing with specific cases, even if there is a public outcry for harsh punishment in those particular cases (Elffers and De Keijser 2007). And while public disconcert with levels of sentences has been suggested by survey research for decades, public confidence in Dutch courts has in fact remained stable for many years (Dekker and van der Meer 2007). There are, nevertheless, also other reasons to be concerned about an apparent punitiveness gap between criminal judges and the public. Such a gap, whether perceived or demonstrated, fuels a mechanism that has been described and discussed in detail in the literature as 'populist punitiveness' (Bottoms 1995) and 'penal populism' (Roberts et al. 2003) and is a driving force behind ever tougher sentences. This mechanism has been associated with a 'punitive turn' that occurred in many Western countries in the past few decades (cf. Hutton 2005). In fact, in terms of prison statistics, the Netherlands may be considered a country with one of the most dramatic punitive turns (cf. Tonry and Bijleveld 2007; Downes and Van Swaaningen 2007; Council of Europe 2007).

One of the core concerns about a punitive turn and the mechanism of penal populism is that the punitiveness gap may in fact not exist or at least be much smaller than most survey research and populist politicians may tempt us to believe. The gap may primarily be a perception gap resulting from lack of reliable and accurate information to the general public (cf. Singer and Cooper 2008; Chapman et al. 2002). The traditional survey methodologies that have been applied for a long time to measure public attitudes about sentencing may be considered invalid and misleading. The best known and traditional types of survey questions attempting to measure public opinion about punishment involve asking peoples' response to single statements such as *In general, sentences for crimes in this country are too lenient*. With such a statement overwhelming majorities of respondents in any Western jurisdiction do agree. In the Netherlands typically between 80% and 90% of respondents in public

opinion surveys have agreed with this item since the 1980's (Sociaal en Cultureel Planbureau 2002, 2005). Also in other countries vast majorities consistently agree to similar statements (cf. Cullen et al. 2000; Roberts and Hough 2005a; Kury and Ferdinand 1999 for reviews). In response to such survey findings, harsher sentencing practices may not truly address public opinion.

In recent years, much research has accumulated, building a very strong case against the validity of survey measurement of public opinion on criminal justice, using the types of questions described above. It has been argued that the overwhelmingly punitive public opinion that consistently (both across time and across jurisdictions) results from large surveys is an artefact of the methodology applied (Hutton 2005; Hough and Roberts 1999). Outcomes of penal attitude measurements are particularly sensitive to questioning technique, information and context (cf. Green 2006; Hutton 2005; Roberts and Hough 2005b; Roberts et al. 2003; Stalans 2002; Tonry 2004). The specific methodology on the one hand, and the information that is provided on the other hand, determine what exactly is being measured in terms of punitiveness. Knowledge, information, and specificity are inversely related to punitiveness (Doob and Roberts 1988; Mirrlees-Black 2002; Indermauer and Hough 2002). It has been demonstrated that the public systematically underestimates the severity of sentences made by criminal courts (cf. Singer and Cooper 2008; Hough and Roberts 1998, 1999; Mattinson and Mirrlees-Black 2000). Deliberative polling techniques and focus groups have resulted in public opinion about punishment resembling actual sentences meted out by judges (Green 2006; Hutton 2005; Roberts et al. 2003). Also, providing people with concrete cases results in less punitive responses as compared to what is measured using general sweeping survey statements (Cullen et al. 2000; Hutton 2005). In a Swiss study using vignettes of specific criminal cases with a sample from the general public, Kuhn (2002) found public responses similar to actual judges' sentences for the same cases.

In a recent Dutch study (cf. De Keijser et al. 2007) we took things one step further than vignettes, and presented a representative sample from the population with detailed and realistic case files (dossiers) of crime cases. The same realistic case files were also decided upon by a large sample of judges working in Dutch criminal courts. Below, we will first very briefly discuss the main results of that study, and then proceed to contrast some of those findings to study findings outside the Netherlands. It will be shown that while the 'information hypothesis' is corroborated by our study, there remain a number of puzzling contradictions between our findings and other studies. These contradictions raise questions, on the one hand, about the possibility of *actual* cross jurisdictional differences in punitive public opinion, on the other hand, about methodological explanations. We will then proceed to present our latest study in which we have replicated the methodology used in some of the studies abroad and applied that to a new Dutch sample. The findings of this latest study will be used to evaluate the feasibility of both types of explanation for the differences in study findings.

Bridging the Gap?

In order to examine in depth the effect of information on public sentencing preferences in specific cases, and to compare the public's sentences to judges' sentencing, we have carried out and integrated a number of empirical studies. The backbone was formed by two sentencing studies.[1] One sentencing study was carried out using professional judges in

[1] For details, relating to study design, samples, materials and respons, we refer to De Keijser and Van Koppen (2007), and De Keijser et al. (2007).

Dutch criminal courts (N=180, data collected in October 2003), using detailed and realistic dossiers (case files) for three serious crimes. These involved an aggravated assault (with serious permanent injuries for the victim), a simple assault (no permanent injuries), and an aggravated burglary (at night, house of an aged widower, high monetary and emotional damage). The dossiers contained the usual formal documents pertaining to the case, such as police affidavits of witness statements, victim statements and statements by the accused, prosecutor's indictment, criminal record, etcetera. Each of the three case files comprised about 20 pages of written report.

The other sentencing study used a representative sample from the Dutch population (aged 18 years and older). The same three dossiers that were used in the sentencing study with judges were now given to members of the Dutch general public (N=917, data collected in November 2004). However, we further introduced an experimental manipulation by giving part of the sample one of the three complete and detailed dossiers, whereas the other part was given a newspaper article relating to one of the three cases. We obtained these newspaper articles by having a court journalist from a national daily newspaper write concise (about 300 words) articles based on the three case files.

In both sentencing studies a number of questions was posed regarding the appropriate punishment that the respondent opted for. The key question was a straightforward open question requiring the participant to write down the preferred sentence in free format. These were coded afterwards. Almost all judges and almost all members of the public specified straightforward (unsuspended) prison sentences. As a result of our experimental manipulation, the sentencing study with the Dutch public allowed us to gauge the effect of information by comparing sentences based on the dossiers to sentences based on the short and rather biased newspaper articles. Further, comparing the average sentences of the public based on the case files with judges' sentences on the same materials gave us an immediate outcome measure of comparative punitiveness between judges and the public. Finally, respondents that had been given a detailed dossier were additionally asked, after having specified their own preferred sentence, what they believed that a real judge would decide when given that particular case. Comparing the outcomes with the judges actual sentencing in the first study provided us with a measure of under- or overestimation by the public of judges' punitiveness. Table 1 summarizes the key findings of these sentencing studies and shows a very substantive and statistically significant effect of information amongst the members of the Dutch public in two of the three cases. For instance, participants who were given the newspaper article of the aggravated assault specified an average prison sentence of 79 months as compared to 61 months for those who were handed the detailed dossier of that particular case. An even stronger effect was found between versions of the burglary case. The simple assault yielded no statistically significant difference between the versions. However, although a strong information effect has been demonstrated, clearly Table 1 shows that it is insufficient to bridge the gap with judges. In each of the three cases, when the public is given the same abundant information on a case as judges had available to them, the public's sentence remains substantively and significantly more punitive than judges' sentences. The proportions of the public that sentenced harsher than judges ranged from 84% to 96%, leaving no doubt about the existence of this gap. The remaining punitiveness gap ranges between 31 months sentence length difference (aggravated assault) and 10 months difference between judges and the public (simple assault).

A final key finding was the fact that for these three cases the Dutch public consistently and considerably *overestimates* judges' sentences. Thus, while the general public has more punitive sentencing preferences than judges, the gap, as perceived by the public, is actually smaller than it really is.

Table 1 Average sentence length (months imprisonment*) public compared to judges and newspaper version compared to full dossier

	Public			Judges
	Newspaper	Case file		Case file
		respondent's own sentence	*perception of judges*	
Aggravated assault	78.7	60.9	36.0	29.7
Simple assault	10.8	12.1	6.7	2.5
Aggravated burglary	62.4	18.8	15.3	5.3

* Means have been trimmed (2,5% at high end) to correct for extreme values. See the original study publications for detailed accounts of statistical measures and significance tests.

Straightforward Contrasts between Study Findings

We have thus demonstrated, as others have before us, a straightforward effect of information on peoples' punitive preferences: more and more detailed case- and offender specific information has led to much more lenient sentences for concrete cases. The effect, despite its magnitude, was insufficient to bridge the gap with judges. However, in a recently published Dutch study, Wagenaar (2008) significantly stepped up the involvement of lay persons and the information provided to them. He studied panels of three laymen who, parallel to the actual court treatment, acted as mock judges. These laymen first studied the complete case file, then attended the actual court hearing, and finally deliberated amongst each other about the verdict (guilt, punishment when found guilty). While this study focused on comparing argument structures between lay-panels and judges' panels (by observing their deliberations *in camera*), it also enabled the comparison of sentences between the panels. The study did present only nine cases to judges and two independent lay panels, and did not find differences between the average punishment severity between higher educated lay panels and judges, while moderately educated laymen panels seemed to be more punitive, though the difference was not significant, possibly because of small sample size. It is a pity that small sample size hampers firm conclusions about the remaining punishment gap. While Wagenaar's study did not address the issue of laymens' perceptions of judges' verdicts, it did provide support for an information effect extended well beyond what we had demonstrated in our study. However, with this specific methodology, the concept of lay persons is also stretched well beyond the lay persons involved in our own study. We will return to this in the discussion section below.

This recent Dutch study and other studies outside the Netherlands have concluded that within the framework of concrete cases, and provided with specific information, members of the general public tend to prefer sentences that are about the same, if not lower than sentences by actual judges (e.g. Kuhn 2002; Seidman-Diamond and Stalans 1989; Hough and Roberts 1999; Mattinson and Mirrlees-Black 2000; see Roberts et al. 2003 and Roberts and Stalans 1997 for reviews). There is a further, and perhaps even more striking contrast between our study and recent studies outside the Netherlands. This involves our finding of systematic overestimation by the Dutch public of judges' punitiveness (cf. Table 1 above). A rather consistent finding abroad is the exact opposite (cf. Hough and Roberts 1999; Mattinson and Mirrlees-Black 2000; Roberts et al. 2003; Nuffield et al. 1998; Roberts and Stalans 1997; Canadian Sentencing Commission 1987).

Several explanations for the contrasts observed come to mind. First of all, it has to be noted that the three cases in our Dutch study were all relatively serious cases, even within

their respective legal categories. Indeed in studies in other jurisdictions it has been found that for some (very serious) crimes the public remains significantly harsher than actual sentencing practice (e.g. for manslaughter, cf. Fichter and Veneziano 1988). Without replication of our cases in a similar study abroad, it remains unresolved whether this has been a major factor in our study. Secondly, taking our study findings at face value for the moment, we may have demonstrated that, although responsive to information, there is something particularly punitive about Dutch public opinion on punishment *vis à vis* Dutch judges. Wagenaar (2008) however, providing much more information and involving lay persons very closely in the proceedings, seems to provide evidence against this conclusion. Indeed it would be too rash to assume a specific Dutch phenomenon, as long as the methodologies and case materials of our study and other studies abroad differ significantly, which may be brought up as an alternative explanation for the difference found. We do mean methodology in a broad sense of the word, including a wide variety of study aspects, such as type and length of specific case materials used, sampling, data collection techniques, etcetera. Studies as treated here happen to differ considerably from one another. However, the largest differences seem to be present between our Dutch study on the one hand, and, on the other hand, the non-Dutch studies, even if the latter do display among each other also differences in methodological respects, such as specific case materials used and question formats. Without condemning one methodology or the other, methodological differences may be serious candidates for explaining the differences found. For instance, in the 1996 British Crime Survey (BCS) respondents were given a burglary vignette (cf. Hough and Roberts 1998). Part of the sample was requested to specify a sentence in free format (responding to an open question) as in our Dutch study, while the other part of the sample was given a 'menu' with available sentencing options. Making people aware of available sentencing options substantively reduced punitiveness in responses. Is this perhaps a viable explanation for the remaining punitiveness gap in our Dutch study?

We decided to examine such methodological explanations more thoroughly by doing a new Dutch survey, replicating some of the methodologies used in other studies that have produced findings which are not in line with our previous study. Before presenting that new study, the relevant elements of the other studies that will be replicated will now be discussed. The focus will be on questioning format for invoking a sentence and on public estimates of punitiveness by the courts.

The British Crime Survey and a Canadian Survey

Our focus is on a set of questions used in the 1996 British Crime Survey, as this provided one of the most clear-cut contrasts with our Dutch study findings and adopted a very straightforward approach that was easy and practical to replicate. A replication of our own extensive Dutch study abroad would have been much more difficult and costly since it involves the use of detailed extensive dossiers with large samples of the public and of judges working in the criminal courts. The 1996 BCS (Hough and Roberts 1998) is useful here for two purposes. First, it led to the conclusion that the British public underestimate the courts' punitiveness. That finding was also replicated in the 1998 BCS (Mattinson and Mirrlees-Black 2000). Secondly, in the 1996 sweep, as described above, given a vignette of a burglary, the sentencing question was varied between open format and closed format with sentencing options. Another type of questioning that was applied in a Canadian survey (Nuffield et al. 1998) that produces public underestimations of punitiveness is of interest here as well. The Canadian survey gauged public estimates of imprisonment rates of one's

own country in comparison to other countries and showed significant public misperception and underestimates.

Underestimation of the Courts' Punitiveness

People's perception of courts' punitiveness was measured in the 1996 BCS by asking respondents for the percentage of convicted offenders who are sent to prison for the crimes of rape, mugging, and burglary. Table 2 shows that in the 1996 BCS large majorities of the public underestimate the percentages of convicted offenders for these crimes who are sent to prison. For instance, for rape, large (more than 30 percentage points less than the true figure as retrieved from British crime statistics) underestimates were made by 57% of the public and small (between 10 and 30 points less) underestimates by 26%. Relatively small minorities of the British public made accurate estimates (i.e. not more than 10 percentage points astray). The most accurate estimate was for burglary (22% about accurate). The 1998 sweep yielded similar findings (Mattinson and Mirrlees-Black 2000).

Another way of looking at public estimates of punitiveness is by concentrating on public perceptions of national imprisonment rates in an international comparative perspective. Nuffield et al. (1998) did that using a representative sample of Canadians. Respondents were asked to indicate whether the imprisonment rate in Canada was much higher than in other countries, somewhat higher, about the same, somewhat lower, or much lower. Only 15% gave the correct answer (being somewhat or much higher depending on what country is being compared to Canada), while 54% believed that Canadian incarceration rate was somewhat (38%) or much (16%) lower than in other countries.

Question Format: Sentencing a Burglar

In the BCS the following description of a burglary case was handed to respondents:

> A man aged 23 pleaded guilty to the burglary of a cottage belonging to an elderly man whilst he was out during the day. The offender, who had previous convictions for burglary, took a video worth £150 and a television which he left damaged near the scene of the crime.

This case was based on an actual case where the offender received a three year prison sentence in Crown Court, but eventually two years on appeal (Hough and Roberts 1999).

Table 2 Public estimates of imprisonment rates (percentage of convicted offenders), for rape/mugging/burglary. BCS findings (Hough and Roberts 1999)

	Rape	Mugging	Burglary
	Actual imprisonment rate		
	97%	60-80%	61%
	Public estimate compared to actual rate		
Over-estimate (>10% above actual)	–	5%	8%
Accurate (± 10% around actual)	18%	12%	22%
Small Under-estimate (10-30% below actual)	26%	20%	15%
Large Under-estimate (>30% below actual)	57%	62%	55%
	100%	100%	100%

The question format in the 1996 sweep was varied between open and closed with a list of sentencing options provided. Table 3 shows the results.

Table 3 shows a substantive effect of providing people with sentencing options. Preference for imprisonment is 12% lower when people are made aware of sanctions other than a prison sentence. Indeed, the preference for other sanctions increases when their availability is mentioned. Most notable, there is a full 22% increase in the use of compensation. The median length of the prison sentence for this burglar was 12 months. This finding is not in line with the idea that the British public is highly punitive. In fact that median prison term is much lower than the two year sentence in the actual case on which this vignette was based. Moreover, only a quarter of the sample opted for a more severe sentence than two years (the Court of Appeal sentence) (Hough and Roberts 1999).

In summary, Table 4 schematically represents the contrasts between study findings that we have discussed above.

Punitiveness and Perceptions: Replication Using a New Dutch Sample

We have replicated the survey questions from the Canadian survey and the British Crime Survey that we discussed above. Using the same types of questioning and stimulus material with a sample from the Dutch public, we can shed more light on the causes of the contrasts between our previous study with these findings abroad.

Survey Questions and Methodology

Apart from a number of background variables and some other criminal justice related questions, the core of the new questionnaire was a replication of methodology from the surveys discussed. To determine public estimates of imprisonment rates for specific types of crime, the BCS used Rape, Mugging and Burglary, and compared public estimates of imprisonment rates to official court statistics. In the Netherlands court statistics for the categories of Mugging and Burglary, are not available as such. As it is mainly expected to be the measurement approach that is of potential influence here, we felt free to define crime categories of which official Dutch statistics are available. We asked respondents to estimate what percentages of offenders convicted for *Rape/ Theft/ Hard drugs offence*, are sent to prison.

For the effect on punitiveness of providing people with sentencing options, we translated the burglary vignette from the British Crime Survey. As in the 1996 BCS an experimental

Table 3 Sentencing a burglar with or without sentencing options provided (percentages)*

Punishment modality chosen	Sentencing options NOT provided	Sentencing options provided
Imprisonment	67%	54%
Suspended sentence	8%	18%
Fine	19%	21%
Probation	5%	9%
Community service	20%	26%
Tagging	4%	11%
Compensation	22%	44%
Discharge	1%	1%

* multiple sentencing options could be selected. Columns thus exceed 100%

(BCS data, 1996. Hough and Roberts 1998)

Table 4 Recapitulation of contrasting study findings*

Source		Research question	Subjects	Materials	Measurement approach	Findings
Hough and Roberts (1998, 1999)	UK	1. Public perceptions of imprisonment rates for types of crime?	sample of public (8365)	· vignette of burglary case	· Split half	· Public underestimates percentages of convicted offenders sent to prison by the courts
Mattinson and Mirrlees-Black (2000)		2. Effect of question format with/without sentencing menu?		· one court sentence on which vignette was based	· Open punishment question	· Public becomes less punitive when sentencing options are provided
		3. Gap judges-public?			· Closed punishment question with sentencing options provided	· Public not more punitive than court
Nuffield et al. (1998)	CAN	Public perceptions of Canada's national imprisonment rate in international comparative perspective?	sample of public (1509)		Closed question, 5-point scale ranging from much higher in Canada than in other countries to much lower	Public underestimates high imprisonment rate in Canada in comparison to other Western industrialized nations
De Keijser et al. (2007)	NL	1. Effect of information on public punitiveness?	· sample of judges (180)	· 3 detailed fictitious dossiers	· Experimental design	1. public: more info à less punitive
		2. Gap judges-public?	· sample of public (917)	· 3 newspaper articles based on dossiers	· Open punishment question	2. public-judges: large gap remains when sentencing same detailed dossiers
		3. Public perceptions of judges' sentences			· Open question public perception judges' punishment	3. Public overestimates judges' punitiveness for every dossier
Wagenaar (2008)	NL	Gap judges-public after public given identical information, presence at court hearing, and deliberating on sentence?	· 9 higher education panels of 3 members of public · 9 low education panels of 3	9 real dossiers and the proceedings in court of those cases	Panels give collective sentence after reading dossier, were present at court proceedings and deliberated amongst	No difference in punitiveness between panels of judges and panels of public

Table 4 (continued)

Source	Research question	Subjects	Materials	Measurement approach	Findings
		members of public · 9 panels of 3 judges		themselves	

* The studies referred to encompass more than what is summarized here. The focus in this table is exclusively on contrasting elements.

manipulation was applied: a random half of the sample was given the open ended question requiring respondents to write down their preferred sentence in free format, whereas the other half was given a 'menu' with sentencing options available to the courts from which a maximum of two options could be chosen. If a prison sentence was chosen, a follow up question demanded the length of the unsuspended prison term to be specified.

As an analogy to the Canadian survey requiring people to give estimates of punitiveness in aggregate international comparative perspective, we asked respondents to indicate whether Dutch judges are more punitive than, about as punitive as, or less punitive than judges in other European countries. Taking prison statistics as a proxy to facilitate international comparisons of punitiveness, we know that the Netherlands is now in fact one of the most punitive countries in Europe (cf. Tonry and Bijleveld 2007; Walmsley 2007).

Data Collection

The data were collected by TNS-NIPO, a commercial Dutch survey bureau, using computer assisted self administered questionnaires. The sample is a representative sample of 1083 Dutch citizens aged 18 years and older. Data were collected in July 2008.

Findings

General Background

The median age of our sample was 46 years. Just over 51% of the sample is female. At the time of data collection the most popular political party amongst our sample are the Christian Democrats (i.e. CDA, 25% voting preference). We posed a limited number of the traditional survey questions on sentencing and crime perceptions. These all yielded similar results as in earlier studies and in similar surveys abroad. Almost nine out of ten (87%) of our respondents is somewhat or greatly worried about crime as a problem. Again, the 'traditional' item *In general, sentences for crimes in the Netherlands are too lenient,* was endorsed by 89%. The (wrong) opinion that crime rates have increased over the past years is held by 81% of the sample. Finally, 44 percent believes that judges have become more lenient in comparison to 10 years ago, 40% thinks that sentences are about the same, and only 16% (correctly) believes that sentences have become more punitive.

Estimates of Imprisonment Rates for Specific Crimes

In Table 5, we used the same cut-off rules for (degrees of) over– and underestimation as applied in the BCS. Regarded as accurate are estimates within 10 percentage points of the

Table 5 Public estimates of imprisonment rates (percentages of convicted offenders) for rape/theft /hard drugs

	Rape	Theft	Drugs
	Actual imprisonment rate		
	63%	35%	59%
	Public estimate compared to actual rate		
Over-estimate (>10% above actual)	22%	16%	12%
Accurate (± 10% around actual)	12%	25%	21%
Small Under-estimate (10-30% below actual)	20%	50%	18%
Large Under-estimate (>30% below actual)	46%	9%	49%
	100%	100%	100%
	N=1052	N=1059	N=1058

actual value derived from the official court statistics. Small underestimations were about 10 to 30 percentage points under the actual value, and large underestimations were considered those more than roughly 30 percentage points below the official statistic.

When asking Dutch people to estimate percentages of convicted offenders who are sent to prison for specific types of crime, Table 5 shows that we find roughly the same patterns as were found abroad. Relatively large numbers of respondents tend to underestimate the courts' punitiveness in terms of convicted offenders sent to prison for rape, theft and hard drugs offences. Although not to the same extent as abroad (e.g. in the BCS 83% underestimated the imprisonment rate for rape, see Table 2 above), we would thus similarly conclude from these findings that the Dutch public underestimates punitiveness of the courts. In contrast, in our earlier study, using a different measure for perceived sentence severity in specific cases, we concluded that the public overestimates judges' punitiveness. So we have demonstrated that differences in methodology, i.e. specific questioning style and materials used, produce findings which lead to opposite conclusions.

Perceived International Punitive Position of the Country

When asked to indicate whether Dutch judges are more punitive, about as punitive, or less punitive than judges in other European countries, only 3% of our sample gave the correct answer, being more punitive than in (most) other European countries. Just under a quarter (23%) believed that judges are about as punitive as judges in other countries, and almost three quarters (74%) stated that Dutch judges are less punitive. As in the Canadian survey these findings lead to the conclusion that the Dutch public underestimates the punitiveness of Dutch courts. Again, we establish that with this replication of a questioning style imported from a survey abroad, we produce findings that are in line with that (Canadian) survey but are opposite to our earlier findings on the topic using another methodology.

Sentencing the Burglar

In Fig. 1, the preferences for sanction types for the burglary vignette are compared between those who were presented with a menu of sentencing options and those who freely specified a sentence without such information. This replication of BCS case material and methodology in the Netherlands does not reproduce the pattern of findings from that

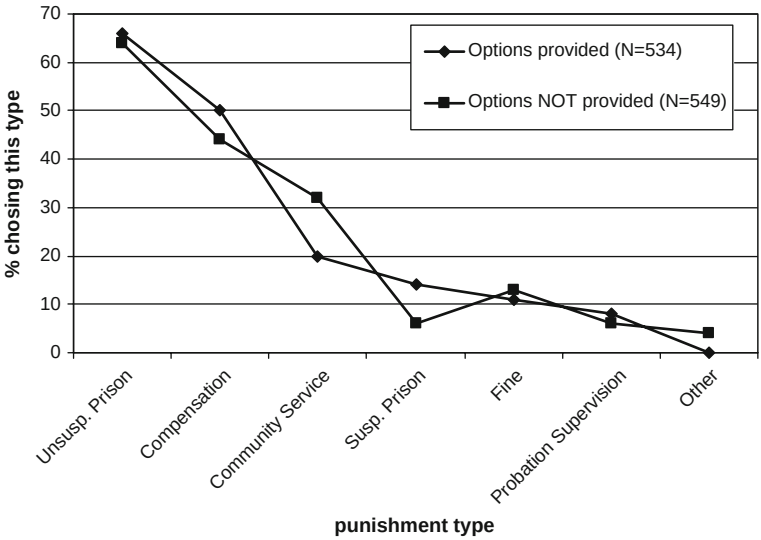

Fig. 1 Sentencing the burglar, BCS vignette: Sanction type with – and without the provision of sentencing options

survey. Preference for unsuspended prison sentence is the same for both parts of our current Dutch sample. For those without the provision of sentencing options 64% specifies an unsuspended prison term, whereas with the sentencing options 66% selected this sanction. The preference for compensation does increase from 44% to 50% with the provision of options, while for community service the pattern is opposite (32% without the menu versus 20% with the menu). The equal level of preference for unsuspended imprisonment and the differences and similarities in patterns for the other sanction types lead us to conclude that for the Dutch public, punitiveness in terms of imprisonment does not change when people are explicitly made aware of other sentencing options. Apparently the Dutch public can be considered up to speed with the courts' menu for choice when deciding upon the sanction.

With the British public, the median term of imprisonment was 12 months, which was lower than the Court of Appeal sentence for the case this vignette was based on. In our current Dutch sample the median term imprisonment was 9 months.[2] Does this lead to a conclusion similar to that drawn from the BCS data, i.e. that the public is less punitive than the courts? The answer must be: 'Not necessarily so'. First of all, we think that it is very hard to draw general conclusions from comparing the sentencing preference of the public based on a very brief case description with one single court decision based on full knowledge of the case. Secondly, 9 months imprisonment for a case such as described in this vignette would, in our opinion, be excessively severe punishment for a Dutch criminal court. Of course this expectation needs to be substantiated, which we did.

In September 2008 we e-mailed the same Dutch translation of the BCS vignette of the burglary to 34 judges throughout the Netherlands.[3] We briefly explained that the vignette was extremely short for comparative research purposes and kindly asked them to try their

[2] There was no significant difference between prison terms issued by people answering open question or the menu style question.

[3] For practical reasons, we selected 'replacement judges' from the criminal courts, because these are much easier to contact. Replacement judges have their main job outside the courts (e.g. in a law department at a university). Most replacement judges do have regular court sessions.

best and specify a sentence. All sentences could be written down in free format and returned via e-mail. We sent out a reminder after three days. Some of the responses were straightforward refusals to specify a sentence because the information provided was considered to be insufficient. Nevertheless 15 judges (44%) returned a sentence. All but one specified an unsuspended prison term. Four of these were combined with a suspended prison term (ranging from one week to three months). One judge sentenced the offender to 120 hours of community service combined with a 3 months suspended prison sentence. The 14 unsuspended prison terms in our limited sample ranged from 1 week up to 10 months. The overwheliming majority of our judges specified a prison term lower than the median prison term favoured by the Dutch public. The resulting median prison sentence meted out by judges was 2.5 months (average 3.3 months). Thus, in contrast to the conclusions based on the BCS findings, we are now confident to say that also in this specific brief case of a recidivist burglar, the Dutch public is more punitive than Dutch judges. Using exactly the same vignette, the median prison term amongst the Dutch public was 9 months whereas the median was 2.5 months among judges. Within the public sample less than 1 in 7 (13%) of respondents sentenced the burglar to prison terms no longer than 2.5 months.

Summary of Findings and Discussion

A limited set of survey questions from the British Crime survey and from a Canadian national survey was replicated with a new Dutch representative sample from the general public. Those particular questions and methodologies were selected because they were most directly at odds with our earlier studies in the Netherlands, and were straightforward to replicate. One of the main research questions here was if the observed contradiction between study findings is due to differential methodology.

With respect to public perceptions of judges' punitiveness the answer here is affirmative. Using question types imported from abroad and applying them to a new Dutch survey sample, we have indeed replicated some of the study findings abroad, and thus, produced findings that are in contrast with our earlier Dutch findings. Thus, depending on type of questioning applied in a survey, diametrically opposite conclusions may be substantiated. Can one of the methodologies then be labelled as flawed and the other as good? In this case, we do not think so, and will return to that question below.

Another part of the replication reported here, however, did not yield the same results as in other studies overseas. In fact they confirm (not contradict) some of our earlier findings. As hypothesized above, public punitiveness in our earlier Dutch study may have been an artefact of the open ended, free format sentencing question. The current experiment with the burglary vignette with and without the provision of sentencing options, has shown that for the Dutch public, this is not a viable explanation. Both experimental conditions resulted in basically the same sentencing preferences. In contrast to the BCS findings, providing a menu with sentencing options did not lead to more lenient sentencing preferences among the Dutch public. Also regarding sentence length given the burglary vignette, the Dutch public is indeed more punitive than Dutch judges. This discrepancy between the Netherlands and (amongst others) England & Wales, therefore still holds water. It should be noticed, however, that the way of establishing the courts' severity was different in both countries: the BCS study used for comparison one real court sentence that was based on full knowledge of all details in that one real case, instead of a vignette. Our Dutch study presented exactly the same vignette as had been given to the public to a number of judges, resulting, in our opinion, in a more representative measure of judges' punitiveness for that vignette, and thereby enabling a more direct comparison between the public and judges.

In summary, using the same measurement approach, findings abroad were replicated for perceptions of punitiveness of judges and the courts. On the other hand, also with methodologies that produce opposite conclusions abroad, the Dutch public does remain more punitive than judges. This mixed conclusion requires some further elaboration. First of all, while the findings on perceptions of punitiveness between our previous Dutch study and the current one appear to be contradictory, we believe that this is not necessarily the case. Not the findings, but the conclusions are contradictory, as they are between our previous study and studies abroad. We have merely shown that these types of conclusions need to be formulated in a methodologically qualified manner. If done so, apparently contradictory findings may be reconciled and spawn new research questions. With the exception of methodologies that are unmistakenly flawed, this relieves us from condemning one measurement approach or the other. There is nothing wrong with the following conclusion: Members of the public overestimate severity of judges' sentences for specific serious cases described in detail, whereas the same people tend to underestimate the proportion of convicted offenders that are sent to prison for certain categories of crime. While every part of this statement reflects on perceptions of punitiveness, they refer to essentially different aspects of that concept on different levels of generality and within different contexts. The challenge then becomes a substantive one, i.e. to explain why and how public perceptions of punitiveness shift with levels of specificity and context. Some of the answers may indeed be found in parallel discussions on public punitiveness itself.

Our earlier finding on a remaining punitiveness gap between judges and the public was replicated here. We are thus quite confident about our conclusion that the Dutch general public is indeed more punitive than Dutch judges, and that compared to other jurisdictions, there is something especially punitive about Dutch public opinion. This is worth further investigation in an international comparative perspective. However, also this conclusion needs a certain level of methodological qualification. The necessity thereof does not necessarily follow from study findings overseas, but can immediately be linked to the recent study findings reported by Wagenaar (2008), as discussed above. How can those findings of a vanishing gap be reconciled with our earlier and current survey findings of a remaining punitiveness gap? The answer to this question is actually quite straightforward. Measuring public opinion along different points on a combined dimension of information and involvement indeed results in different outcomes. Travelling along that dimension from an ill-informed and uninvolved public towards the point of the Wagenaar study, the punitiveness gap diminishes and eventually vanishes. In fact along that line, one would come across our earlier studies. However, it should be borne in mind that with that gradual transformation of the conclusion, the type of public whose opinion is being measured also transforms. It transforms from uninformed and uninvolved to extremely informed and closely involved almost as much as actual judges. While one method is perhaps closer to actual public opinion, the other reflects the public opinion of a more hypothetical public (cf. Green 2006).

There is, in principle, nothing wrong with the observation that an uninformed and uninvolved public holds highly punitive attitudes, as long as it is qualified in that manner. In the same vein, the finding that members of the public, when given exactly the same information as judges, are closely involved with the court proceedings and deliberate amongst themselves, produce the same sentences as judges is extremely important and interesting. It would be mistaken however to use the latter study finding to invalidate the prior.

Our current study underlines the value of comparative empirical work. It shows that some apparently fundamental differences are indeed the result of differential methodologies, but also stresses the fact that findings that are contradictory at first glance need not necessarily be so. In fact, they may be completely reconcilable as long as they are stated in a qualified

manner. We further believe that these findings serve as a caution against fixation on one or the other measurement approach. As with many other social phenomena, the measurement of punitiveness and public perceptions of punitiveness should preferably be a differentiated one.

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Bridging the gap between judges and the public? A multi-method study

Jan W. de Keijser · Peter J. van Koppen · Henk Elffers

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Abstract This article examines the gap between Dutch judges and the public in terms of preferred severity of sentences. It focuses on one particular explanation usually given for the gap: the lack of case-specific, detailed information on the part of the general public. Findings from three studies are reported and combined: (a) a survey among a sample from the Dutch population (N=2,127), (b) a sentencing experiment with judges in Dutch criminal courts (N=180), and (c) a sentencing experiment, using the same case materials as with judges, but now with a sample from the Dutch population (N=917). Results show that providing the public with detailed case information indeed reduces severity of sentences preferred. Moreover, those members of the public who were given short and unbalanced newspaper reports preferred much harsher sentences than did those who were given the full case files. However, despite such a reduction in punitiveness as a result of information, the public's preferred sentences remain much more punitive than judges' sentences pertaining to exactly the same case files.

Keywords Public opinion · Punitiveness · Role of information · Sentence severity

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J. W. de Keijser (✉) · P. J. van Koppen · H. Elffers
Netherlands Institute for the Study of Crime and Law Enforcement (NSCR), Leiden, The Netherlands
e-mail: JdeKeijser@nscr.nl

P. J. van Koppen
Maastricht University, Maastricht, The Netherlands

P. J. van Koppen
Free University, Amsterdam, The Netherlands

H. Elffers
Antwerp University, Antwerp, Belgium

Introduction and research approach

In the Netherlands, as in most Western countries, there appears to be a deeply rooted disagreement about the appropriate severity of punishment for criminal cases between judges in criminal courts and the general public. In the literature (discussed below), it has been suggested that such a gap may be an artefact of survey methodology and the lack of factual information on the part of the general public when responding to questions about the levels of sentencing. In this article we examine the question of whether a punitiveness gap between judges and the public in the Netherlands is really a problem of information rather than a true normative gap in terms of preferred severity of sentencing. Does public opinion become less punitive when more information is provided? Are sentences preferred by the public really that different from judges' decisions in court when the public has available the same type and amount of information on a specific criminal case?

While the role of information in affecting levels of punitiveness has been the subject of much previous research, we believe that a thorough examination of the issues at hand can only be achieved through the combination of distinct but connected studies using both survey and experimental methodologies, and integrating samples from the general public and judges working in the criminal courts. In doing so, we contribute to an existing body of research that is largely based on separate studies incorporating single methodologies. Below, we will therefore discuss and integrate findings from three studies on punitive preferences in the Netherlands: study I, a sentencing study with a large sample of judges from Dutch criminal courts responding to three detailed and realistic case files; study II, a survey among the Dutch general public using survey questions that measured people's punitive opinions off the top of their heads; study III, a sentencing study with a sub-sample from study II (i.e. the public survey), using exactly the same case files as in the judges' sentencing study, as well as descriptions of the same cases in the abridged format of newspaper articles.

The relationship between the three sub-studies is schematically presented in Fig. 1. The design shown in Fig. 1 facilitates three comparisons:

C1. Sentencing compared between lay persons and professional judges when presented with the same detailed case files (comparing study I with IIIa).
C2. Sentencing compared between lay persons presented with a complete case file and lay persons given a short newspaper article of the same case (comparison within study III, i.e. comparing IIIa with IIIb).
C3. Lay persons' answers to general survey questions compared with *the same* persons' sentences when presented with concrete cases (both case files and newspaper articles) (study II compared with study III).

Combination of these connected studies results in the integration of both experimental and survey methodologies. Note that, next to the survey methodology of study II, our approach involves two explicitly experimental elements. Study III is a randomised experiment by design, assigning members of the general public either one of the three detailed case files (IIIa), or one of the three abridged newspaper

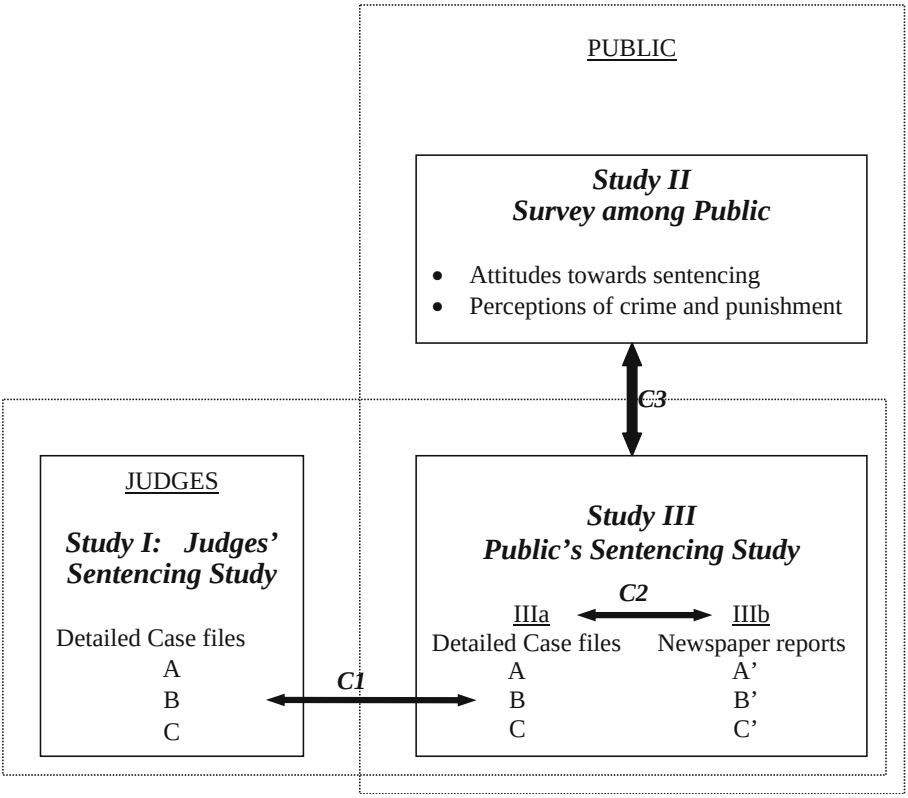

Fig. 1 Design of the study incorporating three related studies; facilitating comparisons C1, C2, and C3

articles based on the case files (IIIb). This design of study III enables experimental testing of effects of amount and nature of information on public sentencing preferences. The second experimental element in our approach is indirect; it is the result of integrating study I with study III (i.e. IIIa in Fig. 1), comparing sentencing decisions of the public with those of judges, based on identical case materials. Both in study I and study III, stimulus materials were randomly distributed to respondents.

Previous research and literature

The concept of a punitiveness gap is based on public opinion surveys. These surveys show, rather consistently, that there is a wide gap between judges and the public in terms of preferred severity of sentences. At first glance, public opinion on the issue of sentencing in the Netherlands appears to be crystal clear and has remained quite stable over time. Typically, between 80% and 90% of the Dutch public agree with the widely used survey statement *In general, sentences for crimes in the Netherlands are too lenient* (e.g. Elffers and de Keijser 2004; Sociaal en Cultureel Planbureau

2002, 2005). In this respect, the Dutch public is not much different from that of other Western countries (cf. Barber and Doob 2004; Hough and Roberts 1998; Hutton 2005; Mattinson and Mirrlees-Black 2000; Roberts and Hough 2002). However, in recent years, research has accumulated to build a strong case against the validity of such survey measurement of public opinion on crime and punishment (see, for overviews, Roberts and Hough 2005; Roberts et al. 2003). A number of reasons have been put forward to explain why public attitudes towards sentencing are not as punitive as general survey questions would tempt us to believe. More informed methods of gauging public opinion on issues such as sentencing would approximate actual judges' decisions much closer than 'unreflecting views' (Hough and Park 2002) as they are produced by general survey methodologies.

Public opinion and populist punitiveness

The public outcry for harsher sentences has, in many Western countries, been associated with a 'punitive turn' that occurred in the past few decades. Hutton (2005) describes the two main manifestations of this punitive turn: rising prison populations and the politicisation of crime and punishment (see also Beyens et al. 1993). In the Netherlands a punitive turn has also taken place. While the Netherlands has, for a long time, been a country with a mild sentencing climate, it is currently average in terms of prison population compared to other Western countries (cf. Tonry 2004). A mechanism through which public opinion may establish and continue to sustain such a punitive turn has been described by Bottoms (1995) as populist punitiveness. More recently, Roberts and colleagues (2003) discussed basically the same mechanism in terms of penal populism. The mechanism is 'simply' that policy makers, judges, and legislators respond to what they perceive as massive popular support for harsher sentencing. One drive fuelling this mechanism may be that the call for harsher sentences is believed to be associated with a lack of confidence in the criminal justice system (Hough and Roberts 1999; van Koppen 2003).

Issues with punitive attitude measurement

Research has shown how outcomes of penal attitude measurements are affected by questioning technique and context provided (cf. Durham III 1993; Green 2006; Hough and Park 2002, Tonry 2004; Hutton 2005; Roberts et al. 2003; Stalans 2002; Walker and Hough 1988). Indeed, also in the Netherlands, some of the scarce research that does not solely rely on the usual general survey questions shows public support for sanctions other than mere stiff prison sentences (Dümig and van Dijk 1975; van der Laan 1993).

Two related issues play a central role in the discussions about variations in public punitiveness. One is the specific method of inquiry, while the other concerns the type and degree of information that is provided to respondents. The combination of these determines what is being measured. Yankelovich (1991) has made a distinction between public opinion and public judgment. Public opinion is what is measured off the top of people's heads without much prior deliberation or processing of specific information. This is measured by general surveys (see also, Zaller 1992). Public judgment, on the other hand, results from more informed and deliberated choice.

Much recent empirical research indicates that informed public judgment is less punitive and more liberal than public opinion is (Hough and Park 2002; Hutton 2005). Techniques such as deliberative polls and focus groups have been shown to generate public judgments about punishment not far removed from, or even the same as, what actual sentencers would do (Green 2006; Hutton 2005; Roberts et al. 2003).

A factor that is believed to affect punitive responses further is the specificity of the questions asked and of context provided. General survey questions on sentencing produce a different type and more punitive response than questions on sentencing pertaining to specific cases (cf. Applegate et al. 1996; Cullen et al. 2000; Hutton 2005). Offering concise vignettes of criminal cases to respondents already produces public responses similar to actual judges' sentences for the same cases, as a Swiss study has shown (Kuhn 2002). One reason that has been given for this is that, when asked a global question about sentencing, people tend to focus on stereotypes and worst case scenarios, which results in more punitive stances (cf. Roberts et al. 2003; Stalans 2002). In general, it appears that knowledge, information, and specificity are inversely related to public punitiveness (Doob and Roberts 1988; Indermauer and Hough 2002; Mirrlees-Black 2002; Seidman-Diamond 1990).

A final factor that has been argued to cause people to express punitive attitudes is their fear of crime (Indermauer and Hough 2002; Sprott and Doob 1997) and the belief (perception) that crime is strongly on the rise (Hough et al. 1988; Rossi and Berk 1997; Sprott and Doob 1997). In this respect, a punitive attitude may be conceived as part of a complex of fear, insecurity and negative attitudes towards crime and justice.[1] In a similar vein Hutton (2005) describes punitiveness as part of a narrative of insecurity that shapes the way that people perceive and respond to crime- and justice-related issues.

The current focus

Using general survey questions it is expected that members of the public will report being (highly) dissatisfied with the level of sentences in the Netherlands. After all, in most Western jurisdictions, this is consistently shown in public opinion surveys. However, when given realistic case files containing detailed information, the same dissatisfied persons are expected to prefer sentences similar to judges' sentences. In contrast, when members of the public are presented with short, one-sided newspaper articles of the same cases, sentences are expected to be more severe.

Our research design facilitates within-subject comparison of survey responses with responses to the experimental case materials. It thus enables us to analyse people's sentencing preferences in more depth by differentiating between types of case material, relating them not only to their general punitive attitudes but also to other crime- and justice-related attitudes.

[1] In fact, support for the death penalty in an abolitionist country such as the Netherlands, can, to some extent, be explained by such a combination of negative criminal justice-related attitudes (cf. Hessing et al. 2003).

In summary, against the backdrop of attitudinal survey information obtained through study II, our specific focus will be on the evaluation of two hypotheses:

1. The general public reaches the same sentencing decisions as judges do when both groups are given exactly the same detailed case file of a specific criminal case.
2. When members of the general public consider a concise newspaper report of a specific criminal case, sentencing decisions will be much harsher than when they are handed the full case file.

Background information on the Dutch criminal justice system

Before we discuss the empirical studies, it is necessary to provide very briefly some relevant background information on the Dutch legal system.

All cases in the Netherlands are tried exclusively by professional judges. Every official involved in each stage of the criminal process (such as police, prosecutor, defence, examining judge, expert witnesses) produces written records that become part of the case file. These written records sum up findings, courses of action and points of view. Dutch criminal procedure and judges' decision making relies to a large extent on these written records. In court, interaction between judges, prosecutor, accused and counsel focuses on evaluation of the case file.

All criminal cases are tried, in the first instance, by the criminal law divisions of the district courts. In these courts the less serious cases are tried by judges sitting alone, the more serious cases by panels of three judges. All cases receive a full trial: plea bargaining does not exist in Dutch law. If the accused is found guilty by the judge(s), single-sitting judges generally give their verdict immediately. When a case is tried before a panel of judges, the verdict is given after the judges have deliberated in chambers. Decisions of a district court are open to full appeal, both on the facts and on the law, to one of the courts of appeal, without leave to appeal. Thereafter, appeal in cassation is possible to the Supreme Court, on matters of law only.[2]

Dutch judges enjoy wide discretionary powers in choosing the type and severity of punishment (de Keijser 2000; Tak 1997). There are no mandatory sentences. Each type of punishment cannot be specified by less than a legal minimum (e.g., one day imprisonment, €10 fine). Specific maximum terms are specified for each offence codified in the penal code. There are no sentencing guidelines, though Dutch judges do aim to enhance consistency through mutual consultation and by formulation of sentencing policies for clearly defined types of offences. Furthermore, the Dutch prosecutor requests a specific punishment at the end of the trial hearing. Judges are not bound by the requested punishment, although it does provide some form of anchor point in judges' deliberations on the sentence.

[2]For further, more detailed descriptions of Dutch criminal procedure, see Taekema (2004), Tak (2003), and van Koppen (2002).

Table 1 The six dossiers in the original study and their content (taken from de Keijser and van Koppen 2006)

	A		B		C	
	Aggravated Assault		Simple Assault		Burglary	
Evidence	**Strong**	Weak	**Strong**	Weak	**Strong**	Weak
Total no. of pages	**19**	21	**25**	25	**19**	21
Total no. of words	**6,765**	6,991	**8,985**	8,562	**6,395**	6,680
Dossier elements						
Summary police findings	**x**	x	**x**	x	**x**	x
Indictment	**x**	x	**x**	x	**x**	x
Victim statement	**o**	o	**x**[a]	x[a]	**x**	x
Records of witness interviews	**3**	3	**3**	3	**2**	2
Record of technical forensic research	**na**	na	**na**	na	**x**	x
Report of arrest	**x**	x	**x**	x	**x**	x
Record of police interview with accused	**x**	x	**x**	x	**x**	x
Record of search in house accused	**na**	na	**na**	na	**x**	x
Record of photo-confrontation witness-accused	**x**	x	**x**	x	**x**	x
Results of forensic research	**na**	na	**na**	na	**x**	x
Record of second police interview with accused	**o**	x	**o**	x	**x**	x
Medical report on injuries victim	**x**	x	**x**	x	**na**	na
Psychological report on accused	**x**	x	**o**	o	**o**	o
Probation report on accused	**o**	o	**x**[b]	x[b]	**x**	x
Full criminal history of accused	**x**	x	**x**	x	**x**	x
Requisitoir: summing up and punishment requested by prosecutor	**x**	x	**x**	x	**x**	x
Prison term requested by prosecution (months unsuspended)	**30**	30	**2.5**	2.5	**6**	6
Concise description of trial	**x**	x	**x**	x	**x**	x

Bold typeface denotes dossiers used in present study.
x Included in dossier, *o* no, *na* not applicable.
[a] Victim states having no recollection of the incident (due to head injuries)
[b] Contents essentially the same as psychological report in case A

Study I: sentencing study with judges in criminal courts

Background and objective

This study was carried out earlier as a separate sentencing study with Dutch judges focusing on particular psychological pitfalls that may affect judges' decisions on proof of guilt and on punishment (de Keijser and van Koppen 2006). The study used an experimental design with fictitious but realistic case files as stimuli, randomly distributed over participating judges. A selection of the case files and judges' sentencing decisions from that study are used for current purposes. The objective is to obtain sentencing decisions in detailed fictitious case files that lend themselves to replication with an experimental study using a sample from the general population.

Materials

Dutch legal procedure strongly relies on evaluation of the written file. The reality of this mode of legal decision making was approached as much as possible by providing

judges with realistic case files. We included in the case files all relevant information in the same raw format as judges are accustomed to.[3] In the original study (de Keijser and van Koppen 2006), case files were constructed from three basic stories: (A) *aggravated assault*, (B) *simple assault*, and (C) *aggravated burglary*.[4] Table 1 describes the characteristics of these case files. For each of the basic files, a strong-evidence version was constructed, together with a weak evidence version, resulting in a total of six case files (cf. Table 1). While the two assault cases (A and B) involved basically the same incident, differences between them related to crime seriousness. Type and level of violence applied by the perpetrator, and subsequent injuries suffered by the victim, were varied. In the serious version (A), the offender did not only kick the body of the victim, but also his head, resulting in permanent loss of powers of speech as well as irreparable paralysis from the waist down. In the less serious version (B), only the victim's body was kicked, not resulting in permanent injuries. The aggravated burglary case (C) was constructed as a non-violent contrast to the two assault cases. Within its own legal qualification, however, it was also a serious case.

Case files included the usual elements, such as police affidavits of witness statements, victim statements and statements by the accused, forensic experts' and medical examiners' reports, prosecutor's indictment and *requisitoir* (summing up), psychological reports on the accused, and criminal records of the accused. In the aggravated assault case, the prosecutor requested 30 months imprisonment; in the simple assault case 2.5 months imprisonment, and in the burglary case 6 months imprisonment. These requested punishments were consistent with national prosecution guidelines for similar cases. Each case file comprised about 20 pages of written reports.[5] An instruction page was added, stating our awareness of two unavoidable abstractions from reality in this study. These involved having to make a decision without actually seeing the accused at trial, and the absence of deliberations in chambers. The lack of a real trial was compensated for by a final sheet attached to the case files in which a short description was provided of the hypothetical trial.

Because issues related to strength of the evidence between case files are not of interest for current purposes, as indicated in Table 1, below we will only use the data that relate to the strong evidence versions of the aggravated assault (A), the simple assault (B), and the aggravated burglary (C).

Procedure and design

In October 2003 we asked all 629 judges in the district courts and all justices[6] in the courts of appeal who served in the criminal law divisions to participate. We excluded

[3]To a large extent, this remedies some known objections (mainly related to ecological validity) that have been raised against the use of experiments in legal decision-making research (cf. Konecni and Ebbesen 1992; Lovegrove 1999).

[4]The appropriate articles in the Dutch Penal Code (DPC) are, for the aggravated assault, art. 302 DPC; for the simple assault, art. 300 DPC; and for the aggravated burglary, art. 311–2 DPC.

[5]For reasons of space, we excluded from our materials all redundant information that is so common in real case files, as well as reports that merely have a legal procedural function (e.g. transport orders of the accused).

[6]In the remainder of this text also referred to as judges.

Table 2 Judges in criminal courts: sample representativeness, gender, type of judge, and regional dispersion (percentages). Regional dispersion is grouped at the level of courts of appeal jurisdictions.

	All Dutch judges and justices in criminal courts	Initial response	Current selection
N=	629	229 (36%)	180 (29%)
Male	54	50	49
Female	46	50	51
Judge district court	80	86	86
Justice court of appeal	20	14	14
Regional dispersion			
Amsterdam	33	33	34
Arnhem	14	14	12
Den Haag	26	24	27
Den Bosch	18	19	19
Leeuwarden	9	9	8

the so-called replacement judges, who serve part time alongside their jobs elsewhere. The Dutch Council for the Administration of Justice (*Raad voor de rechtspraak*) wrote a letter of recommendation to the presidents of all 19 district courts and five courts of appeal, describing the study only in general terms as 'a study on legal decision making'. Two weeks later we sent the case files to the judges. A reminder was sent out 2 weeks later. Participation in the study was anonymous. The dossiers were accompanied by a separate response form and a postage pre-paid return envelope. Judges were requested to write down their sentence freely, in a manner consistent with real sentences. The design of the original study was completely between subjects according to a 3 (case version, A/B/C)×2 (evidence, strong/weak) design. The six case files were *randomly* distributed between judges.

Sample and representativeness

A total of 229 judges returned their written decisions to us. This was 36% of the population of judges in the Dutch criminal courts. As noted above, for current purposes, we only used the data relating to the strong evidence versions of the cases. This selection of data resulted in 180 sentencing decisions pertaining to one of the three strong evidence cases.[7] This constituted 29% of the population of criminal judges at that time. A limited number of background variables for the population were available, enabling a rough indication of representativeness of our sample in terms of gender, type of judge (judge in court or justice in court of appeal), and regional dispersion grouped at the level of courts of appeal jurisdictions. Table 2 compares our sample with the population of criminal judges in terms of these background characteristics. It gives the descriptives for the original sample as well as for the selection that we made for current purposes. Although judges are slightly

[7]This is much more than 50% of 229 because *all* judges who had received a strong evidence version considered the accused proven guilty and subsequently passed a sentence, while large portions given the weak evidence versions acquitted the accused. Notice that our restriction to strong evidence versions does not affect the random distribution of selected case files over judges.

Table 3 Judges' sentences (N=177; months of imprisonment)

	Months of Imprisonment[a]			
Case	N	Mean	Standard deviation	Legal maximum[b]
Aggravated assault	61	29.7	9.6	96
Simple assault	63	2.5	1.0	24
Aggravated burglary	53	5.3	1.6	108

[a] Three outliers were excluded from analyses involving relatively extreme sentences (3+ standard deviations from their respective means): one in the aggravated assault case (72 months); one in the simple assault case (8 months); and one in the aggravated burglary case (48 months)
[b] Specified in the Dutch Penal Code

over-represented and justices slightly under-represented, overall representativeness may be considered satisfactory both in the original sample as well as in our current selection of 180 sentencing decisions in strong evidence cases.

Judges' sentencing decisions

Coding of sentencing decisions was uncomplicated. All but four judges specified a straightforward prison sentence. The four exceptions involved community service orders. These were excluded from further analyses of the sentencing decisions.[8]

A prison sentence in the Netherlands can be imposed completely unsuspended, partly suspended, or completely suspended. In all cases in this experiment the large majority of judges specified a completely unsuspended prison term (74% in the aggravated assault case; 70% in the simple assault case; 83% in the burglary case). Our analyses are based on total prison sentences.

Table 3 shows the sentencing decisions. While the average sentences in Table 3 are well below the formal upper limits, as they usually are, the table does show that Dutch judges make use of their discretionary powers in varying ways. Sentences between judges given identical criminal cases differ substantially. For the aggravated assault, the most serious case in our study, standard deviation was near 10 months imprisonment, with an average sentence length of 30 months. It should be noted, however, that these standard deviations most likely overestimate differences between judges in real cases in Dutch courts. While our participants evaluated the case file and made the subsequent sentencing decision in isolation, in real life serious cases such as these are dealt with by a panel of three judges (cf. above on the Dutch legal system). It may be expected that such deliberations in chambers between judges have a converging effect on the sentence.

[8] We converted community service orders to prison sentences (using the formal conversion table developed by the judiciary). Including these in the analysis did not make any difference.

Table 4 Survey questions

Question No.	Question
1	In general, sentences for crimes in the Netherlands are too lenient. [*1 'completely disagree' ... 5 'completely agree'*]
2	If you had the opportunity to be in the judge's chair, would your sentence, most of the time, be *harsher/about the same/more lenient* than a real judge's?
3	In the eyes of the general public, judges' sentences will never be harsh enough. [*1 'completely disagree' ... 5 'completely agree'*]
4	Compared to ten years ago, do you think that criminals' sentences nowadays are *harsher/about the same/more lenient*?
5	Crime is a problem that causes me great concern. [*1 'completely disagree' ... 5 'completely agree'*]
6	Total volume of crime in the Netherlands has, over the past years, *increased strongly/increased/stayed about the same/gone down somewhat/gone down strongly*
7	In our country, one can be confident that a judge will deal with one's case in an independent and unbiased way. [*1 'completely disagree' ... 5 'completely agree'*]
8	How interested are you in news about crime cases? [*1 'not at all' ... 5 'very'*]
9	In a murder case, who decides on prosecution/guilt/punishment? [*Minister of Justice; police; prosecutor; jury of six; jury of 12; one judge; three judges; don't know*]

Study II: survey among the Dutch population

Objective

In this survey general penal attitudes and their correlates are globally charted and will be used at a later stage to put the findings from the sentencing study (study III) into a wider attitudinal perspective (comparison C3).

Sample

The survey was carried out in November 2004 using the *Telepanel* of TNS-NIPO, a large Dutch marketing research bureau. It concerns a sample that is representative in terms of gender, age, education, and urbanisation. A representative sub-sample from the Telepanel of 2,155 Dutch persons of 18 years and older was used for the current study. The questionnaire was programmed to be self-administered (with computer-assisted personal interviewing methodology).

Questionnaire

As much as possible in the same wording as in previous (Dutch) survey research, our questionnaire covered the following areas: attitudes on sentencing climate in the Netherlands, attitudes toward judges; concern over and perceptions of crime and law enforcement; and knowledge of and interest in crime and law enforcement. Table 4 lists the survey questions. In addition to these items a number of background variables were available for analyses: gender, age, level of education, vocation, political preference, and media consumption.

Findings

Penal attitudes and attitude towards judges

In our sample, 84% agreed that sentences are too lenient, whereas only 5% disagreed. In line with these percentages are people's responses to the hypothetical situation of being in the judge's chair. No fewer than 81% expected to be harsher than a real judge; almost one fifth (19%) expected to sentence about the same, and fewer than 1% expected to be more lenient than a real judge. However, overall attitude towards judges was not negative at all. Fewer than 10% of the public rejected the notion that one can be confident that a judge will deal with one's case in an independent and unbiased way. Moreover, when asked for a general evaluation marking (ranging from 0 to 10), four out of five persons rated judges' performances as at least sufficient (6 or higher). And, somewhat surprisingly, even 75% agreed that, in the eyes of the general public, judges' sentences will never be harsh enough.

Concern over and perceptions of crime and law enforcement

Our sample expresses great concern about crime: 86% are concerned. When further asked about perceived trends in crime rates, over two-thirds believe that crime has gone up strongly over the past years. Only 7% believe that crime rates have remained stable over the past years, and no more than 1% thinks that crime rates have dropped. When asked about perceived trends in sentencing, only 13% think that, nowadays, sentences are harsher than they were 10 years ago. No fewer than one-third even believes that sentences have become more lenient. The remainder of the sample thinks that sentencing has remained at the same level as it was 10 years ago.

Knowledge of and interest in crime and law enforcement

Over 40% of the Dutch claim to be interested in news about criminal cases. Only one in five (18%) expresses no interest whatsoever in such media reports. In order to get a glimpse of our respondents' general knowledge of the criminal justice system, we asked a straightforward multi-staged question on Dutch criminal procedure: which official(s) are responsible in a murder case for prosecution, the decision of guilt, and the sentencing decision, respectively? Just over 80% of our sample knew that the prosecutor is responsible for prosecution,[9] 36% correctly stated that a panel of three judges decides upon the question of guilt and one-third correctly responded that the same panel of three judges gives the sentencing decision in a murder case. Overall, the total number of correct answers to the three straightforward knowledge questions was not very impressive. Only 24% of our sample knew the three correct answers; 16% gave two correct answers, 46% gave only one correct answer, and 14% had it all wrong.

We checked knowledge with respondents' consumption of various television news shows. Correlations were small but statistically significant. There was an

[9] In Dutch language the terminological connection between prosecutor and prosecution is not as trivial as in English (respectively *officier van Justitie* and *vervolging*).

Table 5 Explaining general penal attitude: standardised regression coefficients of background characteristics, perceptions and attitudes (multiple linear regression, N=2,127). Variables not displaying a significant relation are not mentioned in the table: gender, knowledge, judge is seen as independent and unbiased, all other television news shows, all other political parties

In general, sentences for crimes in the Netherlands are too lenient	β	Δ R^2
Concerned about crime	**0.24****	
Perception trend crime rates (increase)	**0.18****	
Perception trend sentencing (more lenient)	**0.15****	**.23**
Vote Green party (GroenLinks)	−0.10**	
Education (higher)	−0.09**	
Vote right nationalist (Wilders)	0.07**	
Age (higher)	−0.07**	
Watch TV news show 'Hart van Nederland'	0.07**	
Watch TV news show 'Actienieuws'	0.06**	
Vote Liberal Democrat (D66)	−0.05**	
Interested in news on crime	0.04*	**.06**
Total F-test $F_{(11;\ 2114)}$=77.7, P<0.00		Total R^2=0.29

**P<0.01, *P<0.05

obvious consequent pattern of association in the sense that watching news shows on public television was positively associated with knowledge, whereas watching tabloid type news shows was negatively associated with knowledge.

Penal attitude and its associates

We regressed responses to the statement *In general, sentences for crimes in the Netherlands are too lenient* on the limited set of predictors available from our survey. These included gender, age, level of education, interest in news about crime, concern over crime, attitude towards judges, perception trend in crime rates, perception trend in sentencing, watching television news shows, knowledge, and political preference.[10] Multiple regression analysis reported in Table 5 shows that 29% of the variance in our respondents' general penal attitudes, as measured by the typical survey question, can be explained.

While demographic characteristics, political preference and news consumption have only a minor influence, the regression model in Table 5 is dominated by three predictors. People who express a punitive penal attitude are, in general, those who are worried about crime (β=0.24), perceive crime rates as rising (β=0.18), and believe that sentencing is becoming more lenient (β=0.15). The public outcry for harsher sentences may be understood not necessarily as dissatisfaction with the penal climate per se, but rather, as a general concern about crime and law enforcement.

An alternative way to analyse these data is by focusing on underlying dimensions, not on causal relations. We ran a principal components analysis (PCA) on opinion on sentencing climate, being worried about crime, perception of trend in crime rates, and perception of trend in sentencing. The dimensional analysis suggested that we

[10]The categories of nominal variables (e.g. political preference) were partitioned into separate dummy variables.

retain a single principal component. This single component summarises 48% of the variance shared by these variables.[11] We describe this factor as *General Concern over Crime*; GCC in short. People who score highly on this GCC factor believe that sentences are too lenient, that crime rates have rise while sentencing has become more lenient, and are, more than others, worried about crime. Our GCC factor connects well with Hutton's earlier mentioned narrative of insecurity (Hutton 2005). Moreover, in a Dutch study explaining public support for capital punishment, similar patterns were found in relation to such extreme punitive attitudes (cf. Hessing et al. 2003).

The wider attitudinal perspective of the study, as it is charted here, is in line with the familiar picture that usually emerges from survey research on public opinion towards crime and justice issues.

Study III: sentencing study with a sample from the Dutch population

Objective

This study enables the comparison of sentencing decisions between the general public and professional judges when the public sample is presented with the same case files as in study I (i.e. comparison C1 in Fig. 1 above). The study further incorporates an experimental 'between-subjects factor' that varies the amount and detail of information presented to members of the public. It is expected that people presented with a concise newspaper report will be harsher in their sentences than people presented with the detailed case file (C2 in Fig. 1 above).

Materials

In the sentencing study with the public, the experimental materials are: (a) the same three strong evidence case files as those used in the sentencing study with judges (study I), relating to an aggravated assault, a simple assault and an aggravated burglary, and (b) three newspaper reports based on the three case files.

The case files

For valid comparison between judges and the public, we carefully refrained from any alteration in the case files. We did, however, consider that one minor addition to the files was unavoidable. We added brief explanations of some juridical technical phrases where they occurred in the headings of reports. For instance, for the heading 'Summons' (*Tenlastelegging*), the clarification was added: 'In juridical language this is the official written accusation of the prosecutor against the defendant'. Thus, the added information referred solely to the function of a specific report without any explanation or interpretation of content.

[11] This was the only principal component with *Eigenvalue* larger than 1 ($\lambda = 1.92$). Component loadings: opinion on sentencing climate 0.75; concern over crime 0.73; perception trend in crime rates 0.70; perception trend in sentencing 0.57.

Table 6 Sentencing study with the Dutch public: materials, response, requested punishment and legal sentencing maximum per case

Case	Materials	Distributed	Received	Response (%)	Punishment requested	Legal maxima
Aggravated assault	Case file	250	199	80	30	96 months *or* 240 h community service *or* fine €45,000
	Newspaper report	150	111	74	30	96 months *or* 240 h community service *or* fine €45,000
Simple assault	Case file	250	186	74	2.5	24 months *or* 240 h community service *or* fine €11,250
	Newspaper report	150	123	82	2.5	24 months *or* 240 h community service *or* fine €11,250
Aggravated burglary	Case file	250	180	72	6	108 months *or* 240 h community service *or* fine €45,000
	Newspaper report	150	118	79	6	108 months *or* 240 h community service *or* fine €45,000
		1200	917	76		

The newspaper reports

Three newspaper reports were obtained by giving the three case files to an experienced court journalist working for a Dutch national daily newspaper (*Algemeen Dagblad*). This newspaper, most would agree, is positioned at the right side of the political left–right continuum. Without revealing our objectives, and without giving any further instructions, we asked the journalist to produce a newspaper report based on each of the three case files. The resulting three newspaper reports were concise and, as expected, rather one-sided, reflecting mainly the seriousness of the crimes and the consequences for the victims, and giving only negative aspects relating to the offender. Without alteration, we adopted the three newspaper reports as experimental materials. Appendix shows the three newspaper reports produced by the court journalist. All newspaper reports mentioned the punishment (the same as in the case file versions) that was requested by the prosecutor in that particular case (see Table 6).

Procedure and design

From the 2,155 persons in November 2004 who participated in the survey (study II above), using the respondent identification numbers kept by the research bureau TNS-NIPO, a random sub-sample was drawn of 1,200 persons in April 2005. Responses by individuals in this second sample were linked to the same individuals' responses in the survey a year earlier.

Case materials were randomly distributed through the normal mail. Because we feared that responses would be relatively low from those who had received an

extensive case file, more case files than newspaper reports were distributed (see Table 6). As in study II, participants were requested to respond using the self-administered *capi at home* questionnaire. Respondents were first asked in open and unrestricted format to give their written sentencing decision:

> What punishment do you personally find appropriate in this case and how severe should it be? Please write this down concisely.

The question was designed to measure respondents' sentencing decisions off the top of their heads with regard to the case in hand. Because we wanted to retain the possibility of comparing sentences preferred by the public with judges' sentences, and because judges are bound to legal sentencing maxima (discussed above), in a follow-up question we mentioned the legal sentencing options and their respective legal maxima for the case in hand and asked the respondent again to give the preferred sentence.[12] This restricted follow-up question was more or less a back-up for the study in case the public's sentences turned out to be too extreme for further comparison. It further enabled us to explore the effect of mentioning different sentencing options. The final column of Table 6 lists the legal maxima per case.

In order to understand respondents' perceptions of judges' sentencing behaviour in specific cases, we posed the following final question:[13]

> What sentence do you think a real judge would give for this case, expressed in months of imprisonment (and of course not exceeding the legal maximum)? Please try to give your best estimate.

The experiment was completely between subjects, and respondents were randomly assigned one of the case materials, with twice as many respondents being randomly assigned to a complete case file than to the newspaper versions. Respondents who were given a complete case file received a €10 voucher in return for their response, whereas those receiving a newspaper report were rewarded with a €5 voucher.

Response

Table 6 gives an overview of the case materials used in the experiment. For each type of case it shows numbers distributed and received, as well as specific and overall response rates. It also shows punishments requested by the prosecutor, and the legal sentencing maxima.

No systematic differences can be observed between response rates for complete case files and response rates for the newspaper reports. Overall response is 76% (N= 917). Moreover, the resulting sample is statistically equivalent to the original sample used in study II with respect to the attitudinal variates analysed in that study.

[12]The questionnaire was programmed so as not to permit respondents to alter previous answers.

[13]Again, we mention that respondents were not given the possibility to alter their previous answers.

Table 7 Percentages preferring prison sentence (initial and bounded), and proportion of public harsher than judges (only initial sentence)

		Initial sentence by public		Bounded sentence by public[a]
		Prison (%)	Harsher than judges (%)	Prison (%)
Aggravated assault (judges' mean sentence=29.7 months)				
Case file	*N*=150	95	91	95
Newspaper report	*N*=73	92	93	89
Simple assault (Judges' mean sentence=2.5 months)				
Case file	*N*=136	91	84	82
Newspaper report	*N*=97	93	82	79
Burglary (judges' mean sentence=5.3 months)				
Case file	*N*=145	97	96	91
Newspaper report	*N*=94	97	99	91

[a] Sentence preferred after sentencing options and their respective legal maxima were mentioned

Findings

Sentences before and after provision of legal maxima

In all cases a large majority specified a prison sentence (cf. Table 7). Small numbers answered 'prison sentence' without specifying the amount. These were excluded from further quantitative analyses. Only two participants imposed the death penalty (for the aggravated assault case). For each case small numbers of respondents, never more than ten, imposed a life sentence. Sentences involving a combination of sanctions were not very common. These mostly involved prison combined with some form of treatment.

Mentioning the legal sentencing maximum for the case in hand did not change much in preference for the prison sentence in the aggravated assault and the burglary cases, both in the case file and in the newspaper report varieties. Table 7 shows that at least nine out of ten respondents in those cases still prefer a prison sentence after the maximum is mentioned. In the simple assault case, however, we observe a mitigating effect. Providing the maximum, and thereby also sentencing options other than imprisonment, does appear to have a modest effect on those judging either the case file or newspaper report of the simple assault: support for imprisonment decreases by, respectively, 9% and 14%. These respondents predominantly shift their preference to a community service order.

Did mentioning legal maxima have an effect on sentence severity? Table 8 shows that, in so far as it did, the effect was mainly in an unexpected direction: an *increase* in severity. Figure 2 enables a more focused investigation of the effect. The figure shows percentages equal to—or above in the case of the unrestricted question—the sentencing maximum. Figure 2 shows that, in all cases, mentioning the legal maximum produces a substantial movement from below to exactly equal to the legal maximum.[14] For instance, in the case of the newspaper report of the aggravated

[14] A side effect of this movement is extremely skewed distributions, with the bulk of the values at the top (i.e. the legal maximum) of the scale.

Table 8 Sentences imposed (months imprisonment): initial sentence and sentence bounded by legal maxima; judges' sentence as perceived by public

		Initial sentence Mean[a]	Bounded sentence Mean[b]	Initial vs bounded[c]	Perception of judges' sentences (Mean)
Aggravated assault (judges' mean sentence=29.7 months)					
Case file	N=150	60.9	69.4	Z=−3.1*	36.0
Newspaper report	N=73	78.7	76.9	n.s.	41.3
Simple assault (judges' mean sentence=2.5 months)					
Case file	N=136	12.1	13.4	n.s.	6.7
Newspaper report	N=97	10.8	13.3	n.s.	5.4
Burglary.(judges' mean sentence=5.3 months)					
Case file	N=145	18.8	36.7	Z=−5.0*	15.3
Newspaper report	N=94	62.4	64.9	n.s.	28.1

*P<0.01

[a] Excluded 'life imprisonment' and 'unspecified'. Means are *trimmed* at the high end by 2.5%. (three to six respondents, depending on case)

[b] Because of extremely skewed distribution at the top (many sentences equal to bounded maximum) trimming was useless, so means are based on complete and extremely skewed distribution

[c] Because of distribution properties, significance tests used are non-parametric (i.e. Wilcoxon's signed ranks test on untrimmed distributions)

assault, 43% of the respondents initially sentenced the offender equal to or above the legal maximum. However, after the legal maximum was mentioned and respondents were asked again for their preferred sentence, no fewer than 65% imposed the legal maximum. For all the subjects lumped together, 22% initially chose the maximum or above, whereas 42% chose the maximum once it had been mentioned (χ^2=379.4; P <0.001). Perhaps many of our respondents perceived the legal maxima as guidelines or orientation points (which, of course, they are not meant to be) and subsequently wanted to close the gap between their initial, apparently relatively lenient, sentence and the legal maximum.

Given the fact that the provision of the legal maximum not only results in harsher sentences than initially, but also that the bounded sentencing question results in extremely skewed distributions, for the following analyses we will focus exclusively on the prison sentences that were specified after the first unrestricted sentencing question.

Case files versus newspaper reports (comparison C2)

The sentencing study with the public enables direct evaluation of our second hypothesis:

> When members of the general public consider a concise newspaper report of a specific criminal case, sentencing decisions will be much harsher than when they are handed the full case file.

Table 8 shows that this hypothesis is confirmed for two of the three cases. Given the case file of the aggravated assault, the public's average prison sentence is 61 months, whereas it is 79 months for those who were given the newspaper report as produced by

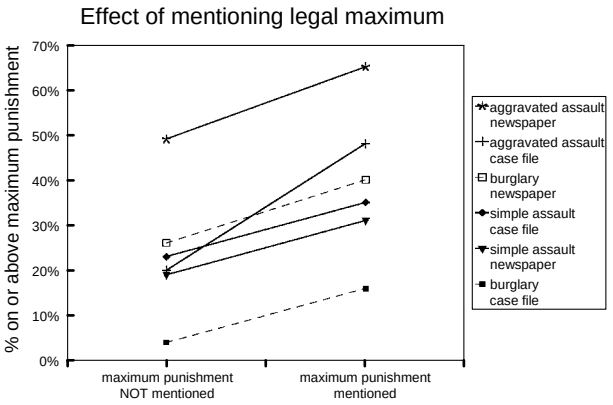

Fig. 2 Effect of mentioning legal maximum

the journalist. The magnitude of the effect here is thus 18 months imprisonment ($P<0.001$).[15] For the simple assault there is no significant effect between the two versions of the case material. The burglary, on the other hand, shows an extreme effect: from 19 months imprisonment, when the full case file was given, up to 62 months when the newspaper version was given. One possible explanation for the magnitude of the effect (43 months, $P<0.001$) is that the newspaper report in this case may inadvertently lead the reader to believe that the death of the victim is related to the burglary. In fact, and this is clear in the detailed case file, the victim's later death is not related to the crime at all. If nothing else, the difference in sentence length between the two versions of the case material shows how extreme the impact of tone and choice of wording of a newspaper journalist may be on the public.

Perception of judges' sentences

Table 8, in the final column, shows respondents' perceptions of what sentences a real judge would impose for the cases presented. Members of the public think that a real judge would be much more lenient than they would themselves. Given the journalist's version of the simple assault, respondents believe that they are twice as punitive as a real judge would be (11 months imposed versus 5 months perceived). Only the case file of the burglary generates a more modest difference between imposed and perceived sentences (19 months versus 15 months, respectively). In the next section we will return to this by relating the differences between sentences imposed and sentences perceived to judges' actual sentences.

[15]Distributions of imposed prison sentences were skewed towards the higher sentences. The averages reported here (and in Table 8) are trimmed averages: 2.5% of the highest sentences are excluded from calculation of the means. In order not to be influenced by distribution characteristics all tests for statistical significance are non-parametric, using Wilcoxon's W.

Integration and comparison over studies

The sentencing studies

Judges and the public on the same cases files (comparison C1)

Integrating results from the two sentencing studies (studies I and III) enables evaluation of our first hypothesis:

> The general public reaches the same sentencing decisions as judges do when both groups are given exactly the same detailed case file of a specific criminal case.

Table 8 shows that this hypothesis is to be rejected. The case against the hypothesis is a strong one. For the aggravated assault, judges' average sentence was 29.7 months imprisonment. Given the same case file, lay persons' average is 30 months *harsher*, with an average prison sentence of 60.9 months.[16] In Kuhn's Swiss study that we mentioned earlier, initially, public sentences appeared to be much more punitive than judges' sentences, when the same vignettes were given. However, Kuhn proceeded to show that the public's average was distorted by a relatively small group of punitive extremes. The majority of lay participants in Kuhn's study were, in fact, not more punitive than judges were. This is, however, not at all the case in our Dutch experiment. A clear majority of lay persons gave sentences harsher than judges'.

Table 7 shows that, when given the case file of the aggravated assault, no fewer than 91% impose a sentence above the judges' average of 29.7 months. The public's sentences when given either the case file of the simple assault or the case file of the burglary, lead to the same conclusion: reject the hypothesis of no difference between judges and the public when presented with identical case files. For the simple assault, lay persons' sentences are almost five-times harsher than judges' (12.1 months compared with 2.5 months). The public's average for the case file of the burglary is 19 months, whereas the judges' average for this case is a prison sentence of 5 months.

Thus, for the three case files given both to judges and to the public, the public is indeed much more punitive than judges are, despite parity of case materials. So, there is a real gap between pubic punitiveness and judges' punitiveness. An interesting additional question is whether the public is *aware* of this gap. Does the public intend to be harsher than judges? We can answer this question by looking at what our lay participants in study III thought that a real judge would do when given the case in hand.

The punitiveness-gap between judges and the public

By comparing the public's perceptions of judges' sentences with judges' actual sentences (see Table 8), one can observe that the lay participants systematically overestimated judges' punitiveness. Without exception, what people think that a real

[16]The average for lay persons is the 2.5% trimmed average (cf. previous footnote). This enables a more honest comparison with judges. The average sentence of lay persons given the aggravated assault case file before trimming 2.5% from the high end is 66 months' imprisonment.

judge would do is significantly more punitive than judges' actual sentences.[17] So, the public's general claim that sentences are too lenient would probably be even louder if the public were to be (*ceteris paribus*) better informed about the actual severity of sentences. This is especially interesting, since studies abroad report the opposite: a tendency among the general public to under-estimate the true severity of sentences (cf. Roberts and Hough 2005).

Integrating the findings from our sentencing studies allows us to dissect further the punitiveness gap between judges and the public into three sections. The first section is the *real gap*: the difference between the public's sentences and judges' sentences. The second section is the *gap as perceived by the public*: it is the difference between the public's sentence and what the public thinks (perceives) a real judge would do. The third section is the *public's misperception*: it is the difference between what the public thinks a real judge would do and the judges' actual sentence. Figure 3 illustrates these sections of the gap.

Figures 4, 5 and 6 show the different types of gaps for our three criminal cases, in case file version as well as in newspaper version. The figures show that the real gap is systematically larger than the gap perceived by the public. Real and perceived gaps are smaller for those who were handed a case file than for those given a newspaper report. This is in line with the effect of information that we discussed above (i.e. confirmation of our second hypothesis). Nevertheless, the perceived gap for each of the three case files remains a gap of substantial size.[18] For the burglary case file, the difference between the public's sentence and what the public thinks that an actual judge would do is relatively the smallest (19 months imposed versus 15 months perceived).

Figures 4, 5 and 6 also illustrate the public's misperceptions of judges' real sentences for the cases presented. The figures illustrate how lay participants overestimate judges' sentences. As a result, our sample of the Dutch population underestimates the magnitude of the gap between themselves and judges in the criminal courts.

Conclusions from integration of the two sentencing studies

Integrating the findings from the two sentencing studies (study I and study III) reveals three things. First, in line with their answers on general survey questions, lay persons are more punitive than real judges, even when judgment is based on the same case files. Second, our study illustrated the impact that tone and wording of presentation and format of information about a case can have on the judgment of a lay person. It was shown (in two out of three cases) that providing lay persons with detailed information on a criminal case has, indeed, a strong mitigating effect on severity. While the effect of information may be huge, it did not suffice, however, in

[17] $P<0.001$ for all paired comparisons (Wilcoxon's signed ranks test).

[18] $P<0.001$ for all perceived gaps.

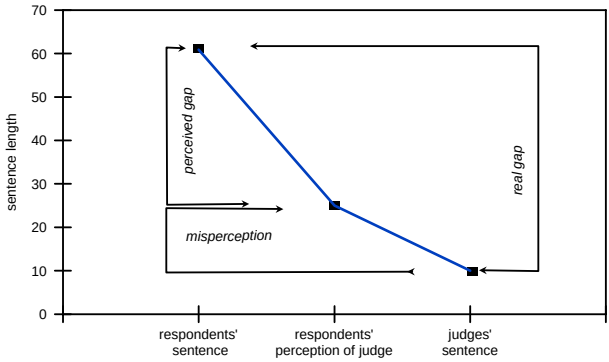

Fig. 3 The punitiveness gap dissected

bridging the gap between judges and the public. Third, lay persons in our study consistently overestimated judges' sentences for the cases presented. The gap as perceived by the public is, therefore, smaller than the real gap between judges and the public.

Comparing experimental findings with findings from general survey

Punitive attitudinal disposition versus sentence when presented with a concrete case (comparison C3)

In the survey in study II, four out of five respondents agreed that sentences in the Netherlands are too lenient. Not surprisingly, in response to the hypothetical situation of being in the judge's chair, the same proportion of people expected to be harsher than a real judge, while one-fifth expected not to be harsher than a real judge. How do these groups compare on their decisions and perceptions when handed a concrete case file?

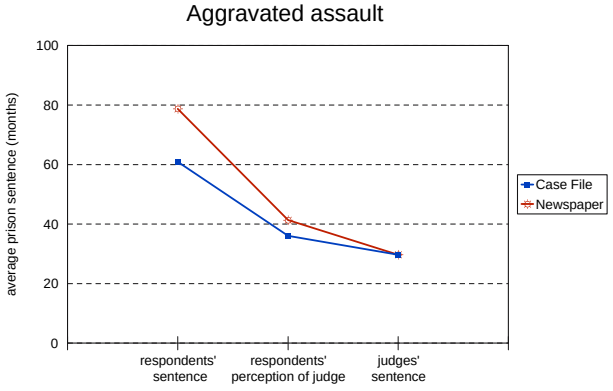

Fig. 4 Aggravated assault: punitiveness gap dissected

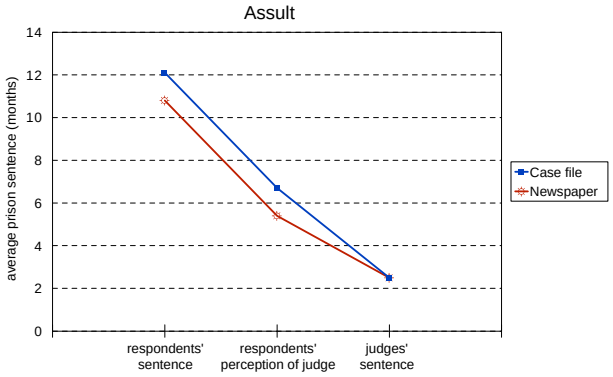

Fig. 5 Simple assault: the punitiveness gap dissected

In Table 9 sentencing decisions from our public sample of study III are related to the same persons' responses to the earlier survey question in study II. The table shows that those who claimed in the survey not be harsher than a real judge are, indeed, more lenient than respondents who expressed a more punitive general attitude in the survey. However, the table also shows that, despite more lenient attitudes and more lenient sentences, these respondents remain much more punitive than real judges. This can be observed for each of the three cases. The most intriguing finding here concerns the burglary case. Those who claimed in the survey not to be harsher than a real judge sentenced the burglar to 10 months' imprisonment, on average, which is, indeed, 11 months less than the sentence by respondents with a more punitive general attitude. At the same time this is still 5 months above the judges' average (i.e. the real gap). However, these respondents with a relatively lenient general penal attitude *think* that a real judge would be harsher than they themselves in this case. The result is a negative perceived gap of more than 3 months.

In summary, among the general public, punitive attitude as expressed earlier in the survey is indicative for *relative* punitiveness when deciding upon a specific case.

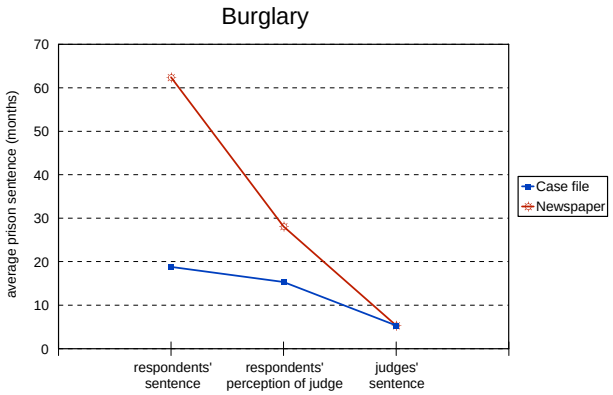

Fig. 6 Burglary: the punitiveness gap dissected

Table 9 Punitiveness claimed in the survey related to judgment based on case files: sentences, perceptions and gaps (differences between 'harsher' and 'not harsher' significant in both parametric and non-parametric tests at at least $P<0.05$, except for differences between the two groups in perception of judges' sentence)

	Aggravated assault [judges: 29.7 months]	Simple assault [judges: 2.5 months]	Burglary [judges: 5.3 months]
If in judge's chair, then most of the time HARSHER			
N	113	112	122
Months imprisonment[a]	**65.1**	**13.3**	**20.8**
Real gap	35.4	10.8	15.5
Perception judges' sentence	34.7	6.3	14.5
Perceived gap	30.1	7.4	6.6
If in judge's chair, then most of the time NOT HARSHER			
N	41	28	28
Months imprisonment[a]	**49.8**	**7.5**	**10.3**
Real gap	20.1	5.0	5.0
Perception judges' sentence	36.7	5.8	13.7
Perceived gap	13.1	1.7	−3.4

[a] 2.5% trimmed from highest sentences

It is relative because even those who claim in the survey not to be harsher than judges are still more punitive that real judges, albeit not to the extent of their counterparts with an explicit punitive attitude.

Conclusions and discussion

Providing complete information on criminal court cases to members of the general public does not bridge the gap between the public and the judiciary with respect to preferred sentence severity. The Dutch public is more punitive than judges in the criminal courts. Considering identical case files, the public imposes much harsher sentences than judges do. The general punitive public attitude that emerges from surveys, and was replicated in the current study, does persist when the public is provided with concrete and detailed case files. The hypothesis that lay persons reach the same sentencing decisions as judges do when given the same case file of a specific criminal case was rejected. Our study did show the potential impact of presentation of information on decisions and perceptions of lay persons. Participants who considered a complete case file of a criminal case were much less punitive than participants who based their judgment on a typical newspaper report of that same case. However, the demonstrated effect of information does not suffice to bridge the gap between judges and the public. Connecting the experimental findings to the survey data further showed that, in general, people with a more punitive disposition pass a more severe sentence, when given a specific case, than do people with a less punitive attitude. However, even the latter group remains significantly more punitive than judges. On top of that, the study showed how members of the public misperceive judges'

punitiveness in an unexpected direction: lay persons consistently, and to a considerable extent, overestimated judges' sentences for the cases presented. The gap, as perceived by the public, is, therefore, smaller than the real gap that exists between judges and the public.

Our study is a multi-method study. We combined experimental and survey methodology. Our integration of three distinct but connected studies, using large samples from both the general public and from the population of professional criminal judges, has given us a unique and focused insight into the depth and nature of the gap between judges and the public. Our approach to the gap, combined with the reality of Dutch criminal procedure, further contributes to existing knowledge because of the external validity of what we have done. Dutch criminal procedure relies to a very large extent on the written case files, which are detailed and cover all relevant aspects of a case in hand. The task required from judges in our study, using realistic case files, was, therefore, very similar to what they do in daily practice. With minimal additional explanation, members of the Dutch public proved to be capable of judging the very same case files. Moreover, because a large number of judges working in the criminal courts cooperated with our study, the gap between judges and the public could be established and analysed in a very direct way under quasi-experimental conditions. There was no need, as in earlier studies on the subject, to have judges pass sentence in concise vignettes or to infer a gap from contrasting the public's sentencing preferences with formal court statistics pertaining to the types of cases used in the study. Our integrative methodology was further tailored to actually measure (not assume) a punitiveness gap between judges and the public in a methodologically sound way, to relate the gap to the wider attitudinal public perspective, and to examine systematically the effect of information on the extent of the gap. Most earlier studies either focused on one or two of these aspects in isolation, or focused primarily on the public's sentencing preferences whilst comparing it to court practices, or to a single decision by a court in a case that served as the basis for a vignette.

While our study provides strong support for the information hypothesis, it has also become clear that it would be naïve to expect additional or better information for the public to close the gap with judges completely. In our opinion, the gap that remains in our study is simply too large to support such an expectation. True, a sample of the public could be given much more information than we have on details of the criminal cases, on what happens during trial in court, on criminal law and criminal procedure, and about different types of sanctions and their effectiveness. However, given current findings, we are not at all convinced that such information would ever completely bridge the gap between lay persons and judges. It can, in our view, only be bridged by information if, through training, we make experts out of lay persons, who are, then, no longer lay persons.

Apart from charting the actual gap between judges and the public, and the role of information therein, our study further contributes to discussions on the gap by introducing the contrast between the real gap and the gap as perceived by the public. While the former is the actual difference between preferred sentences by judges and by the general public, the latter refers to the difference between what

members of the public prefer and what they believe that a real judge would do. The gap, as perceived by the public, can, therefore, be established without reference to actual preferences measured on part of the judiciary. Our study has shown that both types of gaps are certainly not the same thing. While other studies (many reviewed in Roberts and Hough 2005 and in Roberts et al. 2003) have shown that the public tends systematically to underestimate the severity of actual sentencing practices, the perceived gaps analysed in our study portray the opposite. With regard to the preferred sentences when concrete and detailed information about criminal cases is given, the Dutch public consistently overestimates judges' (average) sentences in those cases. For each of our three cases, the gap as perceived by the public is thus a smaller one than the real gap between them and judges. This contradicts the results of other studies and deserves further investigation in the future.

This brings us to the question of why our findings are not in line with earlier studies abroad. A first and obvious explanation would focus on differences in the methodologies applied. This explanation includes reference to the nature and extent of the case materials used in the current study and to the integration of several connected studies. It should further be noted that our three cases may be considered special in the sense that each of them represents a more serious example within its own legal classification. We cannot indicate whether other types of cases or less serious cases would yield different results within our methodology. Would the same conclusions be reached if cases were used that were more eligible for sanctions other than mere prison sentences? One may further ask whether findings abroad would be that much different from ours if our study were to be replicated in other jurisdictions. Given earlier findings abroad, it does seem hard to believe that replication would lead to similar results. For instance, using British Crime Survey (BCS) data, Hough and Roberts (1999) showed that large majorities of respondents provided estimates of actual imprisonment rates for rape, mugging and burglary that were much too low (p. 16). Moreover, in the same study, it was shown that public preference when a burglary vignette was given (two sentence description) in the BCS was far less punitive than the decision by the court in the actual case on which that vignette was based. That study also showed that giving respondents a 'menu' of sentencing options (including alternatives to imprisonment) strongly reduced public preferences for imprisonment. Our own study provides some support for the latter finding in the simple assault case, where preference for imprisonment dropped as a result of giving sentencing options. Nevertheless, given the different approaches taken by researchers, comparing study findings is comparing chalk with cheese.

If we assume that the contrast between our study and findings from other countries is not due to differences in approach, there must be something special about the Dutch in comparison with other jurisdictions. The punitiveness gap between the Dutch public and Dutch judges may, then, be the result of either one or a combination of the following. First, the Dutch courts may be very lenient, also in international perspective. Second, on the opposite side of the gap, the general public may be especially punitive, also in an international perspective. It is, however, unlikely that leniency of the courts is a valid explanation. This may have been true more than a decade ago, but inspection of trends in prison

populations shows that this has changed. From 2000 to 2005, the Dutch prison population increased from 90 per 100,000 inhabitants to 134 per 100,000, an increase of 49% (cf. Aebi and Stadnic 2007). To date, Dutch courts, in comparison with other jurisdictions, can no longer be labelled 'mild'.[19] What about an excessively punitive public? The 2005 European Survey of Crime and Safety (van Dijk et al. 2007) gives an indication. Respondents were asked for a sentencing preference for a recidivist burglar, as described in a vignette. In the Netherlands, in the 2005 sweep, 32% preferred a prison sentence. While this is above the international average of 24% preferring prison, we do not consider that enough to merit the conclusion that the Dutch public is excessively punitive.[20] Moreover, it appears to be in line with the increased punitiveness of Dutch courts.

In short, we are very much inclined to take the gap, as we have charted it, at face value. There is a punitiveness gap between judges and the public. More and better information results in a smaller gap, but is insufficient to close it. Does this mean that the legitimacy of our criminal justice system is in jeopardy? No, we think not. Our survey (study II above) showed that the Dutch public, while expressing dissatisfaction with levels of sentencing, is not necessarily negative about the performance of Dutch judges. Moreover, 75% agreed with the statement that, in the eyes of the general public, judges' sentences will never be harsh enough. This combination of survey findings leads us to the conclusion that the Dutch public is willing to accept a certain gap, even finds the existence of such a gap a normal situation. However, when the courts fail to explain or fail to give reasons for their decisions and effectively convey them to the public, then the gap between the courts' decisions and the public preferences may become a true threat to the legitimacy of the justice system. Apart from information, the explanation of decisions is a key aspect in the public's acceptance of the courts' decisions and of the gap of which they are aware. Indeed, Dutch criminal judges themselves appear to be aware of this fact. In an earlier study (de Keijser et al. 2004) judges claimed to be well able to relay their arguments and reasons to the public attending a case in the courtroom, and to create, there, at least understanding, if not approval, of their decisions. They add, however, that they fail to reach public opinion effectively outside the courtroom, which worries them. On a final note, we have discussed how the Dutch public overestimates judges' sentences in the cases presented to them. It should be noted that, in so far as the public is willing to accept the existence of a gap, this necessarily refers to the gap as they perceive it. The judiciary now faces the challenge of removing the difference between the real gap and the gap perceived by the public. Increasing sentence severity is not likely to resolve the matter. For bridging this 'gap between gaps', providing the public with more factual information and better explanation of decisions would be a logical course of action.

[19]For comparison: the prison population in England and Wales increased by 15% from 2000 to 2005 (143 per 100,000 inhabitants in 2005) (Aebi and Stadnic 2007).

[20]In the UK, 52% preferred a prison sentence in the 2005 sweep (van Dijk et al. 2007).

Appendix

Newspaper articles of the three criminal cases

Aggravated assault

Loose cannon kicks man lame and mute
From our reporter

The Hague – Tony King cannot walk or talk anymore. According to the prosecutor, this was caused by 22-year-old JohnnyV., who also lived in The Hague. The assailant kicked and beat his victim hard and many times on the head on September 2nd, even after Tony stopped moving. The victim sustained brain damage and a broken cervical vertebra and because of that has lost his speech and is paralysed from the waist down.

Tony's answer to an unpleasant remark by Johnny V. led to this destructive deed. The prosecutor takes the 'extremely severe' assault with 'disastrous consequences for the victim' very seriously and demanded in court a sentence of 30 months imprisonment. The defendant – who has been convicted for battery in the past – did not, according to the prosecutor, show any respect at all for the victim, or signs of remorse.

Tony, who has admitted to committing this crime, was frustrated that day. His girlfriend had left him for someone else. After training in the gym to work off his anger he went out for dinner with some friends in the evening and afterwards to a bar. Around 2 a.m., he and his mates were on the streets, drunk. At that moment King and his girlfriend Corinne passed by. According to the girlfriend the defendant called her and said "Come with me tonight." King replied "Cool it: go and bother your own girlfriend."

The defendant could not take that remark, "At that moment all hell broke loose. I felt I was being made a fool of, and the remark reminded me of my broken relationship" he declared to the police later on. After the other boys left he went after the couple to beat up the man.

Psychological examination has proved that V. was completely accountable at the time of the beating. The prosecutor thinks this is a cause for concern. The prosecutor stated "It makes it even less comprehensible that this defendant turned aggressive so suddenly". The prosecutor is concerned about the future and wants V. behind bars for a long time.

The police tracked Johnny down after one of the boys who was with him that night tipped them off. The boy read about the beating in a local newspaper and linked it to the dispute.

Simple assault

prosecutor: 10 weeks' imprisonment for assault
From our reporter

The Hague – The prosecutor demanded 10 weeks' imprisonment (2.5 months) as a sentence for The Hague resident Berry V. who has beaten Tony King, a 26-year-old fellow citizen out of frustration. The defendant was drunk and annoyed. He beat and kicked the victim because of a remark made just before.

V. has admitted to the police that he committed the crime. The reason for acting that way was that his girlfriend broke up with him on September 2nd, the day before the assault. She admitted seeing someone else. After training in the gym to work off his anger he went out for dinner with some friends in the evening and afterwards to a bar. Around 2 a.m., he and his mates were on the streets, drunk. At that moment the victim and his girlfriend passed. According to the victim's girlfriend the defendant called her and said "Come with me tonight." King replied "Cool it; go and bother your own girlfriend."

Berry V., convicted of earlier bodily harm, could not swallow that remark. "At that moment all hell broke loose. I felt I was being made a fool of, and the remark reminded me of my broken relationship" he declared to the police later on. After the other boys left he went after the couple to beat up the man. The victim sustained broken ribs, broken teeth and a concussion.

The Prosecutor stated that the assault was "very brutal and extremely violent". Moreover the prosecutor is concerned that the defendant because of his violent past will be in the wrong again in the future. The prosecutor hopes that imprisonment will drive some sanity into the defendant's brain.

Aggravated robbery

Retired invalid robbed of savings
From our reporter

The Hague – The prosecutor had demanded a sentence of 6 months' imprisonment for 26-year-old Ferdinand L. from Delft – a notorious burglar. The thief stole 100,000 euros' worth of savings and almost 30,000 euros' worth of jewellery from the house of a 77-year-old Delft inhabitant on November 12th. The defendant needed the money to pay off gambling debts.

According to the prosecutor the defendant acted in a cold-blooded way against the defenceless invalid old man. The aged victim – emotionally shaken after the burglary – has in the meantime died from cardiac arrest.

Ferdinand L., who has pleaded guilty had been working in the victim's house, installing an invalid elevator. During that job he discovered a safe and jewellery box in a kitchen cabinet where the old man kept part of his savings and his late wife's jewellery.

The mechanic, who has been convicted of burglaries in the past, entered the house at night with a copied key. The old man caught him in the act, but could not do anything from upstairs because the thief had disconnected the invalid elevator. By calling from the window the victim could alarm the neighbours. One of them saw the burglar drive away on a moped. Some days later he remembered that the fleeing man had installed the lift. The police apprehended Ferdinand L. the next day. According to him there had been only 50,000 euros in the safe instead of 100,000. He gave the money and jewellery to his creditor – someone supposedly called Neil – on the evening after the burglary to pay off his gambling debt of 65,000 euros. The burglar says that he does not know how to reach 'Neil', "and even if I knew who he is and where he lives I would not tell. That would mean signing my own death certificate" so he declared to the police.

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Jan W. de Keijser (1968) is senior researcher at the Netherlands Institute for the Study of Crime and Law Enforcement, in Leiden, the Netherlands. He graduated in political science and obtained his Ph.D. at Leiden University, examining judges' sentencing decisions in relation to the functions and goals of punishment. Much of his recent research has been focused on the psychology of judicial decision making, factors influencing legitimacy of the criminal justice system, and public opinion on the justice system.

Peter J. van Koppen (1953) is senior researcher at the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) at Leiden, the Netherlands, and is professor of Law and Psychology at the departments of Law of Maastricht University and the Free University, Amsterdam. He is a psychologist. van Koppen is co-editor of *Psychology, Crime, and Law* and serves as President of the European Association of Psychology and Law. His research includes negotiation behaviour of attorneys in civil cases, recovered memories, geographic profiling of criminal behaviour, execution of court decisions, lie detection, judicial decision making and sentencing, police interrogations and false confessions, and value of forensic evidence.

Henk Elffers (1948) is senior researcher at the Netherlands Institute for the Study of Crime and Law Enforcement and professor of Psychology and Law at Antwerp University, Belgium. He graduated in mathematical statistics at the University of Amsterdam and obtained his Ph.D. in Psychology of Law at Erasmus University, Rotterdam, on a thesis on income tax evasion. Before his current position, he held various research appointments in Amsterdam (mathematics), Utrecht (geography), and Rotterdam (law and psychology). His research interests include spatial aspects of crime, rational choice theory of rule compliance, statistics in the courtroom, and relationship between judges and the general public.