A GIRARDIAN VIEW OF THE CRIMINAL JUSTICE SYSTEM

by Nico Keijzer[1]

1. Introduction

This paper deals with the question, to what extent the hypotheses of René Girard about the scapegoat mechanism being the origin of human culture can serve as an explanatory tool regarding the criminal justice system. It will be argued that this system, at least insofar as it concerns very serious offences and punishments, is rooted in that mechanism. The traces of this will be shown in relation to an actual case.

It would be wrong, however, to conclude that the scapegoat mechanism suffices for explaining the criminal justice system. It will be suggested that an additional root is to be found in family justice.

2. Summary of basic ideas

The ideas brought forward by Girard that are most relevant for explaining the criminal justice system (the official system for punishing crime, which includes the legislature, police, prosecution service, courts and prisons) may briefly be summarized as follows.[2]

2.1. mimesis

The cornerstone of Girard's anthropological theory is his observation that human behaviour is governed by imitation, especially unconscious imitation, which he calls mimesis. Although mimesis manifests itself in all sectors of human behaviour,[3] Girard especially elaborates this idea in relation to desires. Adam, who also wanted to taste the apple, is an archetypical example.[4] Desires, in the Girardian use of the term, should be distinguished from needs, such as hunger, thirst and the need for recognition. Desires are the choices made for the satisfaction of those needs. We need clothes; what clothes we desire mainly depends on what others wear.

The mimesis of desires, Girard points out, can lead to rivalry. Children need to play; they often prefer to play with the very toy already chosen by their brother or sister. Rivalry may lead to conflict, even to violence, such as between Cain and Abel. Again, the children's play serves as a practical example.

Mimesis between rivals not only leads to conflict, but also to a blurring of their differences. On a larger scale, the rivalry and the

[1] The author is grateful to Dr. Michael Elias and other members of the Dutch Girard circle for their observations regarding an earlier version of this paper.
[2] See also Pierette Poncela, Justice Pénale et vengeance, à propos de deux ouvrages de René Girard, Archives de Philosophie du Droit 24 (Sirey, 1979).
[3] René Girard, Things Hidden since the Foundation of the World (revised version of: Des choses cachées depuis la fondation du monde, Paris, 1978), Stanford, Cal., 1987, p. 290.
[4] René Girard, Les origines de la culture, Paris, 2004, p. 73.

resulting indifferentiation and loss of structure may lead to destabilisation of society, and ultimately to crisis – Girard speaks of rage and ultimate excitement[5] – where everyone harbours hostile feelings against everyone.

2.2. scapegoat mechanism

In such a mimetic crisis, the general uneasiness may be relieved by blaming it on one particular individual or group. Once such an individual or group has by some or by someone been pointed out as the cause of the trouble, it is by mimesis, again, that the general population joins in and turns its hostility against that person or group. This mimesis of hostility may lead to general aggression resulting in the elimination of that individual or group.[6] Genocide, of course, is the ultimate example of an inside group being so scapegoated;[7] if the targeted group is an outside enemy, the obvious example is war.

The elimination of such a chosen enemy has the at least temporary effect of the crisis being resolved. Hostility of all against all is realigned towards the common enemy. Society is restored: a reconcilement amongst the people takes place and a strong cohesion results. Without this mechanism, the group would be subject to extinction by internal violence.[8]

In the hope of again evoking its peacemaking effect, the elimination of the scapegoat is later re-enacted by sacrificial rituals (re-enaction also being a form of mimesis).[9]

In such re-enactments, the prospective victim preferably is a member of the society who is sufficiently different for making acceptable that he, and not everyone else, is the cause of the general unease or crisis.[10] The scapegoat mechanism[11] only works if the people believe that the person sacrificed is indeed the cause of their troubles and has by his conduct endangered the survival of the society. For the selected victim to be able to fulfil its sacrificial function, the society at large must believe it to be guilty.[12] As i.a. the case of Jesus[13] has shown, however, this belief can be mistaken.[14]

Once selected, the victim is prepared for being sacrificed by certain acts being imputed to him that justify the sacrifice because they are dangerous

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[5] Les origines de la culture, p. 180.
[6] Les origines de la culture, p. 76-78.
[7] Girard uses the word scapegoat in the metaphorical sense of common parlance; he does not especially refer to the goat mentioned in Leviticus 16: 20-22, which is not killed but expelled. Things Hidden, p. 33, 130-134 ; René Girard, Generative Scapegoating, in: Robert G. Hamerton-Kelly (ed.), Violent Origins, Stanford, 1987, p. 73-145 (74, 112).
[8] Les origines de la culture, p. 147-151.
[9] Les origines de la culture, p. 164.
[10] René Girard, Violence and the Sacred (translation of: La violence et le sacré, Paris, 1972), London (1988) 1995, p. 271 ; René Girard, The Scapegoat (translation of : Le Bouc Émissaire, Paris, 1982), London, 1986, p. 12-23.
[11] Girard also uses the term 'victimage mechanism'.
[12] Les origines de la culture, p. 80, 88.
[13] According to Luke 23: 1-5, Jesus was put to death on the unfounded accusation by the crowd of having stirred the people up against the authorities.
[14] The Scapegoat, p. 100-111.

for the society.[15] This is important, because if the victim were discovered to be innocent, this would invalidate the sacrifice and would expose the accusers' own guilt.[16]

The performance of the sacrificial rite is either done by the people themselves, collectively, e.g. by stoning, in order for the ritual to have its maximal beneficial effect, or it is done by specialists, priests, in order not to contaminate the people with the evil that is to be expelled.[17]

2.3. culture

The scapegoat mechanism is typically human, as it is based on symbolic thinking, to which animals are not supposed to be able.[18]

According to Girard, the scapegoat mechanism is the origin of religion and of human culture generally.[19] The sacrificial rituals have come to involve music, dance, etc. Another sequel are the prohibitions, that are meant to prevent recurrence of the crisis.[20]

The scapegoat mechanism is also seen as the origin of monarchy. After having been sacrificed, the scapegoat receives gratitude for the harmony it has established and is venerated as god. Sacrifice makes sacred. Before being sacrificed, a prospective scapegoat may be venerated as king.[21]

By and by, although still governing 'by the grace of god', kings were no longer sacrificed[22] (in some East African tribes, however, ritual regicide is still practiced), and their power has achieved a worldly character, in contrast to the religious power of the gods.[23] It seems, however, that the development from prospective sacrificial victim to centre of worldly power still needs further explanation.

2.4. history

Although the scapegoat mechanism according to Girard dates from the primeval ages of mankind, traces of it are still visible in historical

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[15] Violence and the Sacred, p. 101-116, 271-272 ; The Scapegoat, p. 15-21. Marie-Antoinette, victim of the French revolution, is mentioned as an example. She was accused of incest with her son.
[16] Les origines de la culture, p. 122.
[17] Things Hidden, p. 49.
[18] Les origines de la culture, p. 153-157.
[19] Things Hidden, p. 94; Les origines de la culture, p. 159.
[20] Les origines de la culture, p. 161.
[21] Things Hidden, p. 54-57.
[22] According to Frazer, several tribes in the old days used to sacrifice their kings when weakened or after expiration of their term of office. Sir James Frazer, The Golden Bough (1922), abridged edition, New York, 2002, p. 264-283.
[23] According to Luc de Heusch, Girard's hypothesis is too simplistic and is not supported by actual anthropological findings regarding African tribal kingship. Luc de Heusch, Sacrifice in Africa, a Structuralist Approach, Bloomington, 1985, p. 16-17, 106-107. As rightly observed by Simon Simonse, however, Girards theory does not regard the inner coherence of ritual practices but their genesis. Simon Simonse, Kings of Disaster; Dualism, Centralism and the Scapegoat King in South-eastern Sudan, Leiden, 1992, p. 31-32.

times, e.g. in the persecutions[24] of Jews and in the lynchings of black Americans.[25]

As a clear example, we may mention the case of Jesse Washington (1916).[26] When in the power of a sheriff he had confessed the murder of a white lady. He had in a few minutes been convicted by a jury. After someone had shouted "Get the Nigger", he was in the presence of thousands of people stabbed, maimed and hanged above a fire, after which his body was pulled around the City Hall Plaza. The corpse was finally put in a sack and hung for public display in front of a blacksmith's shop.[27] The case marked the end of a period in which Texas' leaders had publicly supported and encouraged extra-legal violence.[28] There is no evidence of Jesse Washington having become sacred, but as a member of the black population he can perhaps be considered to share in the present veneration of the late Dr. Martin Luther King, whose death has contributed to the achievement of interracial peace.[29]

2.5. outlook

Girard not only describes the scapegoat mechanism, he also criticizes it as a system of unreasonable violence. In the Biblical precept "Love your enemies"[30] Girard reads the divine wish that violence and revenge should be abstained from, and be replaced by mercy.[31] He also points to Paulus' admonition[32] not to judge another "because you, the judge, are doing the very same things".[33]

In Girard's view, the Bible has defused the scapegoat mechanism by exposing the innocence of its victims and the ignorance of its perpetrators.[34] In this context, Girard refers to such texts as "They hated me without a cause.",[35] "I find no crime in this man.",[36] and "Father forgive them, for they know not what they do."[37]

Girard believes that the exposure of the scapegoat mechanism as a system of sacrificing innocent victims will enable the world to renounce violence.[38] Here, however, we enter into the field of eschatological

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[24] In contrast to 'prosecution' (a legal action against someone accused of a criminal offence), 'persecution' means: violent, cruel and oppressive treatment directed towards a person or group of persons because of their race, religion, sexual orientation, politics or other beliefs.
[25] Things Hidden, p. 129.
[26] William D. Carrigan, The Making of a Lynching Culture; Violence and Vigilantism in Central Texas 1836-1916, Chicago, 2004.
[27] According to Girard, the metal worker incarnates the sacred violence. Violence and the Sacred, p. 262.
[28] William D. Carrigan, o.c., p. 189.
[29] Cf. the story of Apollonius of Tyana, where the peace which followed the lynching of a beggar not the victim himself but Heracles was thanked for. René Girard, I See Satan Fall Like Lightning (translation of: Je vois Satan tomber comme l'éclair, Paris, 1999) New York, 2001, Chapters IV and V.
[30] Matthew 5: 44.
[31] Things Hidden, p. 180-183, 210.
[32] Romans 2:1.
[33] I See Satan Fall Like Lightning, Chapter XII.
[34] The Scapegoat, p. 102-111.
[35] John 15: 25.
[36] Luke, 23: 4.
[37] Luke 23: 34.
[38] Things Hidden, p. 126-138.

prospects, which seem less relevant for explaining the worldly criminal justice system of today.

3. Criminal justice system

3.1. root

Although he has touched upon the subject only incidentally,[39] Girard's ideas regarding the origins of culture also shed light on our criminal justice system. This has especially been made clear by Christian Nils Robert.[40] Much of what follows in this paragraph I owe to that author.

The original kings, who shared in the powers of the gods, were legislator, executive and judge at the same time. In modern times, those three functions are more clearly distinguished, although not always clearly separated.[41] Each of the three functions is part of the criminal justice system.

In the light of Girard's hypotheses, the criminal justice system may be understood as a sacrificial rite, although the criminal justice system of today hides its sacrificial function.[42] In this perspective, it seems that we do not so much need the system for dealing with crime, but that we need criminals for feeding them to the system. Alleged purposes of the criminal justice system such as rehabilitation of offenders are in this view mere rationalizations in the rear.

The view that the criminal justice system basically has a sacrificial character finds support in history.[43]

According to the Bible, the death penalty was in Moses' times meant to restore the people's relation to God[44] by purging the people of the stain attached to it by a crime committed against His laws[45] and by deterring the people from committing further crimes.[46] Execution normally was by stoning, in which originally the whole community was involved.[47]

Also in ancient Rome, the death penalty probably was of sacral character. This appears inter alia from the use of the hatch, which was also used in the sacrificial rituals of those days.[48] Nightly poachers were hanged as a sacrifice to the harvest-goddess Ceres.[49]

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[39] Violence and the Sacred, p. 21-27, 297-299.
[40] Ch. N. Robert, l'Impératif Sacrificiel, Lausanne, 1986.
[41] There is a striking resemblance of the trias politica with the Holy Trinity, God being paralleled by the legislator, the Son by the executive, and the Holy Ghost by the law as pronounced by the courts.
[42] Violence and the Sacred, p. 22.
[43] H. von Hentig, Die Strafe, Berlin, 1954, I, p. 131 et seq. About human scapegoats: p. 202-206.
[44] Numbers 25:4.
[45] Deuteronomy 17:7; 17:12; 19:13; 21:21.
[46] Deuteronomy 13:11; 17:13; 19:20; 21:21.
[47] Deuteronomy 21:21 and 22:21; Leviticus 24:14.
[48] H. Hetzel, Die Todesstrafe in ihrer Kulturgeschichtlichen Entwicklung, Berlin, 1870, p. 26
[49] W. Kunkel, Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit, München, 1962, p. 43, 139.

The death penalty as it was practiced by old German tribes has also been interpreted as a sacrifice to the gods, in order to avert their wrath from the people the criminal had belonged to.[50]

In the Middle Ages, cleansing of injustice was considered one of the functions of the death penalty.[51]

One of the reasons why the sacrificial roots of the present-day criminal justice system are not easily recognizable is the fact that the number of legal norms enforced by the system has explosively increased, and nowadays includes many regulations which hardly involve the survival of the society. Another reason is that, at least in Europe, application of the death penalty has become exceptional, and less bloody sanctions have become more fashionable, such as imprisonment and fine. It is harder to see the sacred aspect of living prisoners than that of sacrificed victims. Both sanctions, however, have a purgatory aspect.

Few participants in the present-day criminal justice system will admit that they take part in sacrificial rites. More commonly, the criminal justice system is explained as a system of control: criminal justice canalizes and restricts revenge by the community, and by giving effect to legal prohibitions it inculcates those prohibitions and encourages the people to comply with them (giving an a contrario reward for good behaviour to those who do).

According to Emile Durkheim – in this respect a precursor of Girard – repression of crime is common vengeance, and the basic function of the criminal justice system is to maintain inviolate the cohesion of society.[52]

These explanations fail to answer the basic question, however, why transgressions of norms should be answered by making people suffer. The fact that, worldwide, special institutions exist for making people suffer, as a seemingly inherent part of human culture, calls for a fundamental explanation. Girards's view on the criminal justice system as stemming from a system of sacrificial rites does give such an explanation.[53]

As we have seen, the scapegoat mechanism, as described by Girard, can only work if the selected victim is generally believed to be guilty of conduct threatening the society. In modern individualistic times, however, it does not suffice, for being victimized, that one belongs to a certain mistrusted category of people. The sacrificial ritual, originally an expression of collective responsibility, has been refined by the requirement of personal guilt. "Every man shall be put to death for his own sin."[54] Instead of diverting the general hostility towards a possibly innocent victim, present-day criminal justice systems select the persons to be sacrificed on

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[50] H. von Hentig, l.c.
[51] H. Hetzel, o.c., p. 95.
[52] E. Durkheim, The Division of Labour in Society (translation of De la division du travail social, 1893), London, 1984, p. 56-63.
[53] Sigmund Freud had also given such an explanation: "What is in question is fear of an infectious example, of the temptation to imitate – that is, of the contagious character of the taboo. If a person succeeds in gratifying the repressed desire, the same desire is bound to be kindled in all the other members of the community. In order to keep the temptation down, the envied aggressor must be deprived of the fruit of his enterprise (...). This is indeed one of the foundations of the human penal system (...)." Totem and Taboo (translation by James Strachey of 'Totem und Tabu', 1913), London/New York (1950) 1994, p. 71-72.
[54] Deuteronomy 24:16; Ezekiel 18:19-20.

the basis of evidence of their having personally committed a crime. Only this way, the people can nowadays be convinced that the selected person is indeed guilty of a crime, and will the sentencing and the execution of the penalty be accepted as justified, and have its peacemaking effect.

Girard has pointed out an important difference between the original system for the prevention of inadmissible violence, which diverted the spirit of revenge into other channels, and the present-day criminal justice system, which takes over the revenge by itself. The first is oriented not towards the guilty parties but towards those injured by the crimes. The latter, for their resentfulness, posed the most immediate threat. The injured parties had to be accorded a careful measure of satisfaction, just enough to appease their need for revenge but not so much as to awaken that need elsewhere. The break has come at the moment when the intervention of an independent legal authority became so constraining that vengeance by injured parties is repressed. The system then reorganized itself around the accused and the concept of guilt. In fact, retribution still holds sway, but is forged into a principle of abstract justice that all men are obliged to uphold and respect. In the judicial system, the violence falls with such force, such resounding authority, that no retort is possible.[55] This makes clear why in present-day laws of criminal procedure the rights of the accused are much more elaborated than the rights of the victims of the offence.

Still, the present-day criminal justice system, requiring personal guilt, may be understood as a new manifestation of the old sacrificial rituals for which the sacrificial victims were more randomly selected. Their selection having originally been at random serves as an explanation for the fact that in many countries not all suspects of criminal offences are prosecuted; the expediency principle *(opportuniteitsbeginsel)* authorizes the prosecuting authorities to make a fair selection.[56]

The criminal justice system of today appears in roughly two types. On the one hand, in the common law countries (mainly the English speaking countries), the jury system prevails, and defendants are normally released on bail until their conviction and sentence have become final. In the so called civil law countries, on the other hand, decisions are normally made by professional judges (juries are exceptional) and, apart from less serious cases, accused persons are normally held in custody. In the first type, the guilt of the accused is established by the judgement of the jury *(vox populi, vox Dei),* in the second type it is established by the judges. The first type can be seen as a reflection of the collective sacrificial rites of the past, the randomly selected jury representing the people at large. In the second type, the judges have succeeded the sacrificial priests. Their gowns show them as priests of the law.

In both types, much effort is devoted to the collection and presentation of proper evidence of the guilt of a suspected person. This reminds of the preparation of a selected scapegoat for its sacrifice. The examination

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[55] Violence and the Sacred, p. 21, 22.
[56] I.a. Belgium, Denmark, France, Ireland, Luxemburg, Netherlands, United Kingdom. This is different in e.g. Austria, Germany, Italy and Spain, where the authorities are in principle obliged to prosecute.

whether the suspect is mentally sufficiently sane for standing trial and for carrying responsibility for his act may be understood as serving the same purpose.

Confession implies recognition by the suspected person of the norms he has violated. A suspected person who refuses to confess cannot properly symbolize the unease the people are suffering from. Moreover, confession seems to excuse the authorities for eventually accusing the wrong person. This explains why in serious cases, even if there is abundant evidence against the suspected person, the police normally tries to bring that person to confession: *Confessio regina probationis*. In the pre-modern period, this has even given rise to torture as a regular element of criminal procedure. In our present days, torture is outlawed.[57]

Individual psychological faculties tend to be weakened in situations of extreme stress.[58] This is no less true for judicial authorities. Accordingly, the criminal justice system may in such situations be subject to regression. It is important to be alert to the risk that in cases of very serious crimes the prohibition of torture will be violated and perhaps even the personal guilt principle itself will be lost out of sight.

3.2. law

Girard has exposed the scapegoat mechanism as an anthropological root of the criminal justice system. However, the system is more than its roots. It is a legal system. Legal punishment must meet the requirements of the law. Accordingly, certain principles of law must be respected, first of all the guilt principle *(nulla poena sine culpa)* and the presumption of innocence, and also the principles of fairness and proportionality.

The nulla poena sine culpa rule means that no punishment may be imposed unless the accused is personally guilty. If this cannot be proven, the accused is acquitted. If he has committed the crime but couldn't have avoided it, he is excused. The criminal justice system has insofar been emancipated from its sacrificial roots.

The presumption of innocence[59] means that no one has to prove his own innocence; it is for the judicial authorities to establish one's guilt. It is not presumed that we are innocent, but the authorities may not treat us as guilty unless our guilt has been duly proven in court. This is an important barrier against innocent persons being victimized, a barrier that the scapegoat mechanism basically does not provide.

The principle of fairness implies that an accused has certain fundamental rights which the authorities must respect, irrespective of whether he is guilty or not guilty (e.g. the right to defend oneself in an independent and impartial court). Those rights have been laid down in international conventions that states have to comply with. Those rights to a certain extent protect individuals against the powers of the state. This

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[57] U.N. Convention against torture and other cruel, inhuman or degrading treatment or punishment, New York, 1984.
[58] Les origines de la culture, p. 168.
[59] The presumption of innocence, as developed in canonical law, dates from the 11th Century. In the wording of Art. 6-(2) European Convention for the protection of human rights and fundamental freedoms (1950): Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

way, the law tries to strike a fair balance between the legal interests of the state and those of the individual.

The criminal justice system punishes acts that are unlawful, irrespective of whether they are also evil in a moral sense or sinful in a religious sense. In determining what is unlawful, however, legislature and courts may take morality and religion into account.

An individual may be found legally guilty of a certain crime, although in a moral sense the society can also be considered guilty, for not having prevented the crime to happen. This may be taken into account in the sentencing decision.

Whether it is better to invest in social welfare or in prison-building is a matter of penal policy. At present, the latter tendency seems to prevail.[60]

4. Practice: the Nienke case

In this paragraph, the Girardian explanatory model will be tested in relation to a recent criminal case.

4.1. what happened

In June 2000, a ten years old girl was found dead in a public park in Schiedam. After several weeks of investigations, B confessed to the police that he had raped and murdered the girl. Although B had on the next day revoked his confession, the District Court and subsequently the Appeals Court convicted and sentenced him. In August 2004, however, another person, H, confessed that in fact he was the one who had committed the crimes. The case against B was reopened and B was finally acquitted. H was tried and convicted, and was severely punished.

In more detail, the facts were the following.[61]

On 22 June 2000, an 11 years old boy, M, naked, with blood on his body and with a shoe tied on his neck, appeared from the shrubs in the Beatrixpark, Schiedam. He called for help from the first person he noticed. This person called upon a cyclist who was passing by. The cyclist, B, then by cell phone made an emergency call to the police. M pointed out that another person still was in the shrubs. This appeared to be a young girl, who apparently had been strangled.

According to M, he and his friend Nienke had after school together been playing in the park, where they had gone by bicycle. When they were walking back to where they had left their bicycles, they had been seized by a man, who then took them into the shrubs. There they had had to undress, and the man had forced M to enter his finger in the girl's vagina. After that, the

[60] David Garland, The Culture of Control; Crime and social Order in Contemporary Society, Oxford, 2001.
[61] Data mainly derived from the Evaluation Report on behalf of the Public Prosecution Service, 13 September 2005, by F. Posthumus.

man had attempted to strangle M and had stabbed M. From that moment on, M had pretended to be dead. Subsequently, the man had strangled Nienke. Some time after the man had left, M had gone to seek for help. According to M, the man was rather young, and had an unusually white and pimpled face.

An extensive police investigation was started. The burgomaster, the public prosecution service, the chief constable and the press emphasized the importance of this case to be solved. This was because of the seriousness of the case, taking into account the age of the victims and the general fear the crimes had raised.

The police investigation team, which had especially been formed for the case, at first consisted of 30 persons. Some were experienced police officers, others were not. The team leader had no previous experience of dealing with such an important case. The deputy team leader, who was more experienced, had been recruited from another district, and the team leader had not personally known him beforehand. The deputy team leader in fact became the informal leader of the team. The public prosecutor who had been assigned to the case had no previous experience with a case of such importance. She closely supervised the investigations and kept herself continuously informed of the progress made. The team had been divided in sub-teams. These were not fully informed of each other's activities. Only the public prosecutor and the two team leaders had a complete overview of the investigations.

When it appeared that B had a year earlier shown a sexual interest in a boy (who happened to be the son of a police officer), he was suspected of the crimes against M and Nienke. On 5 September 2000, B was arrested. Although he was subjected to protracted interrogations, there is no evidence that improper means were applied. On 9 and 10 September 2000, during a period that the deputy team leader was on vacation, and in the absence of his lawyer,[62] B confessed having committed the crimes. On 11 September, however, and ever since, B has denied having in any way been involved in the crimes. After 11 September, the hearings were audio-visually recorded. No audio- or audiovisual records had been made of the confession.

The truthfulness of B's confession could be doubted, i.a. for the following reasons:

- B's DNA had not been found on the victims.
- B's appearance did not match the description of the perpetrator as given by M.
- When M, calling for help after the crimes, had seen B, he had not pointed him out as the perpetrator.
- B was known as an unstable, emotional and compliant person. Such a person could easily have collapsed under the pressure of the interrogations.

Nevertheless, once B had confessed, less effort was put into further investigations. The size of the team was reduced. The presumption that B should be the perpetrator was even by the public prosecutor taken for granted. Possibilities that the crimes could have been committed by someone

[62] Under Dutch law (apart from recent experiments) arrested persons have no right to have their lawyer present at police interrogations.

else were not seriously considered. A confrontation of M with B, in order to verify whether M would recognize B as the perpetrator, was not arranged.

On 25 January 2001, B was sent to an observation clinic, for examination of his criminal responsibility. According to the psychological and psychiatrical report that was drawn up in that clinic, B had because of a personality disturbance been in a state of diminished responsibility for the sexual crime, and in a state of slightly diminished responsibility for the violent crimes.

Under Dutch criminal procedure law, hearsay testimony is not inadmissible and, accordingly, reports by the police of confessions made towards them are admissible evidence. Notwithstanding B's continued denial at his trial, the District Court of Rotterdam has, mainly relying on B's confession towards the police, convicted B of having committed the rape and murder of Nienke and of having attempted to murder M, and of two cases of indecent assault on minors he had committed in earlier years.

After the District Court had given its verdict, officers of the National Forensic Laboratory (NFL) have approached the public prosecutor and have expressed their doubts about B being the perpetrator of the murder. Their doubt was based on weak DNA-traces that had been found on Nienke's body, probably left by a third person. The prosecutor has not made this information known to the Appeals Court. When the NFL officers were heard during the trial in the Appeals Court, they have not expressed their doubts either.

The Appeals Court has sentenced B to 18 years imprisonment plus detention under a hospital order.

In August 2004 another person, H, has reported himself to the police and confessed that in fact he was the one who had raped and murdered Nienke and had committed the attempted murder on M. His appearance did match the description given by M, and the weak DNA-traces which had been found on Nienke's body could quite well be his. H was tried and sentenced for these and for other crimes to 20 years imprisonment plus detention under a hospital order. On 10 December 2004, B was provisionally released. On 25 January 2005, the Supreme Court has reopened B's case. B was finally acquitted on 4 May 2005.

The miscarriage of justice regarding B has received much attention in the media and has given rise to parliamentary questions. An evaluation report was ordered. The general trust in the criminal justice system was undermined. An extrajudicial commission has been installed for the detection of other miscarriages of justice.[63] The government has adopted plans for improvement of the police and the prosecution system. In order to prevent 'tunnel vision' in the investigation process, dispute and review will be institutionalized. Communication between the police and the forensic laboratory will be improved and standardized. Rules will be developed for audio-registration or audiovisual registration of police interrogations in serious cases. Defence lawyers will on an experimental basis be admitted to police interrogations in murder cases.

[63] The commission is chaired by Prof. dr. Y. Buruma of Radboud University, Nijmegen.

4.2. explanation in the light of Girard

4.2.1. mimetic crisis

Although not having caused 'rage and ultimate excitement',[64] the crimes against M and Nienke have shocked the public of Schiedam. This may be considered an example of a mimetic crisis, albeit a modest one.

The fear and anger, caused by the victim being a young girl who had been raped and by the fact that the perpetrator was still at large, could easily be shared by other citizens than those who have actually seen Nienke's body, especially by those who had children or grand-children of a vulnerable age.

Rape cases raise public anger because they are evidence of a dangerous aspect of the sexual drive that every adult feels. Child murders are more shocking than other murders because they touch our responsibility for the protection of the weak, especially children. As violations of two of our strongest taboos (prohibitions of conduct endangering the vital order of the society) child rape murders weaken our trust in our normative system.

What makes a sexual child murder especially serious is that it raises general fear not only for the perpetrator himself as long as he is still at large, but also for violent paedophiles in general, who are not as such recognizable, and who might commit similar crimes in the future. This undermines the general confidence of citizens in each other, a basic element of a peaceful society.

Although Girard, when discussing mimesis, emphasizes the mimesis of desires and the rivalry that may result from it, he does not exclude other affections from being subject to mimesis as well. Mimesis of hostility even plays an essential role in his theory of the scapegoat mechanism.

Mimesis of fear and anger explains the general public's interest in this case: people probably did not only feel their own fear and anger but also unconsciously copied the fear and anger of others.

4.2.2. tunnel vision

A striking aspect of the Nienke case is the rather uncritical way by which the investigation team has accepted the hypothesis that B should be the perpetrator, which the courts have later failed to falsify.

A possible explanation of this uncritical acceptance is that the leadership of the team was rather weak, as it was shared by the team leader and the deputy team leader, the first being formally responsible but the deputy having informal authority. The other team members lacked a complete overview of the results of the investigations. The public prosecutor, perhaps because of her daily meddling with the case, lacked the emotional distance that should have enabled her to more critically test the suspicion regarding B. The lack of clear leadership has possibly given the team a

[64] Les origines de la culture, p. 180.

mob-like character and may have made its members susceptible of a mimetic narrowing of their minds. In such an amorphous environment, uncritical imitation of opinions is to be expected, with neglect of other possible solutions as a result. This has been called 'tunnel vision'.[65] Being able to point out a suspect may by the team have been felt as a relief from its lack of structure.

Courts, however, should especially have an open mind for all circumstances of a case. That the two courts in this case, by having abstained from confronting M with B, seem to have been subject to the same tunnel vision, shows the force of mimesis.

4.2.3. confession

That the police has made a strong effort for obtaining a confession can be explained by the sacrificial character of the criminal process: suspects who confess can properly ignite our mimetic hostility and leave their interrogators with clean hands.

It is not uncommon that accused persons, although not guilty, come to confess certain crimes because they feel a psychological need for being punished. That B has succumbed to the pressure of the interrogations may at least partly be due to his paedophilic inclination. Although he had not really committed the crimes, he probably could in his own eyes quite well have committed them. The false confession may therefore also be attributed to mimesis, in the sense that B has unconsciously imagined himself committing the kind of crimes that violent paedophiles are known for.

4.2.4. scapegoat

The fact that B was accused, with neglect of rather strong indications that the suspicion might be false, can be understood on the basis of the scapegoat mechanism. The fact that B appeared to have a paedophilic inclination, together with the fact that on the day of the murder he had been present in the Beatrixpark, justified special attention by the investigation team. The fact that he as a paedophile belonged to a generally disliked fragment of the population made him a proper candidate for being scapegoated. The fact that there were no indications that B had ever before committed a rape or a murder did not alter that.

The scapegoat mechanism also explains the investigation team's overlooking other possible solutions of the case. As pointed out by Girard, it is not a requirement for being a scapegoat to be guilty, as long as he is believed to be guilty. Once a proper candidate for blaming the crisis on has been found, this blame is copied by others and a sigh of alleviation appeases the group. This is what has probably happened within the investigation team, the appeasement within the team having caused the relaxation of further investigations.

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[65] The proper psychological terms seem to be 'confirmation bias' and 'belief perseverance'. P.J. van Koppen c.s., De Schiedammer Parkmoord, een rechtspsychologische reconstructie, Nijmegen, 2003, p. 60-61.

The scapegoat phenomenon also explains why the doubts that were brought forward by the NFL experts have been waved away. Those doubts undermined the general appeasement, achieved by the scapegoat having been convicted and sentenced. In stronger words: By expressing those doubts, the experts defiled that sacrifice. This could well be the main reason why those doubts have found no access to the prosecutors' minds.

4.2.5. criminal responsiblity

Sending B to an observation clinic for examination of his criminal responsibility can be taken as a measure to make sure that he was a proper victim. If B were found not responsible for his actions, he would be less apt for attracting general hate.

Insofar as the psychological and psychiatrical report expressed the view that B had at the time of the crimes been in a state of (slightly) diminished responsibility, the report seems to start from the presumption that B was the perpetrator of the crimes. It is questionable whether such a presumption is justified in cases such as the present one, where the suspect denies to have committed the crimes. In such cases, mimesis (unconscious copying of the police's positive belief that the suspected person is the perpetrator) is likely to play a role.[66]

4.2.6. upheaval

The upheaval arisen from this miscarriage of justice matches with Girard's observation that rehabilitation of the 'victim' and exposing the persecutors will not go lightly and will give rise to disenchantment. The case shows how the scapegoat mechanism is weakened by a victim being exposed as innocent.

4.2.7. outlook

H is now suffering for two reasons, not only for the crimes he has committed, but also because he has given himself up, has liberated B, and has exposed the criminal justice system as having in this case turned against an innocent person. Although being rejected for the former, he must be respected for the latter.

It is not to be expected, however, that this exposure will put an end to the criminal justice system, because unlike the original scapegoat mechanism as described by Girard, the criminal justice system is designed for victimizing only guilty persons.

5. Epilogue

The Nienke case shows the Girardian hypotheses to be a useful model for explanation of severe punishments being imposed for serious crimes. In addition, although this particular miscarriage of justice has undoubtedly also been caused by the psychological interplay between the characters of

[66] Van Koppen, o.c., p. 109-111.

the individuals involved in the case, Girard's theory helps explaining how the system can under circumstances go astray.

However, in relation to the numerous less serious crimes and misdemeanours and the less serious penalties that are usually imposed for them, the Girardian model does not fit well. It seems a bit farfetched to give a sacrificial explanation to the many penalties imposed by the courts for day to day criminal offences such as traffic offences or shoplifting, that do not seriously endanger the basic order of society.

It is here submitted that the criminal justice system is also rooted in intra-family justice, along the following lines.[67]

The family, evidently, is the first environment where man is confronted with norms, and with their maintenance. In societies where stately power had not yet developed, the punishment of crimes committed within the context of the (extended) family was in the hands of the *pater familias*. Incest, and parricide, murder of a family member, were examples of intra-family crimes, which could lead to severe penalties, such as death or expulsion. Naturally, within the family, less serious forms of misconduct were subject to punishment as well.

Next to this intra-family justice system, there were inter-family crimes to be dealt with, e.g. murder of a non family member, or theft. These were a cause for revenge between the families, which could give rise to a feud, or could be bought off.

When states had become sufficiently powerful, they appropriated the task of maintaining intra-family justice and the task of revenging inter-family crimes as well. This way, the state judicial system adopted for all its citizens the role of *pater familias*, as if all were members of a state—wide extended family.

On the basis of this hypothesis, present-day criminal justice can be considered to have its *'Urbild'* in the family justice of old.[68]

There are a communitarian and a paternalistic aspect to this view.

From a communitarian perspective, Oldenquist has emphasized that retributive thoughts and feelings do not arise unless the criminal is in some sense one of our own, someone from whom we expect compliance and group regard. Retributive punishment sends to a criminal the message that he still belongs to the community, and aims at his reintegration. If we try to elicit a confession, we are seeking a moral transaction with a fellow human being with whom we share at least some principles.[69]

According to a paternalistic theory of punishment, as Morris has put it, punitive responses guide the moral passions as they come into play with respect to interests protected by the law. Punishment, in his view, permits purgation of guilt and ideally restoration of damaged relationships. Punishment communicates what is wrong, and in being imposed it both rights the wrong and serves as a reminder of the evil done to others and to

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[67] This development has been described in much more detail by François Tricaud: l'Accusation, recherche sur les figures de l'agression éthique, Paris, 1977, p. 51-106.

[68] S.R. Steinmetz, Ethnologische Studien zur ersten Entwicklung der Strafe, Groningen, 2nd. ed., 1928, II, p. 176, 251, 303.

[69] Andrew Oldenquist, An explanation of retribution, The Journal of Philosophy, 1988, p. 464-478 (467-470).

oneself in the doing of what is wrong.[70] Unlike the scapegoat mechanism, the paternalistic theory of punishment provides for an explanation for some of the limitations the law imposes on punishment, such as the prohibition of cruel, inhuman or degrading punishments.[71] (Needless to say that, during the course of history, this requirement has not always been met.)

Juvenile court practice obviously reflects the parent-child relationship as a model for dealing with young offenders. At least in the years when the Dutch society was mainly agricultural, its population was relatively homogeneous and rehabilitation was considered the primary aim of punishment – the first half of the 20th century – Dutch criminal courts more generally tended to act in accordance with that model. The main purpose of the criminal justice system, as it worked in those days, was bringing lost sheep back into the herd, not sacrificing them. Although those days have gone, and both criminality and the criminal justice system have become less friendly, the 'family model' still appears to be a valid additional explanation tool for the criminal justice system as we know it today.

It is submitted that the scapegoat mechanism and the family analogy are complementary tools for explaining the criminal justice system. The scapegoat mechanism can be characterized as a system of hate, while family justice is based on love. These two are inseparable twins. Each is an element of punishment.

[70] Herbert Morris, A Paternalistic Theory of Punishment, 18 American Philosophical Quarterly, 1981, p. 263-271 (268).
[71] Art. 7, International Covenant on Civil and Political Rights (New York, 1966).