Utrecht Law Review
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This article is published in a peer-reviewed section of the Utrecht Law Review

Theorizing criminal intent: a methodological account

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1. Introduction

1.1. The argument

The concept of intent constitutes one of the central concepts in substantive criminal law. Before the court can convict a person of a certain intent crime, it must have been declared proven that the offender committed the unlawful act under consideration *intentionally*, that is: knowingly and willingly. The concept has attracted much doctrinal attention in the Netherlands over the last few years. The doctrinal discussion has focused, among other things, on a rather difficult question pertaining to the nature of the concept: does the concept of intent designate an essentially 'psychic' or an essentially 'normative' phenomenon? While some theories hold that the concept of intent refers to the substance of the subjective and internal intention with which the offender has performed his action, other theories hold that the concept refers exclusively to the inter-subjective meaning which can be attributed to the action externally on the basis of social, constitutive norms. In my doctoral dissertation I defended the thesis according to which the concept of intent designates an essentially psychic or mental *and therefore* normative phenomenon.[1] In this article I want to, first of all, argue for this proposition on the nature of criminal intent. Secondly, I will discuss a number of normative implications that ensue from the rather abstract account of the nature of criminal intent for the way courts or other adjudicating institutions are to arrive at the conclusion that a defendant did or did not act intentionally. To this extent, this article also intends to contribute to an aspect of the wide discussion on the legitimacy or justifiability of criminal judgments.

The argument to be discussed is roughly grounded on the recognition that intent is not to be understood as a substance or a 'thing', which could be localized somewhere, e.g. in the mind

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1 F. de Jong, *Daad-Schuld. Bijdrage aan een strafrechtelijke Handelingsleer met bijzondere aandacht voor de Normativering van het delicts-bestanddeel Opzet*, 2009. The central research question of the study was formulated as follows: in what way does intentional human conduct acquire criminal relevance, in such a manner that the said conduct may be characterized as criminally intentional or possibly negligent conduct?

URN:NBN:NL:UI:10-1-101158 www.utrechtlawreview.org Volume 7, Issue 1 (January) 2011
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of a subject or in the action that is performed by him. The concept of intent designates, instead, a criminally relevant manifestation of intentional directedness *between* a subject and the social life-world. It refers to the intention with which an acting subject, as it were, 'inspires' or invests his action, but this intention externalizes itself in the action performed and is thereby rendered amenable to interpretation. This interpretation is guided by rules or norms by virtue of which a subjective utterance intersubjectively 'counts as' an utterance with a specific meaning. This interpretative, rule-guided process consists of a pre-eminently *hermeneutic* activity: by way of outward indications, the internal world of intentions and perceptions that lie behind the externally observable phenomena is reconstructed. The externally ascertainable characteristics of the action undertaken by the offender and of the context in which this action has taken place provide the ingredients for the reconstruction of the intention which a reasonable person could be taken to have had in undertaking the action, given the relevant circumstances of the case at hand. This interpretative process will henceforth be referred to as 'normativisation'.[2]

1.2. Epistemological presuppositions

In this article I present, in a condensed form, an outline of the argument leading up to the thesis stated in the previous subsection. In this regard I will first have to confess to a few prejudices. The first one is that the following account is based on the epistemological assumption, perhaps contestable, that objects of inquiry can have universal and essential properties that identify the object as an object of its kind, and that it is in principle possible to reveal at least a number of those properties. My main objective in this article will be the revealing of a number of essential features of the concept of intent in criminal law. The emphasis, therefore, will be placed on the *nature* of the concept of intent, i.e. on those characteristics that are to be found whenever and wherever a concept of intent exists and that identify the concept *as* a concept of intent.[3] In my view, the only promising way of revealing aspects of the nature of the concept of intent in criminal law is to regard this concept as a juridical particularization – accommodated to the specific purposes which the criminal law is taken to serve – of the very general, pre-legal notion of intentionality. The following account is consequently very basic and abstract, and is not intended to reveal any surprising or revolutionary insights into the meaning attributed to different conceptions of intent in different legal systems. The account offered here is intended, rather, to provide a comprehensive and reasoned scheme on the basis of which various concepts, stemming from different legal traditions, could be analyzed in a methodologically sound way. To this end the criminal legal concept of intent is stripped of most of its contingent, parochial particularities.

Secondly: this article is based on the assumption that although concepts can contain unalienable or essential features which are indicative of the nature of the object *of* which they are concepts, they are *themselves* 'parochial' entities.[4] Different legal traditions contain different concepts of intent. The description of a specific concept of intent depends on a 'conventional' or 'criterial' semantic account: the intersubjectively shared rules that are followed whenever a certain concept or word is used set out the criteria which supply the concept's or the word's meaning. The meaning of a concept lies, as it were, not somewhere hidden 'in' the concept, but in the way the concept is used or applied within a certain context. An obvious example of this

2 The concept of intent is characterized by both an intellectual element and a volitional or dispositional element. These elements are not available for unmediated sensory observation and need to be ascertained by means of externally observable indications, the means being constituted by the 'normativising method'. For a terminological clarification, see Subsections 3.2 and 4.1, infra. What is here referred to as the 'normativising method' is often referred to as the 'reasonable person test' in the common law tradition.

3 See J. Raz, *Between Authority and Interpretation. On the Theory of Law and Practical Reason*, 2009, pp. 24-25.

4 Cf. Raz, supra note 3, pp. 18-19. Cf. R. Dworkin, *Justice in Robes*, 2006, pp. 223-240. See also note 22, infra.

is provided by the fact that different legal systems employ different criteria to define the concept of intent in criminal law. In most civil law systems, including the Dutch criminal legal system, the minimal requirements for proof of intent are captured by a concept which is absent in all or most common law systems: the concept of *dolus eventualis*. This concept applies when it is established that an offender not only was aware of the considerable possibility that a certain consequence may result from his action, but also approved of, or reconciled himself to, the possible occurrence of that result.[5]

The notion of *dolus eventualis* constitutes a parochial feature of the concept of intent because, although it is a very significant element of the concept of intent in many legal systems, it is not a defining characteristic of the concept of intent in *all* legal systems. But, as stated earlier on, this does not preclude the possibility of inquiring into the nature of intent in criminal law. Essence is a matter, not of convention, but of necessity. An account of the nature of intent will necessarily be very abstract as it will have to apply whenever and wherever a concept of intent exists. The argument presented in this article is intended to make explicit a number of implicit presuppositions *underlying* our concept of intent in criminal law, and underlying the different parochial and contingent features of the various concepts thereof in different times and legal traditions. Hence, it is not part of the argument's function that it should be possible to check its validity against the positive substantive criminal law as it is in force and applied in the Netherlands or anywhere else today. The account will therefore by definition be compatible both with various formulations of the concept in different legal traditions, and with various ways of applying the concept in case law.

Thirdly and finally: the argument presented in this article is based on the recognition that different concepts of law and different concepts in law are ultimately expressive of the way in which those who apply these concepts understand *themselves*. That is to say: an understanding of aspects of the law amounts to an understanding of aspects of ourselves.[6] This implies that any theory of some legal concept should meet a minimal teleological requirement: it needs to be attentive to the *reasons* we have for employing the concept under consideration. With regard to the concept of intent in criminal law this means that any theoretical account of it will have to be responsive to the functions which the concept of intent is taken to fulfil in criminal law. It also means that the ways in which the concept of intent is applied by judges or courts – the meanings that are conferred to the concept in case law – need to be responsive to the reasons we have for applying the concept in the first place.[7]

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5 The present article will only deal with the concept of intent in a very general way, i.e. as a juridical specification of the pre-legal notions of intention and intentionality. The different gradations of intent (e.g. direct, indirect, oblique, conditional intent etc.) will not be discussed, nor will the concepts of recklessness and negligence. For this, see De Jong, supra note 1, where I argued that the concept of negligence or *culpa* (a concept that, in civil law, encompasses what in common law systems is called 'recklessness') consists of a *privative* particularization of the pre-legal notion of intention, whereas the concept of intent (encompassing in civil law the gradation of *dolus eventualis*) constitutes the criminal law's *cardinal* particularization of the pre-legal notion of intention. Furthermore, no attempt will be made to lay bare the similarities and/or differences between the concept of intent as it is commonly applied in civil law systems, on the one hand, and as it is applied in common law systems on the other. For such a comparison and a critical discussion of the concept of *dolus eventualis*, see G. Taylor, 'Concepts of Intention in German Criminal Law', 2004 *Oxford Journal of Legal Studies*, pp. 99-127; G. Taylor, 'The Intention Debate in German Criminal Law', 2004 *Ratio Juris*, pp. 346-380.

6 Raz, supra note 3, p. 31.

7 Raz, supra note 3, p. 236, and at p. 231: 'An interpretation successfully illuminates the meaning of its object to the degree that it responds to whatever reasons there are for paying attention to its object as a thing of its kind.' Interpretation in law is motivated, according to Raz, primarily by two central reasons: legal interpretation is generally expected to accord with the intentions of the (legislative) legal authorities, and legal interpretation is supposed to secure the continuity of the law. The concern for equity and the concern for legal development provide additional, secondary reasons for interpreting the law. See Raz, supra note 3, pp. 232-240. Cf. B. Bix, 'H.L.A. Hart and the Hermeneutic Turn in Legal Theory', 1999 *Southern Methodist Law Review*, pp. 167-199, at p. 176.

I will argue that these reasons are to be inferred from the very basic fact that the criminal law in a general sense is oriented towards the imputation of criminal liability to persons. As will hopefully become apparent in the following pages, this recognition has important implications, both for the account of the essential substantive features of the concept of intent in criminal law, and for the account of the norm-guided, interpretative process of the furnishing of proof of intent, referred to above as the process of 'normativisation'. To be sure, to the extent that both these accounts are based on the above-mentioned teleological and hermeneutic requirement according to which interpretations *should* be responsive to the reasons we have for paying attention to the objects of interpretation, they are not strictly descriptive but rather normative, *de lege ferenda* accounts. Hence, they need not fully correspond to the criminal law as it is currently in force and applied within a certain legal system. A final terminological clarification: I use the term intent to refer to the criminal concept, and the term intention to refer to the pre-legal, general concept.

1.3. Structure of the argument

Section 2 is intended to provide the 'groundwork' for the subsequent sections: it consists of a relatively long preamble leading up to the accounts of the nature of intentionality, of the nature of intent in criminal law, and of the pertaining characteristics of the interpretative process of normativisation in Sections 3 and 4. This preamble discusses the teleological orientation, inherent in criminal law, towards the imputation of criminal liability to persons. Attention will be paid to the notion of subjectivity and the legal view of persons. Attention will be paid also to a number of important aspects of the difference between the empirical, pre-legal life-world and the formalized and doctrinal symbolic order of the criminal law's different concepts and norms. It will be argued that it is both possible and fruitful to apply a hermeneutical perspective to our object of inquiry, since such a perspective enables us to be fully attentive to the teleology that underlies the concept of intent in criminal law.

Section 3 discusses the nature of intentionality in a general, pre-legal sense. The emphasis in this section falls on what I view to be an intrinsic relation between some essential characteristics of intentionality, on the one hand, and normativisation as an interpretative process, on the other. With the help of a number of insights from phenomenology and modern hermeneutics this 'method' of normativisation will be furnished with a general theoretical foundation. It will be argued that intentionality is simultaneously both subject-intrinsic and subject-extrinsic: an intention is not to be regarded merely as a manifestation of inner, individual responsibility or culpability, but also – and to the same degree – as a specific, value-laden 'meaning' attached by the intersubjective world to an action performed by a subject.

Section 4 contains a theoretical account of the nature of criminal intent. The account is based on the criminal law's general teleological orientation and its claim to legitimate authority, as discussed in Section 2, and the general nature of intentionality, as discussed in Section 3. It will be argued that criminal intent has to be regarded as an essentially bivalent concept, in two respects: criminal intent is characterized by both a subject-intrinsic and a subject-extrinsic moment, and criminal intent is both an analogue of and a deviation from the general, pre-legal notion of intention. In the second half of Section 4 the focus is moved from intent as an *object* of acts of judging to the *act* of judging itself: how is proof of intent to be furnished? This part deals with the ways in which it can be ensured that the juridical concept of criminal intent maintains a sufficiently firm connection with the pre-legal concept of intention, or, put differently: the ways in which it can be prevented that the criminal concept of intent will deviate too strongly from the reasons we have for employing the concept in criminal law. In this connection, it will be argued that the means to secure this connection are to be distilled out of a number of

requirements that ensue from the principle of legality (an aspect of the rule of law). The legality principle serves as a demarcation criterion: it can be regarded as that aspect of the rule of law, on the basis of which it is decided what phenomena can, and what phenomena cannot be deemed to be in conformity with the law. Section 5 contains some concluding remarks.

2. Hermeneutics and the teleology of criminal law

2.1. The act of imputation: a succinct grammar

In a very general sense, criminal law is oriented towards imputing criminal liability to culpable persons. From this basic 'teleology' spring certain normative and structural prerequisites for any theoretical account of any criminal concept: these accounts will have to be responsive, in some as yet unidentified way, to the 'telos' inherent in criminal law. This implies that we will first need to get a clearer view of the teleology underlying the criminal law. For this reason, the present section explores the relations between three main phenomena that are involved in any act of imputation. In the subsequent sections I will try to answer the question *in what way* a theoretical account of the concept of intent in criminal law can and should be responsive to the basic teleology underlying the criminal law.

In order to get the phenomena involved in acts of imputation within sight, let me quote Kant's famous definition of the concept of imputation from *Die Metaphysik der Sitten* (1797):[8] '*Zurechnung* (imputatio) in moralischer Bedeutung ist das *Urteil*, wodurch jemand als Urheber (causa libera) einer Handlung, die alsdann *Tat* (factum) heißt und unter Gesetzen steht, angesehen wird; welches, wenn es zugleich die rechtlichen Folgen aus dieser Tat bei sich führt, eine rechtskräftige (imputatio iudicaria, s. valida), sonst aber nur eine *beurteilende* Zurechnung (imputatio diiudicatoria) sein würde.' Kant's definition shows that imputation has something to do with questions concerning the applicability and effects of certain 'laws' that can be of a legal, but just as well of a non-legal, moral nature. These laws inform us about the manner in which we are to characterize individual human acts (e.g. as reprehensible, as unlawful, or as criminal offences) and also about the appropriate effects of a certain characterization (e.g. a reprimand, or some sort of state-inflicted punishment).

Imputation can then be taken to function as the key that is used to unlock the said laws, and to subsequently effectuate their validity. This implies that every actual application of 'the law' is preceded by a judgment on its *applicability* to a person. This latter judgment has the form of an imputation. Schematic as it may be, the picture drawn here seems to resonate well with the structure of judicial construction or interpretation within the criminal law system. The criminal law system's various operations are orientated towards answering the question whether certain subjective actions that have been characterized as criminal offences can be imputed to the 'authors' of these actions. Following this somewhat crude description of the intentional focus of the criminal law, the concept of criminal responsibility could be defined as an individual's liability to punishment, imputed to him by the deciding court, on the basis of the law.[9] The

8 Citation taken from A. Aichele, 'Grüße von Sam. Zum Verhältnis von Zurechnungsfähigkeit und Menschheitsbegriff am Paradigma der Rechtsphilosophie Kants', in M. Kaufmann et al. (eds.), *Zurechnung als Operationalisierung von Verantwortung*, 2004, pp. 247-262, p. 250. Kant continues as follows: 'Diejenige (physische oder moralische) Person, welche rechtskräftig zu zurechnen die Befugnis hat, heißt der Richter oder auch der Gerichtshof (iudex s. forum).'

9 This article is predominantly written from the perspective of a civil law tradition, where the court, i.e. the judge, is actively involved in the process of truth-finding. Therefore, there will be ample references to the person of the deciding judge. The fact that sometimes also the public prosecutor is authorized, in some cases, to decide on a defendant's criminal liability, will be left aside, and so will the common law tradition's various jury trial systems (and the fact that also many civil law traditions have some type of jury system involved in criminal

criminal law, in other words, is characterized by its orientation towards imputation: it is orientated towards holding individuals responsible for acts that are proven to have been committed by these individuals.

Within the administration of criminal justice, judgments are passed on acts that do not accord with the imperative rules of conduct, objectified by the substantive criminal law. These judgments are accompanied by certain juridical consequences: in many cases the imputation of criminal responsibility ends in the infliction of a criminal sanction. The term 'imputation' is a nominalized verb; it is taken to designate a concept that ultimately refers to an *act* whereby something is imputed to someone, by someone. Seen in this way, the concept of imputation presupposes at least three phenomena that in some way or another are implied in the act of imputation. In the first place there is the 'thing' imputed: within the context of the criminal law this *direct object* of the act of imputation is constituted by the criminal liability for having committed an offence. Secondly, there must be someone to whom this liability is imputed. This *indirect object* of the act of imputation is the liable offender. Lastly, the act of imputation involves a *subject*: the deciding judge or court. In the following subsections, I intend to give all three mentioned phenomena a moment's thought, in order to shed some light upon the question whether the criminal law system's imputative judgments can be said either to be based independently upon *legal* considerations alone, or to depend to some degree on *sensu stricto* extra-legal, moral considerations also.

It is a truism that the criminal law system does not perform its various operations within a clinical, value-neutral, and in that sense 'objective' context. However, the question of what features define the exact nature or identity of this context remains a matter of dispute, and I will make no attempt to answer it. My purpose in the following pages is a more modest one: I will argue that it is both possible and fruitful to apply a hermeneutical perspective to the questions raised in the introduction.[10] The administration of justice and, in its wake, academic legal theory, are social practices that concern a domain of reality which in important ways is closely connected to the domain of reality with which (modern) hermeneutics is concerned.[11] Hermeneutics can be shown to hold a number of very important insights into the interrelationship between and the status of all three mentioned phenomena involved in the act of imputation. These insights have important implications for both the criminal law system's self-image, and the criminal law system's image of its environment.[12]

2.2. Subjectivity and the symbolic order of language

Let us start with the person whose legal position is placed in the centre of the criminal law's attention: the offender who is liable to punishment. What kind of person is he? To start with, we can establish that he is someone who is, in principle, *presumed* to be amenable to the court's

proceedings). Regardless of *who* exactly eventually performs the act of imputation, the conclusions drawn in this article should, *mutatis mutandis*, retain their validity.

10 I use the term hermeneutics in a rather wide sense. Hermeneutics is here taken to mean: the theory of intersubjective interpretation. According to its hermeneutic definition, the process of interpretation consists of the conferring of sense or meaning to an initially incomprehensible or puzzling subjective utterance, against the necessary, intersubjective background of 'familiarity'. Here, a further definition will not be ventured. For references to more literature on the subject, see e.g. De Jong, supra note 1, pp. 108-122.

11 This statement is compatible with different conceptions – stemming from both the positivist and non-positivist traditions in jurisprudence – concerning the abstract, topical question of what is the *nature of law* (what is the set of essential and sufficient features by virtue of which an object of jurisprudential inquiry necessarily 'is' law and not something other than law?), and concerning the methodological question of *how to study the (criminal) law* (can it or can it not be done in a completely value-neutral way?). The literature on these and closely related issues is abundant and cannot be discussed here. I will make only a modest and tentative suggestion loosely relating to these questions in Subsection 2.4 and Section 4, infra.

12 The terms 'system' and 'environment' are borrowed from N. Luhmann, *Law as a Social System*, 2004.

judgment by which criminal responsibility with regard to a criminal offence is imputed to him. As long as, and in as far as, no message to the contrary comes to the court's attention, people are presumed to be *accountable* for acts that are proven to have been performed by them. This presupposed, subjective capability of being held accountable for one's own doings is certainly not an undisputed phenomenon. Numerous scientific researchers have set out to corroborate the hypothesis that individual freedom, responsibility and guilt are in fact hollow, illusory categories that cannot be scientifically held up in view of the fact that all (human) utterances are causally determined in strict accordance with the 'laws of nature'.[13]

We can leave aside the question concerning the plausibility of such conclusions drawn from empirical-analytical research. For, considered from the domain-specific viewpoint of the criminal law, it does seem that the presupposition of human responsibility and accountability, at least in some respect, has a self-evident stature after all.[14] This self-evident character is closely connected to a number of philosophical insights furnished by modern hermeneutics. The human individual, whom the criminal law subjects to its different norms and judgments, is considered as an agent endowed with the capacity to render account for his actions. This presupposed capacity is part of the foundations of individual criminal responsibility, and therefore essential to the criminal law. By adhering to this legal view of persons, the criminal law dovetails with the image of man that is deeply entrenched in our (Western) culture as such.[15] This legal view of persons can be said to be composed of three layers.[16]

First of all, this legal view of persons presupposes a *subjective position*, i.e. the existence of a subject endowed with an intentional consciousness that enables him to relate to his environment both cognitively and affectively. We can describe the subjective position as a centre of sensations and utterances, or, with a term borrowed from Husserl, as a 'radiation centre', directed towards the intersubjective life-world of the subject with a kind of laser beam consisting of 'intentionality'. The latter term can be taken to refer to the abstract and formal principle according to which the (human) subject is characterized by his directedness towards the world.[17]

The 'world' consists of the entirety of *objects* of the subject's intentional consciousness: every act of consciousness implies a consciousness *of* something, of some object. The term intention then refers to the more concrete manifestation of intentional directedness in a subjective act of consciousness.[18] From this, it follows that intentionality presupposes at least two phenomena between which this directedness or involvement manifests itself. On the one hand, there has to be a subjective position, a position from where the subject *relates*, in one way or another, to

13 For a discussion, see e.g. J. Habermas, *Zwischen Naturalismus und Religion. Philosophische Aufsätze*, 2005, pp. 155-186.

14 The doing away with the difficult and widely debated problem pertaining to the plausibility of naturalistic and deterministic views of human agency should not be conceived of as a form of ostrich policy. The argument developed in this article need not be incompatible with scientific determinism as such. We can indeed here jump over this problem, because what interests us here is not some external scientific view of certain concepts that also have legal relevance, but rather the way certain legal concepts are entrenched in our society's *self-understanding*. See Subsection 1.2, supra; Raz, supra note 3, p. 31; A. Mooij, *Intentionality, Desire, Responsibility. A study in Phenomenology, Psychoanalysis and Law*, 2010, pp. 268-270.

15 For the line of argument envisaged in this section, it is unnecessary to specify in detail what is 'our' culture or in what way the (legal) view of persons is embedded therein. Suffice it to contend that our view of persons lies embedded in what can be called our 'moral tradition'. See Mooij, supra note 14, pp. 308-310, 324; P. Ricoeur, *Reflections on The Just*, 2007, pp. 59-63. For a comparable, but more Kantian notion of the connection between personhood and culture, see C. Korsgaard, 'The Authority of Reflection', in C. Korsgaard et al., *The Sources of Normativity* (ed. O. O'Neill), 1996, pp. 90-130; C. Korsgaard, 'The Dependence of Value on Humanity', in J. Raz et al., *The Practice of Value* (ed. R. Wallace), 2003, pp. 63-85.

16 Mooij, supra note 14, pp. 5-12, 23-31, 38, 56, 78, 279, 281-293, 306-308; Aichele, supra note 8. The three layers are conceptually distinguishable, but cannot be strictly separated from each other.

17 E. Husserl, *Logische Untersuchungen. Zweiter Band: Untersuchungen zur Phänomenologie und Theorie der Erkenntnis. I. Teil*, (1901) 1968, p. 378. See Subsection 3.1, infra.

18 Husserl, supra note 17, pp. 378-379.

the life-world that surrounds him. On the other hand, there is this life-world that the subject is directed towards and that constitutes intentionality's 'objective correlate'. In a very broad sense, intentionality thus consists of a relationship between a subject-pole and an object-pole.

This object-pole brings us to the second layer within the view of persons that underlies the criminal law: the intersubjective life-world. The subject is not a self-enclosed entity; the subject is, by virtue of his subjectivity, a self-transcending entity who is *receptive* to the world outside of himself. It is towards this socially dimensioned outer-world, comprising an endless stream of 'apperceptible' objects, that the human subject unavoidably directs himself time and time again, in every utterance whereby he gives himself to understand in the public sphere, that is: whenever he speaks, writes, acts. The subject necessarily acts and speaks out of his subjective position, but his utterances are only understandable and even *conceivable* as meaningful utterances by virtue of the pregiven intersubjective life-world in which the subject finds himself 'inscribed'.[19]

This intended world of meanings should not be mistaken for reality *as such*. The social life-world cannot be thought to coincide with the physical external world, i.e. the natural world of 'brute facts' that are subjected to laws that man cannot influence, and that, as such, are not even susceptible to human processes of interpretation. Interpretation is only possible by virtue of the existence of a third layer within the (legal) view of persons: the operativeness of a *symbolic order*. This third layer brings within sight the pre-eminently hermeneutic core notion of the foundation underneath the two previously mentioned layers of the subjective position and the intentional directedness towards the world. As stated previously, intentional consciousness enables the human individual to relate meaningfully to his environment. Intentionality, therefore, can be described in terms of a movement towards sense, a movement towards meaning.[20]

This movement, however, is in turn conditional upon a pregiven, and therefore subject-independent, structure. This structure is primarily constituted by *language*, comprising as it does a system of signs and meanings, of instruments by which we denote and confer meaning to the world we live in.[21] Whenever we denote something *as* something, whenever we understand something *as* something, we do so in a manner which is not absolutely autonomous or independent. Quite the contrary: language puts into effect a symbolic ordering structure, a kind of grid through which the empirical reality is filtered and transformed into a socially dimensioned life-world, susceptible to human interpretation. The order of language thus 'converts' reality, that cannot be available for human experience in its immediate and brute guise, into a symbolically *mediated* reality where we find subjects with whom, and objects with which we can engage in meaningful relations.[22]

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19 For more on Husserl's concept of the 'life-world' (*Lebenswelt*), see D. Welton, *The Other Husserl. The Horizons of Transcendental Phenomenology*, 2000, pp. 336-339.

20 P. Ricoeur, *Husserl. An Analysis of his Phenomenology*, 1967, p. 6: 'The empty act of signifying is nothing other than intentionality. If intentionality is that remarkable property of consciousness to be a consciousness of …, of moving out from itself toward something else, then the act of signifying contains the essence of intentionality. (…) When I mean or intend something, there is a first intending which goes to the sense, which is like a stable object (*Gegenstand*) to all the acts of signifying which intend the *same thing*.'

21 Language contains, in a phrase coined by Wittgenstein: 'a picture of the world'. It harbours the various pre-reflexive assumptions and socially embedded verities that people have learned to continuously presuppose. See B. van Roermund, *Law, Narrative and Reality. An Essay in Intercepting Politics*, 1997, pp. 138-141.

22 It is worth noting that in recognizing that all matters communicative and interpretative are ultimately conditional upon a lingual symbolic order, one in no way commits oneself to the fallacy of what in jurisprudence is sometimes called the 'semantic sting', in other words: the view that the description of a concept can only be adequate to the extent that it matches the language, including the different underlying beliefs, of the participants in a certain practice in which this concept is in use. This view leads to a 'criterial' semantic account: the intersubjectively shared rules, that are followed whenever a certain concept or word is used, set out the criteria which supply the concept's or the word's meaning. See e.g. Dworkin's objection to Hart in R. Dworkin, *Law's Empire*, 1986, pp. 31-46; and see Dworkin, supra note 4, pp. 223-226. The recognition referred to above, however, does not preclude the possibility of inquiring into the 'essence', 'nature' or 'identity' of some object, over and above the meaning it has on account of intersubjectively shared conventions within certain (parochial)

Our subjective perception of objects and other subjects in the life-world is structured by a pregiven symbolization that has been handed down historically and culturally, and that already *denotes* the world in a certain manner.[23] The subject is initiated into this symbolization at least partly by language; the symbolic order is a *lingual* structure. Meaning, therefore, is not an asset bestowed upon facts in the physical world by nature. We perceive the world through the grid of language; we perceive the world, but simultaneously we are directed towards the world. The existence of symbolic language is a precondition for this directedness. The system of meanings embodied by language puts natural, physical reality at a *distance*. By means of this separation, a social life-world is constituted, harbouring the objects of all our perceptions and experiences.[24] The symbolic order separates the subject from other subjects too. Each subjective communication is oriented towards the life-world. Between the other and the self a symbolic interval is situated, which enables the subject to interpret another subject's utterances. Interpretation inserts subjective communications into the intersubjective web of the outside world.

In a certain sense, the symbolic dimension also separates us from ourselves. The self is no longer immediately present to itself. The symbolic dimension enables us to disassociate us from ourselves, and to temporarily consider ourselves as 'another' whose identity and utterances could be subjected to our own reflection and interpretation. By virtue of our capability of reflection, which entails the ability to take in another person's perspective, we no longer completely coincide with ourselves. In this way, the various forms of distanciation or separation, instituted by the symbolic order of language, are constitutive of our freedom and of the responsibility we bear for the way we make use of this freedom.[25] Hermeneutics thus furnishes the subject with an ambivalent status. On the one hand, the subject finds himself 'thrown' into an already existing world that he has not put together.[26] On the other hand, the subject is not at all a prisoner of the order in which he finds himself. Gradually, the subject learns to find and follow his own path through the pre-existing traditions in which he is radically situated. By way of his initiation into the symbolic order of language, the subject is enabled to distance himself from other beings and himself, in order to 'project' his own existence.

2.3. Attaching criminal relevance to subjective intentional utterances

The person addressed by the criminal law's different norms is, by way of his generally presumed accountability, a somewhat abstract or 'formalized' human subject, to some extent disassociated from the 'material' individual whom the criminal law system subjects to its various operations in concrete cases.[27] The conclusion that human beings are in principle amenable to the imputation of responsibility raises the following question: what is the nature of the thing imputed? The direct object of the act of imputation is constituted by the involved person's individual responsibility with regard to a criminal offence. Whenever some subjective act has been proven, and has been

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contexts. Essential properties of an object are its (universal and *per definitionem* abstract) characteristics that are to be found wherever and whenever the object of inquiry exists, and that identify this object *as* an object of its kind. On the difference between the meaning, the concept and the nature of an object, see Raz, supra note 3, pp. 18-24. See also Subsection 2.4, and notes 46 and 74, infra.

23 See H. Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, (1960) 1975, pp. 265-266; E. Levinas, 'Meaning and Sense', in A. Peperzak et al. (eds.), *Emmanuel Levinas. Basic Philosophical Writings*, 1996, pp. 33-64; P. Ricoeur, *Hermeneutics and the Human Sciences. Essays on Language, Action and Interpretation* (ed. J. Thompson), 1989, pp. 165-181.

24 Mooij, supra note 14, pp. 58-62, 224; and see R. Visker, *Vreemd Gaan en Vreemd Blijven. Filosofie van de Multiculturaliteit*, 2006, pp. 90-91.

25 Mooij, supra note 14, pp. 7, 10-13, 266-268, 293-297, 311-313; Habermas, supra note 13, pp. 155-186; Korsgaard 1996, supra note 15, p. 94: 'It is because of the reflective character of the mind that we must act, as Kant put it, under the idea of freedom. (…) If the bidding from outside is desire, then the point is that the reflective mind must endorse the desire before it can act on it, it must say to itself that the desire is a reason. (…) Then although we do what desire bids us, we do it freely.'

26 M. Heidegger, *Being and Time*, (1927) 2005, pp. 174, 219-224.

27 For an elaborate discussion, see J. Broekman, *Recht und Anthropologie*, 1979.

characterized as a particular criminal offence on the basis of the applicable provisions in the criminal law, the judge is confronted with the ultimate question of whether, and to what extent, this offence can be imputed to the person standing trial.

The juridical concept of a criminal offence is characterized, even more so than the juridical concept of a liable person, by a strong formalization. Offences derive their criminal character from a set of features that can be classified into a number of categories. These categories together bring within sight what one could call: the substantive criminal law's paradigm. The doctrinal definition of the term criminal offence stipulates the different prerequisites for the imputation of criminal liability.[28] According to its doctrinal definition, a criminal offence is constituted by an act that complies with a legal definition of a certain crime, laid down in the applicable, substantive law, and that is unlawful and culpable.[29]

The first requirement is constituted by the act or the legally relevant failure to act (act of omission). Something must have actually *happened*, before questions concerning criminal responsibility can present themselves. Furthermore, an act or an omission can only constitute a criminal offence on condition that the law characterizes or typifies particularly *these* acts or omissions *as* criminal offences.[30] Substantive criminal law includes the norms that stipulate the conditions for subjective conduct to be qualified as an 'offence' and for authorities to have the power to impose a criminal sanction. The drastic nature of this power entails that its use should be predictable. For this reason, the principle of *legality* requires that the scope of application of the conditions of liability is safeguarded in a systematic manner. Thirdly: as soon as it is established that an act can be legally characterized as a criminal offence, the act is presumed to be unlawful. In certain exceptional circumstances, legally acknowledged as so-called 'justifications', this assumption can be nullified. Finally: as soon as it is established that an act can be legally characterized as a criminal offence, also the defendant's culpability or responsibility for this act is presumed. And also this assumption can be challenged: in certain exceptional circumstances, recognized by the criminal law as so-called 'excuses', the defendant is exculpated.[31]

The doctrinal scheme, only very succinctly discussed above, in accordance with which the judge assesses whether or not criminal liability can be imputed to a person, answers an important need. The structuralization of the process of judicial construction makes the individual judgments susceptible to intersubjective validation and criticism within the forum of the interpretative community of the criminal law.[32] Furthermore, the communication between the criminal law system and its 'environment' (society) benefits from a certain structuralization. Even so, the classification into different categories of the conditions that, taken together, are both necessary and sufficient for the imputation of criminal liability to a person does not alter the fact that the concept of a criminal offence essentially constitutes an indivisible, normative entity: it is

28 Criminal legal doctrine consists of a systematic framework of concepts that define the preconditions for the imputation of criminal liability to persons. An important function of legal doctrine, according to Raz (supra note 3, p. 233), is that it endows the (criminal) law with a considerable measure of continuity: 'Legal doctrine provides a glue which binds different legal regulations together. It smoothes and polishes the law, regularizes what would otherwise be deviant, irregular aspects of legislation or precedents.'

29 Different legal traditions have (slightly) different typologies for the concept of a criminal offence. But the set of requirements, referred to above, seems to be shared by most legal systems. See e.g. G. Fletcher, *Basic Concepts of Criminal Law*, 1998, pp. 74-110; H. Jescheck et al., *Lehrbuch des Strafrechts. Allgemeiner Teil*, 1996, pp. 196-199; C. Kelk (with the cooperation of J. Lindeman), *Studieboek Materieel Strafrecht*, 2010, pp. 53-65.

30 If the applicable conditions are met, also attempts to commit certain crimes and the preparations of certain crimes are punishable.

31 On the relevance of the distinction between justifications and excuses, see A. Eser, 'Justification and Excuse. A Key Issue in the Concept of Crime', in A. Eser et al. (eds.), *Rechtfertigung und Entschuldigung. Rechtsvergleichende Perspektiven. Band I*, 1987, pp. 17-65.

32 For the concept of an 'interpretive community', see S. Fish, *Is there a Text in this Class? The Authority of Interpretive Communities*, 1980.

characterized by different aspects, but these aspects cannot be cut loose, as particles with independent meanings, from the concept of a criminal offence as a whole.[33]

This is so, because the abstract, doctrinal concept of a criminal offence is a strongly polished and formalized construct, whose design is a function of the very *reasons* we have for using the concept within the criminal law. The different components of a criminal offence therefore ultimately derive their meaning from the fact that they form parts of the 'object' of the act of imputation.[34] This implies that the different aspects that characterize a criminal offence ultimately derive their meaning from the normative unity of which they form parts. This again brings hermeneutics within sight. The criminal law assesses and 'denotes' subjective utterances in terms of the relevant legal criteria, and incorporates them into the symbolically structured domain of the criminal law system (a fact becomes a legal fact, becomes an offence). To this extent, these subjective utterances are also expropriated from the subject (who becomes a perpetrator, a convicted person). This appropriation by the criminal law system brings us, finally, to the *subject* of the act of imputation: the judge or court.[35]

2.4. The counterfactual order of criminal law

2.4.1. The act of judging

It is in many cases the court that eventually passes the judgment that a certain individual is to be held liable to punishment, because he or she is proven guilty of having committed a criminal offence. The term judgment refers to an act whereby a *separation* or delimitation is brought about between the different relevant legal facts and interpretations thereof, and between the different claims that are based upon these interpretations by the parties involved.[36] If the relevant applicable conditions are fulfilled, the court will impute a proven criminal offence to the person who has been called to account for this act before the court. This imputation culminates in a retribution of the injustice or wrong inflicted on society by the liable offender: with his punishment the perpetrator receives 'his share'.

To judge, we can say, is to put at a distance: during criminal proceedings, facts and circumstances are extracted from their pre-juridical context. They subsequently undergo a juridical process of formalization that detaches them from the immediate historical context they originate from, in order that they can be subjected to a legal assessment. In the course of this process, the different parties involved in criminal proceedings are put at a certain distance from each other. The criminal law system constitutes, as it were, an intervening third term, redefining the original conflict that lies at the heart of the criminal proceedings, and thereby 'expropriating' the conflict from the parties immediately concerned. The deciding court ends this juridically encoded conflict by passing a judgment, which lays claim to being authoritative and legitimate, and to which one is therefore expected to resign oneself.

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33 W. Schild, *Die 'Merkmale' der Straftat und ihres Begriffs*, 1979, p. 37: 'Es wird damit [with the term "Aspekt"] zum Ausdruck gebracht, dab jede Verselbständigung zu einem Teil (Element usw.), jede Substantialisierung, unzulässig ist. Ein auf diese methodische Weise erarbeitetes Merkmal kann nur als Moment des Gegentandes in seinem Ganzen und bezogen auf seine Einheit aufgefabt werden.'

34 For example: intent forms an important, constitutive element of many criminal offences. The meaning of the element of intent in substantive criminal law is affected by the criminal law system's pervasive orientation towards imputation, as indicated in Subsection 2.1, supra. I will come back to this later.

35 On the hermeneutic relevance of the notion of appropriation, see Ricoeur, supra note 23, pp. 182-193. See also, with regard to the criminal law, De Jong, supra note 1, pp. 162-165, 417-421.

36 Cf. P. Ricoeur, *The Just*, 2000, pp. 129-130: 'Taken in a broad sense, the act of judging consists in separating spheres of activity, in delimiting the claims of the one from those of the other, and finally in correcting unjust distributions, when the activity of one party encroaches on the field of exercise of other parties. In this respect, the act of judging certainly consists in separating. The German term *Urteil* expresses this well (…).'

The assertion that the criminal law lays claim to being authoritative and legitimate is in itself quite uncontroversial. According to Raz it is part of the nature of law – of *all* law, and therefore also of criminal law – that it claims 'legitimate authority'. Other authors make similar claims with regard to the nature of law.[37] This does not mean, however, that law necessarily always *succeeds* in being authoritative and legitimate. Whether or not instances of law that do not live up to claims of legitimacy can still be conceived of as 'law' is a distinct question, to which positivist and non-positivist scholars can and do provide different answers.[38] This discussion does not concern us here. I will content myself with a line of reasoning that intends to bring out some of the normative, ideal implications that result from the criminal law's being committed to its claim to legitimate authority.

2.4.2. The function of criminal law

The fact that the criminal law lays claim to authority and legitimacy automatically confronts us with the topical question of what *function* or what purpose the criminal law system can be said to serve. The criminal law system's orientation towards imputation is dominated by an ideal image in pursuance of which the criminal law system performs its different operations in the life-world. The function of the criminal law can only be described in the rather general and abstract terms of the most notable purposes it is intended to serve. Obviously, both law in general and criminal law in particular may serve many, sometimes conflicting purposes, and accordingly they can have different functions. This makes it a difficult and speculative, if not a downright impossible enterprise to reveal something like *the* function of the criminal law.[39] But notwithstanding this great analytical difficulty, it does seem possible to single out one major function that is ascribed to the criminal law surprisingly often: criminal law is commonly taken to fulfil the function of contributing to the stabilization of normative expectations within society.[40] In and through the enforcement of its standards, criminal law aims at confirming, on a symbolic level, the normative standards set down in substantive criminal law. The criminal law protects the essential normative, intersubjective expectations by virtue of which a social system may pass for a 'society'. Formulated positively, then, the criminal law's ultimate or 'long-term' finality lies in the preservation of *social peace*. Formulated negatively, criminal law ultimately serves the purpose of preventing uncontrolled vengeance, of preventing members of society from taking justice into their own hands.[41]

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37 See J. Raz, *The Authority of Law. Essays on Law and Morality. Second Edition*, 2009, pp. 3-33. According to Dworkin theories on the nature of law indicate 'how far and in what way past political decisions provide a necessary condition for the use of public coercion'; see Dworkin, supra note 22, p. 96. And according to Alexy all law lays claim to 'correctness'; see R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism*, 2002, pp. 34-39, 76-81.

38 See e.g. Alexy, supra note 37; Raz, supra note 37, pp. 313-335.

39 According to Raz the functions of law are the intended or actual social consequences of the law (Raz, supra note 37, p. 165). He stresses that, in order to evaluate different accounts of the functions of law, we are in need of a comprehensive scheme or classification of the functions. According to the typology suggested by Raz, the social functions of law can be divided into *direct* functions (aiming to secure that the law is obeyed and applied) and *indirect* functions (aiming for certain attitudes, feelings or opinions that are supposed to *result* from compliance with and application of the law). The direct functions can be further divided into *primary* functions (for example: the preventing or encouraging of certain behaviour) and *secondary* functions (that have to do with the procedures for changing and enforcing the law). The account presented in this subsection falls under the heading of the indirect functions of the (criminal) law.

40 The terms are borrowed from Luhmann, supra note 12, pp. 142-172. Similar accounts can be found – in varying formulations – elsewhere. See e.g. Ricoeur, supra note 36, pp. 130-131; Ricoeur, supra note 15, pp. 223-231; and J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1992, pp. 145, 567, who stresses the complementarity of law and morality: by way of the juridical institutionalization of intersubjective expectations, accompanied by the state's authority to sanction, morality's own shortcomings are compensated for, and people are relieved from the duty to find themselves moral solutions for conflicts.

41 Ricoeur, supra note 36, pp. 130-131. Ricoeur distinguishes between a short-term and a long-term finality of legal *judgments*. The functions of judgments need not overlap precisely with the functions of law, but from the fact that judgments are instances and final promulgations *of* the law, it follows that they ultimately have to respond to the functions of the law itself. The short-term end of a legal judgment is that

Following political decision-making, the criminal law canonizes as 'legal goods' certain normative expectations in society, which it is subsequently expected to 'immunize' against possible violations in the form of criminal offences that take place in the social life-world. In order for this immunization process to have the required effect, the criminal law system is in need of a systematic framework of legal concepts that define, as clearly as possible, the different, general preconditions for the imputation of criminal liability for the violation of the norms and expectations concerned.[42] This specification is a product of the application of the different instruments that are put at the disposal of the deciding court for the formation of its different interpretations and judgments. Within criminal law, governed as it traditionally is by a relatively rigid legality principle, it is (in civil law systems) first and foremost the *statutory law* that constitutes the most prominent instrument available to the judging institution. In addition to this, stable case law constitutes an important means as well.

At this point, some of modern hermeneutics' important insights again come into sight. Hermeneutics' relevance here concerns the unfortunate fact that the different instruments available to the deciding court are not themselves capable of announcing precisely *how* they should be applied in concrete cases.[43] Statutes and (case) law are comprised of language, of words, and the meanings of these words are dependent on their *interpretation*. Hermeneutics is concerned with this activity we call interpretation: we speak of interpretation whenever we attempt to confer sense or meaning to an initially strange, incomprehensible or at least not completely understandable utterance. Concepts designated by lingual terms do not contain inalienable semantic cores, with which they, as it were, would have been equipped by nature. The meaning of a term can be said to be constituted by the ways in which the term is applied or used. The existence of meaning is therefore dependent on the act whereby it is *conferred* to objects in the social life-world.[44]

By way of his initiation into the legal 'interpretive community', the judge is trained to interpret certain utterances *in a specific manner*.[45] As is often the case in civil law traditions, the court receives and studies a criminal case file, containing detailed information on many of the involved defendant's actions, already before the court has even actually seen or heard this defendant at trial. The legal relevance of this information, and of all events that may occur during an investigation before the court, is dependent on what the law considers to be legally relevant. In every act of interpretation, there is an insurmountable mutual interplay between the thing interpreted, and the rules or norms that guide the interpretation. In judicial interpretation 'facts' cannot be strictly separated from the 'norms' that are applied to them. Judicial interpretation is never a matter of subsuming some set of facts under some available legal norm that announces its own applicability to the facts. Norms, like all texts, have no fixed meaning; the meaning of the legal definition of manslaughter does not leap out from the paper on which it is written down.

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it authoritatively brings an end to the situation of legal uncertainty that accompanies legal disputes (it falls under the scope of the secondary social functions in the classification referred to in note 39, supra).

42 The contents of this framework were discussed succinctly in Subsection 2.3, supra.

43 See S. Fish, 'There is no Textualist Position', 2005 *San Diego Law Review*, pp. 629-650; Fish, supra note 32, pp. 322-337.

44 Wittgenstein is commonly seen as the originator of this influential view; see L. Wittgenstein, *Philosophical Investigations*, (1953) 2001, p. 18, § 43. See also R. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*, 1989, pp. 47-58; De Jong, supra note 1, pp. 122-142. It should be noted that the view presented in this subsection is very basic and in different ways incomplete. As yet, it says nothing about the source or sources of meaning. According to what may be termed the 'intentionalist' view, the meaning of an utterance can only be retrieved from what the agent intended the utterance to mean. According to the 'subjectivist' view, meaning has nothing to do with the agent's (or speaker's) intention, but is to be found exclusively 'in the eye of the beholder'. In the following sections I will argue – having equated the notion of meaning with that of intention – that both views are fallacious.

45 Fish, supra note 32; Fish, supra note 43.

The meaning of a norm reveals itself no earlier than at the occasion of its application to a set of facts.[46] A judge, therefore, is continuously occupied with relating facts to norms, and *vice versa*.

Facts are first criminally *relevant* facts, if and insofar as these facts can be made susceptible to an interpretation according to which they can be brought under the semantic scope of pregiven norms and, thus, be incorporated into the criminal law system. The criminal law abstracts from the endlessly diversified social reality, by being oriented solely towards those aspects of social reality that the criminal law *itself* preselects. The term aspect already suggests that the criminal law inevitably 'sees away from' a large quantity of meanings in the pre-legal life-world.[47] The criminal law system encodes and simplifies its environment, that is: it selects, and leaves out the rest.[48] Judicial interpretation culminates in a kind of 'appropriation' by the criminal law system: the moment facts appear to be legally relevant, the moment it is established that facts lend themselves to legal encoding, they are transformed into *legal facts*. The different concepts and norms, in light of which the criminal law examines these legal facts, together constitute the criminal law system's counterfactual 'doctrinal reality', consisting of an idealized abstraction of the pre-legal life-world.

The judge, then, is active in a sphere where two realities or horizons intersect: on the one hand, a normative and doctrinal reality or, rather, ideality; on the other hand, an empirical, social reality made up of human acts and other facts. On top of the previously discussed symbolic order, imposed upon the world by colloquial language, the criminal law's different concepts and norms establish a juridical symbolic order of their *own*. By repeatedly applying these concepts and norms to concrete cases, the criminal law maintains this symbolic legal order.[49] The symbolic order of the criminal law presupposes the operativeness of the pre-legal symbolic order that bestows the natural world with social dimensions, on account of which a social life-world is created that is amenable to human experience. Considering, however, that the criminal law's norms and concepts fixate parts of the pre-legal life-world in 'formalized', juridical meanings, the criminal order can by no means be taken to *coincide* with the symbolic order of colloquial language.

There is a symbolic interval in place between the normative world of the criminal law and the pre-legal life-world of intersubjective relations. Criminal judgments are passed on the crossroads between these two diverging realities. The criminal law system is characterized by its orientation towards the imputation of criminal responsibility to persons. The person subjected to the judgments in which this orientation towards imputation manifests itself primarily inhabits and belongs to the intersubjective, pre-legal life-world. However, the act whereby criminal responsibility is *imputed* to this person unavoidably drags him into the horizon of the criminal law system's symbolically structured reality. It is the judge by whom all this is done: he embodies, as it were, the connection between the criminal law system and its environment. And in and through his judgments the judge is supposed to contribute to the stabilization of certain vital – and hence legally protected – normative expectation patterns in the extra-legal realm of society.

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46 See Gadamer, supra note 23, pp. 289, 290-295. This view furnishes powerful arguments against *semantic* essentialism. However, the fact that *meanings* cannot be found 'inside' the objects of interpretation does not imply that one interpretation cannot be better than another interpretation. Nor does it imply that all sorts of identifying essentialism are unfounded. Objects of inquiry can – but need not always – have universal characteristics that determine the *nature* (as distinct from the meaning) of the object concerned. See also note 22, supra. In Section 4 I attempt to illustrate this point in relation to the 'nature' of the element of intent in criminal law.

47 Cf. P. Fuchs, *Die Psyche. Studien zur Innenwelt der Aubenwelt der Innenwelt*, 2005, pp. 12-13.

48 Luhmann, supra note 12, pp. 76-141.

49 Maintaining the order (*ipse*) does not mean that it continuously remains the 'same' (*idem*).

2.4.3. The inescapable role of narrativity in imputation

The criminal law system's intentional orientation relates to a reality sphere characterized not only by its symbolic and counterfactual nature, but also by what is called an 'axiological' structure: the conviction that an offender is criminally responsible for a certain act cannot be arrived at on the sole basis of purely objective, constative facts.[50] The relation between the 'objective' viewpoint wherefrom actions or facts are amenable to value-neutral descriptions, on the one hand, and the 'prescriptive' viewpoint wherefrom individual criminal responsibility is imputed to persons, on the other, is mediated by a narrative dimension in which actions and their agents lie 'emplotted'. This claim holds true, firstly, in a very general, pre-juridical sense: any ethical or moral judgment on a person's action in terms of right or wrong, just or unjust, is always and inevitably grounded on a certain reading of the act in connection with its practical, and *ipso facto* narratively construed context. The establishment of individual moral or criminal responsibility requires knowledge of intersubjective relations, nested in teleologically and narratively structured social *practices* that contain ethical standards.[51]

Secondly, the claim according to which the descriptive viewpoint of objective truth-finding and the prescriptive, deontological viewpoint of imputation are necessarily mediated by a narrative dimension, also particularly holds true for the doctrinal and counterfactual reality sphere of the criminal law. Criminal judgments are not arrived at by simply subsuming 'facts' under legal norms. The facts documented in the different records and case files in criminal proceedings are never 'pure' facts, but are juridically pre-processed in such a way as to become parts of narratively construed *cases*. This juridical processing of initially pre-legal facts unavoidably involves a modification of these facts and, with that, it is accompanied by the creation of a certain *distance* between the original, empirical facts and their juridical representation. The act of imputation of criminal responsibility to persons therefore necessarily depends on certain ways of being attentive to the narrative and practical identity of the 'indirect object' of the act of imputation, that is to say: it requires knowledge of the type furnished by hermeneutics. It is the human individual, inhabiting the pre-legal domain of the social life-world, on whom the criminal law system imposes its grip. It would be a romantic misconception to be thinking that the judge, in one way or another, could gain direct access to the (suspected) offender's own perception of his environment. But this does not alter the fact that the judge, in his capacity as an official of the criminal law system, is or ought to be fully *aware* of the fact that he operates from within a 'symbolic circuit' that differs from the 'horizon of understanding' inhabited by the person whose utterance is made subject to the judge's assessment.[52]

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50 Cf. Ricoeur, supra note 15, p. 70: 'What kind of truth is at issue here? (...) It is a truth that fits, that is, a kind of characteristic situational sense of what is obvious that merits being called a conviction, an inner conviction, even if the decision is made in the judge's chambers. Can we speak then of objectivity? No, not in the constative sense of the term. It is a question rather of certitude that in this situation this is the best decision, what has to be done. It is not a matter of constraint; the force of this conviction has nothing to do with a factual determination. It is the sense *hic et nunc* of what obviously fits, of what ought to be done.'

51 According to Ricoeur narrative theory provides the middle ground between action theory and moral theory; see P. Ricoeur, *Oneself as Another*, 1992, pp. 114-115, 140-168, 171-180. See also D. Zahavi, 'Self and Other: The Limits of Narrative Understanding', in D. Hutto (ed.), *Narrative and Understanding Persons*, 2007, pp. 179-201. On the notions of practice and practical identity, see also Korsgaard 1996, supra note 15, pp. 100-113; and A. MacIntyre, *After Virtue. A Study in Moral Theory*, 1985, p. 187: 'By a "practice" I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.' On the relevance of the notion of narrativity for the criminal law, see also note 101, infra.

52 Cf. Visker, supra note 24, p. 268; R. Foqué, 'Legal Subjectivity and Legal Relation. Language and Conceptualization in the Law', in F. Fleerackers et al. (eds.), *Law, Life and the Images of Man. Modes of Thought in Modern Legal Theory*, 1996, pp. 325-342.

3. Intentionality and interpretation

3.1. The nature of intentionality

I hope the reader will forgive me for the rather long and abstract discussion in the previous section. Why was this necessary? The main objective of this article is the revealing of a number of essential features of the concept of intent in criminal law, i.e. those characteristics that identify the concept *as* a concept of criminal intent. As stated in the introduction, the only promising way of revealing aspects of the nature of the concept of intent in criminal law seems to me to be opened up by regarding this concept as a juridical particularization – accommodated to the specific purposes which the criminal law is taken to serve – of the very general, pre-legal notion of intentionality. In the previous section the main purposes which the criminal law is taken to serve were discussed at some length. In that connection we have seen that there is a symbolic interval in place between the normative and doctrinal world of the criminal law system and the pre-legal world of intersubjective relations. This interval is necessary and unavoidable, but the criminal law system cannot allow itself to become too remote from the pre-legal life-world. In order to gain a clear insight into the criminal concept of intent we therefore first need to have at least some understanding of the concept of which it is a particularization: the concept of intentionality. This is what will be examined in this section. So I am afraid that the reader will have to bear with me for just a bit longer: some more abstract reflections are following, that will be integrated in the discussion of the nature of criminal intent in Section 4.

The modern concept of intentionality was developed by F. Brentano who regarded intentionality as the defining characteristic of all mental phenomena. Intentionality, according to Brentano, is the *principium divisionis* between the mental phenomena and the physical phenomena. By virtue of this property of intentionality, all mental phenomena are directed towards an object. The term intentionality thus refers to an immanent or intra-mental directedness towards an extra-mental object.[53] It was Husserl, a student of Brentano, who stressed that intentionality should not be thought of as some sort of identifiable 'thing' or as a substance, but that it instead has to be conceived of as an *activity*. In this activity an initially meaningless sensation is transformed into an *apprehension* (*Auffassung*) of an object.[54] Intentionality consists precisely in this act of 'apperception' whereby a sensation announcing itself to subjective consciousness is transcended and whereby the subject subsequently enters into a relation with an intended object, i.e. a signified object (*Gegenstand*) grasped in a specific meaning. On account of this activity, intentional consciousness can be ascribed a sense-establishing or meaning-bestowing function. Consciousness does not consist of a mental inner-world, hermetically sealed off from the outside world; consciousness always implies the consciousness *of something* and, accordingly, the being directed *towards something*.[55]

This interplay between subject and object can be analyzed conceptually in different ways. In the first place, two basic *forms* of intentionality are distinguished: the cognitive and the affective form.[56] In every utterance whereby a conscious subject gives himself to understand in

53 Th. de Boer, *The Development of Husserl's Thought*, 1978, pp. 4-9; F. Brentano, *Psychology from an Empirical Standpoint*, (1874) 1973, pp. 77-100, especially at pp. 88-91; F. de Jong, 'Intentionaliteit en Interpretatie. Fenomenologische en hermeneutische Voor-onderstellingen', in F. Koenraadt et al. (eds.), *Vrijheid en Verlangen*, 2009, pp. 37-52.

54 E. Husserl, *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie. Erstes Buch: Allgemeine Einführung in die reine Phänomenologie*, 1922, pp. 103-104, 167-172, 203-204; Mooij, supra note 14, pp. 99-104; H. Philipse, 'The Concept of Intentionality: Husserl's Development from the Brentano Period to the *Logical Investigations*', 1987 *Philosophy Review Archives*, pp. 293-328.

55 Mooij, supra note 14, pp. 100-101.

56 Mooij, supra note 14, p. 51; E. Husserl, *Arbeit an den Phänomenen. Ausgewählte Schriften* (ed. B. Waldenfels), 1993, pp. 70-88.

the intersubjective sphere, be it an act of speaking, writing, or another type of intentional activity, the subject expresses a certain knowledge or awareness and a certain will or desire. The utterance expresses both forms of intentionality and is therefore connected to them *internally*.[57] Secondly, one distinguishes between different *qualities* of intentional acts that correspond to different intentional objects. The quality of an intentional act designates the mode in which an object is intended; it is related to a set of diverse subjective attitudes in the performance of the intentional act and expresses a certain 'mode of belief' in relation to the intended object.[58] An object can, for example, be intentionally present as desired, as requested, as merely posited, etcetera.[59] Thirdly, one distinguishes the aspect of the *matter* or objective content of the intentional act. By way of its intentional acts, subjective consciousness 'inspires' sensations and apprehends them in a certain, intersubjectively available meaning. The matter of an intentional act designates the meaning, or the intention, in which consciousness' intended correlate is appercepted.[60]

Subjective consciousness and the utterances or acts in which it expresses itself refer to a subject-pole and to an object-pole: all intentional utterances involve *someone* who 'gives himself to understand' in the intersubjective sphere and *something* which is 'given to understand'.[61] The term intentionality designates the abstract and formal principle according to which the human subject is characterized in a very general sense by his directedness towards objects in the life-world. The term intention refers to a concrete manifestation of intentional directedness within the performance of a subjective utterance. The intention corresponds to the matter of the intentional act and is expressive of the specific 'content-value' with which the abstract property of intentionality is manifested in a concrete utterance.[62] The intention with which the subject internally 'inspires' his act subsequently materialises in the act committed by the subject, and bestows the act with a certain meaning. Although this 'meaning' can, in a colloquial sense, be said to be of subjective origin, it is interpretatively accessible in the external world.

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57 Mooij, supra note 14, pp. 283-284, 313-316. Cf. J. Austin, 'Three Ways of Spilling Ink', in J. Urmson et al. (eds.), *Philosophical Papers of J.L. Austin*, 1970, pp. 272-287, p. 283: 'The most subtle of [the notions intention, purpose and deliberation] is that of intention. As I go through life, doing, as we suppose, one thing after another, I in general always have an idea – some idea, my idea, or picture, or notion, or conception – of what I'm up to, what I'm engaged in, or in general "what I'm doing". I don't "know what I'm doing" as a result of looking to see or otherwise conducting observations (…). I must be supposed to have *as it were* a plan, an operation-order or something of the kind on which I'm acting, which I am seeking to put into effect, carry out in action: only of course nothing necessarily or, usually, even faintly, so full-blooded as a plan proper.'

58 Husserl, supra note 17, pp. 411-416; see R. Bernet et al., *An Introduction to Husserlian Phenomenology*, 1993, pp. 93-95.

59 Cf. E. Husserl, *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie. Zweites Buch: Phänomenologische Untersuchungen zur Konstitution*, 1952, p. 317: 'Ich merke auf, ich erfasse, ich fasse kolligierend zusammen, ich vergleiche, ich zergliedere, ich glaube, ich zweifle, ich bin geneigt zu glauben, ich entscheide mich bejahend, ich lehne ab, ich überlege, ich werte, ich schwanke wertend und entscheide mich, ebenso im Wollen.'

60 Husserl, supra note 17, pp. 415-416: 'Die Materie – so können wir noch weiter verdeutlichend sagen – ist die im phänomenologischen Inhalt des Aktes liegende Eigenheit desselben, die es nicht nur bestimmt, dab der Akt die jeweilige Gegenständlichkeit auffabt, sondern auch als was er sie auffabt, welche Merkmale, Beziehungen, kategorialen Formen er in sich selbst ihr zumibt. An der Materie des Aktes liegt es, dab der Gegenstand dem Akte als dieser und kein anderer gilt, sie ist gewissermaben der die Qualität fundierende (aber gegen deren Unterschiede gleichgültige) Sinn der gegenständlichen Auffassung (oder kurzweg *Auffassungssinn*).'

61 See Mooij, supra note 14, pp. 5, 169; vgl. Husserl, supra note 59, p. 105: 'Sofern jedes cogito ein cogitatum fordert, und dieses im Aktvollzug zum reinen Ich in Beziehung steht, finden wir in jedem Akte eine merkwürdige Polarität: auf der einen Seite den Ichpol, auf der anderen das Objekt als Gegen-pol. (…) Das Ich ist das identische Subjekt der Funktion in allen Akten desselben Bewubtseinsstroms, es ist das Ausstrahlungszentrum, bzw. Einstrahlungszentrum alles Bewubtseinslebens (…). M.a.W. alle die vielgestaltigen Besonderungen intentionaler Bezogenheit auf Objekte, die da Akte heiben, haben ihren notwendigen terminus a quo, den Ichpunkt, von dem sie ausstrahlen.'

62 See Husserl, supra note 54, pp. 167-171, 256-259; Husserl, supra note 17, p. 378: 'Das determinierende Beiwort *intentional* nennt den gemeinsamen Wesenscharakter der abzugrenzenden Erlebnisklasse, die Eigenheit der Intention, das sich in der Weise der Vorstellung oder in einer irgend analogen Weise auf ein Gegenständliches Beziehen.' See also Mooij, supra note 14, pp. 102, 283-284.

3.2. From intentionality to interpretation

3.2.1. Intention and meaning

The epistemological questions pertaining to the interpretative accessibility of the intentions with which subjects invest their utterances can safely be regarded as the focal point in hermeneutical philosophy. In view of the human subject's pre-reflexive interwovenness in cultural traditions and historical practices hermeneutical philosophy contends that the position of the subject with his intentional consciousness is not to be hypostasized into a reified *terminus a quo* of all forms of intentional directedness.[63] The idealistic prioritization of subjective consciousness over its correlate, i.e. over the world of objects, has met with the forceful objection that the contraposition of the allegedly 'autonomous' subject and the adverse and 'relative 'object ignores a prior and more fundamental relation of *inclusion* which encompasses both the subject and the object.[64] The subject-object relation, this connection which bears the name 'intentionality', cannot be established by subjective consciousness unilaterally or, as it were, 'out of nothingness', but is instead *grounded* by a fundamental hermeneutical experience of 'belonging' or of 'being-in-the-world' which precedes reflection.[65]

Even prior to being a subject, the human being is already 'in-the-world', that is: he is bound, in a pre-reflexive manner, to an intersubjective, historical environment shaped by culturally handed down traditions. It is within this intersubjective environment that he will only gradually be able to realize his status as a subject. Hermeneutics has brought to the fore that every consciousness *of* something is in turn conditional upon an anticipatory, pre-reflexive understanding of this something *as something*.[66] This 'as' presupposes that the object which lends itself to conscious apperception, on a deeper level, already 'lies before us as something expressible'.[67] All understanding of the position of the subject within the life-world is therefore dependent on an anticipatory structure of *fore-conceptions*, being the conditions under which meanings can be conferred to objects or utterances in the intersubjective life-world.[68] Not only does this foundation underneath intentionality show us that the primacy status initially attributed to the subject has to be substituted for a decentred or derived status for the subject, it also unlocks an important potentiality: the *scope* of intentionality is expanded in a considerable measure.

Intentionality can no longer be conceived of as an activity over which the subject enjoys exclusive dominion. In order to illustrate this point, let us briefly focus our attention on a highly exemplary object of interpretation: text. Texts are written or spoken by a subject who 'charges'

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63 See Ricoeur, supra note 23, p. 112; see also Mooij, supra note 14, p. 104.

64 Ricoeur, supra note 23, p. 105. Hermeneutics raises objections against certain idealistic, Cartesian tendencies in Husserlian phenomenology: according to some readings of Husserl, a complete execution of the so-called 'transcendental reduction' – a method practised in the description of phenomena in which one suspends (*épochè*) or puts between brackets all available interpretations of the world or of reality, in order to gain an unmediated view of what it is that these interpretations are ultimately derived from – is supposed to leave only the subjective consciousness as an indubitable and ultimately irreducible foundation of the entire phenomenal life-world. For a relativization of the view that holds that Husserl's phenomenology is characterized strongly by idealism, see C. Bermes, 'Reduktion und Verstehen. Husserls Phänomenologie und die Hermeneutik', in H. Vetter et al. (eds.), *Hermeneutische Phänomenologie, phänomenologische Hermeneutik*, 2005, pp. 11-25, especially at pp. 18-20.

65 M. Wischke, 'Hans-Georg Gadamer und die Phänomenologie der Traditionsaneignung', in H. Vetter et al. (eds.), *Hermeneutische Phänomenologie, phänomenologische Hermeneutik*, 2005, pp. 210-221; Gadamer, supra note 23, pp. 247-250, 279; Heidegger, supra note 26, pp. 78-90; Ricoeur, supra note 23, p. 106.

66 Heidegger, supra note 26, p. 189: 'That which is disclosed in understanding – that which is understood – is already accessible in such a way that its "as which" can be made to stand out explicitly. The "as" makes up the structure of the explicitness of something that is understood. It constitutes the interpretation.' See also Ricoeur, supra note 23, pp. 106-107.

67 Heidegger, supra note 26, p. 190.

68 Ricoeur, supra note 23, p. 107; Heidegger, supra note 26, pp. 188-195; Gadamer, supra note 23, pp. 261-269; see also Visker, supra note 24, p. 257.

his text with a meaning that lies hidden in his *intention* in writing or speaking. In this way, the subject gives himself to understand in the intersubjective sphere. But as soon as his text is released upon the world, the intention with which the subject has invested it develops a life of its own, a life which breaks loose from the subject's intentional grasp. In other words: the 'sense' of the text and the intention of the author cease to coincide. The meaning of the text becomes *autonomous* in that it frees itself from the tutelage of authorial intention and from the entire finite situation in which it came into existence. Owing to this, the text unfolds a 'plurivocity' which makes it susceptible to a variety of different interpretations. The same can be said to apply to *actions*, because actions are, in some important respects, similar to texts.[69] Actions, too, distance themselves from the context in which they were performed and emancipate from the subjective intentions of the agent.[70]

Intentionality can still be conceived of as a relation of directedness established by subjective consciousness. It is a relation of directedness of a subject towards an object, but the two poles between which this relation manifests itself can no longer be definitively delineated from one another. On the subject side one is confronted with the unsurpassable symbolic order of language providing a necessary condition for the subject to be capable of any intentional act of apperception. On the object side this same symbolic order is constitutive of the possibility for any intended object's sense or meaning to escape the intentional control of the subject. The foregoing implies that intentionality performs its operations in two directions. On the one hand, the subject, by way of the intentional act of apperception, bestows an intended object with a certain, pregiven meaning. On the other hand, the separation between subject and object entails an emancipation of the object: the object has a potentiality of meanings which can never be fully exhausted by the way in which the object is intentionally apprehended by a subject.

3.2.2. Constitutive norms and the concept of 'method'

The autonomy of texts and actions, i.e. the recognition that the meaning of a text or an action is rendered independent from the intention of the author or the agent, confronts us with the fact that every act of interpretation is performed within a domain marked, on the one side, by a feeling of belonging or familiarity, and, on the other side, by a feeling of remoteness or distance.[71] Ricoeur has noted that the direct dialogical situation, in which two or more subjects are posited face to face, is a 'short' intersubjective relation which, in turn, is intertwined with various 'longer' intersubjective relations. These long relations between subjects are sustained by historical traditions and mediated by different social institutions, social roles and social practices. In view of the fact that a dialogue between two people can never take place 'unmediatedly' but is always and necessarily embedded in a longer intersubjective relation, every form of intersubjective communication undergoes the 'efficacy of history'.[72]

As noted in Subsection 2.4.3 the establishment of individual moral or criminal responsibility requires knowledge of intersubjective relations, nested in teleologically and narratively structured social *practices* that contain ethical standards. Every subject is united with other

69 Ricoeur, supra note 23, pp. 197-221. See De Jong, supra note 1, pp. 142-165.

70 According to Ricoeur (supra note 23, pp. 197-221), the 'objectivity' or autonomy of written texts is constituted by a set of four traits that together characterize the status of the text: the fixation of its meaning; its dissociation from the subjective intention of the author; the display of non-ostensive references; and the universal range of its addressees. Analogously, actions emancipate in four ways from their original context: the meaning of action is socially inscribed or fixated; the meaning of action becomes dissociated from the intention of the agent; the objective 'importance' of an action exceeds the 'relevance' of the action in the situation in which it occurred; and the action becomes an 'open work'. See also Mooij, supra note 14, p. 108.

71 Gadamer, supra note 23, pp. 247-250, 279; Ricoeur, supra note 23, pp. 110-111.

72 Ricoeur, supra note 23, pp. 107-111; see Gadamer, supra note 23, pp. 284-290.

subjects in an intersubjectively shared space.[73] As noted earlier on, hermeneutics emphasizes that this intersubjective space is structured by a symbolic order instituted by colloquial language. Language 'filters' the unmediated, natural world and thus converts reality, that cannot be available for human experience in its immediate and brute guise, into a symbolically mediated, socially dimensioned, human life-world where we find subjects with whom, and objects with which we can engage in meaningful relations. The historically developed and ever-developing intersubjective space is characterized by smaller and larger variations, both culturally and regionally.[74] An important trait common to all practices or intersubjective communities of which the human subject can form part is that they contain patterns of intersubjectively shared rules or norms by virtue of which subjective utterances have intersubjectively recognizable meanings.

In a general sense these norms are constitutive of the way in which we apprehend or understand subjective utterances, that is to say: they determine what, in the intersubjective domain, 'counts as' a particular meaningful action or utterance. The conceptual dependence of meaning on norms implies that any grasp or understanding of the meaning of an utterance, or of any object whatsoever, is ultimately conditional upon the efficacy of a certain 'method'. This term method should not be taken to refer to some sort of prescriptive or procedural interpretation guideline, but ought rather to be taken in the more fundamental sense of a 'route' along which the meaning or the identity of an object becomes apparent. In a very fundamental sense, the term method refers to what it is that happens when an interpreting subject, as it were, 'posits' an 'object', e.g. an utterance of another subject, before or in front of himself, in order to determine its meaning.[75] The route along which this meaning manifests itself between the interpreting subject and the interpreted object is paved with norms. Those norms do not spring from the interpreting and intending subject; on a pre-subjective level they are already subsistent in the symbolic order of language. Not only are these norms determinant for the retrospective inter-subjective evaluation of subjective utterances, they are also prospectively *directive* of each subjective utterance: my intentional action derives its subjective *directedness* from the same norms that enable other subjects to ascertain the intersubjective meaning of my action. Intentional utterances, in other words, are 'rule-guided'.[76]

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73 This relational connectedness of subjects within intersubjective domains is not a contingent notion, but is in fact constitutive of subjectivity itself: without 'other' there can be no 'self', without intersubjectivity, no subjectivity. This is the central thesis in Ricoeur, supra note 51. Also in Wittgenstein, supra note 44, this forms a central insight resulting from the recognition of the impossibility of something like a 'private language'. See also Visker, supra note 24, p. 207.

74 The lingual symbolic order should therefore not be taken to be in every respect an 'absolute' given fact. The symbolic order constitutes a necessary condition for the human subject's capability of relating to the world in a more or less autonomous way. This does not imply, however, that the symbolic order, as it happens to be in place in any given language, at any given place or in any given period of time, would be immune to any form of fundamental critique. See Ricoeur, supra note 23, pp. 63-100; De Jong, supra note 1, pp. 118-120.

75 See De Jong, supra note 1, pp. 351-383; Oudemans traces back the semantics of the term method to the beginning of the scientific or modern era – the *terminus a quo* of what he calls the 'great reduction' – and ultimately to the fourth rule formulated in Descartes' *Regulae ad Directionem Ingenii* (1626-1628; 'Necessaria est methodus ad rerum veritatem investigandam'). See Th. Oudemans, *Echte Filosofie*, 2008, p. 77 (my translation, FJ): 'Method is not primarily something that people invent, but it is a road that appears to be there and that people thereupon follow, a road which already had marked their world. (...) The sense of method is this: the road leading to a specific identity, out from that same identity.'

76 See Mooij, supra note 14, pp. 287-289. The rule-guided character of action is a central theme in Wittgenstein, supra note 44. Searle distinguishes between two types of norms. Constitutive norms are the norms by virtue of which subjective actions intersubjectively 'count as' particular, meaningful actions. Regulative norms are imperative norms; they prescribe, rather than describe. See J. Searle, *Speech Acts. An essay in the Philosophy of Language*, 1969, pp. 33-42. In light of the view presented by N. MacCormick, 'Norms, Institutions, and Institutional Facts', 1998 *Law and Philosophy*, pp. 301-345, that the efficacy of norms always presupposes some teleological reference to the practical domain or context in which the norms are said to apply, I argued in De Jong, supra note 1, pp. 47-59, 157, that norms cannot be analyzed solely in terms of the constitutive function ascribed to them, and that constitutive and regulative or imperative norms can be distinguished on a conceptual level, but cannot be separated radically. Cf. J. Raz, *Practical Reason and Norms*, 1990, pp. 108-111.

The rule-guided nature of action faces us with the fact that not only psychic reality itself but also its important property of intentionality are permeated by social reality. Consequently, intentional utterances must be conceived of as essentially both 'mental' and 'normative' phenomena.[77] Intentionality, therefore, is more than an interjection between a subject and an object in the life-world towards which the subject is directed intentionally. Intentionality comprises the cognitive and affective forms of subjective directedness towards an object, but this relation appears to be accessible from different directions: in addition to the subject who acts or who expresses himself intentionally in other ways, there is the subject who interprets the utterance, who apprehends the utterance in a certain, intersubjectively applicable meaning.[78] The utterance of the subject frees itself from the subject, breaks loose in the intersubjective sphere where it is bestowed with the polysemic property of plurivocity. This plurivocity impels perspective taking. The manner in which a subjective utterance is understood intersubjectively is dependent on the interpretative context. The form of this context is closely connected with the purpose or *objective* in service of which certain subjective utterances are to be interpreted within the context.

4. Criminal intent and judicial interpretation

4.1. The twofold bivalent nature of intent in criminal law

The criminal law represents a particular interpretative context that bears the hallmark of a particular interpretative objective. In this section it will be examined in what way the specifically juridical interpretative context of criminal law shapes the nature of the criminal law's concept of intent. The present subsection's objective is to make apparent the implications ensuing from the rather abstract reflections in the preceding sections for the development of a criminal theory of intent. It will be argued that criminal intent has to be regarded as an essentially bivalent concept in two respects: criminal intent is characterized by both a subject-intrinsic and a subject-extrinsic moment (horizontal bivalence), and criminal intent is both an analogue of and a deviation from the general, pre-legal notion of intention (vertical bivalence). Subsection 4.2 will subsequently deal with the ways in which it can be ensured that the juridical concept of criminal intent maintains a sufficiently firm connection with the pre-legal concept of intention, or, put differently: the ways in which it can be prevented that the criminal concept of intent will deviate too strongly from the reasons we have for employing the concept in criminal law. In this connection, it will be argued that the means to secure this connection within the practical context of the furnishing of proof of intent are provided by a number of requirements that ensue from the principle of legality.

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77 Put more precisely: in view of the fact that social reality permeates mental reality and *vice versa*, the juxtaposition of the terms 'mental' and 'normative' in fact amounts to a tautology. See Fuchs, supra note 47, pp. 141-143 and p. 11: '(…) dab das Soziale, ohne je psychisch zu sein, so durch Psychisches ist wie das Psychische, ohne je sozial zu sein, durch das Soziale ist.'

78 Cf. Ricoeur's distinction between three meanings of the term intention (supra note 51, p. 68): '[W]e distinguish between three uses of the term "intention": having done or doing something intentionally, acting with a certain intention, and intending to ... (...) As close as is the tie between the intention-to and the person to whom it belongs, so qualifying the action as intentional can be accomplished independently of any consideration of the relation of possession that attaches the action to the agent.' According to Ricoeur the *reduction* of the concept of intention to its adverbial meaning ('doing something intentionally') is a predominant feature of Anglo-American, analytical philosophy of action (supra note 51, p. 61): '[I]n order to determine what counts as an action (the question "what?"), one sought in the explanation for the action (the question "why?") the very criterion for what deserves to be described as an action.' And at p. 63: 'The "what" of action, in fact, is specified in a decisive way by its relation to the "why?" To say what an action is, is to say why it is done. (...) Describing is beginning to explain, and explaining more is describing better.' This descriptive focus is quite clearly recognizable in Anscombe's famous work on intention (E. Anscombe, *Intention*, 1976, p. 9): 'What distinguishes actions which are intentional from those which are not? The answer that I shall suggest is that they are the actions to which a certain sense of the question "Why?" is given application; the sense is of course that in which the answer, if positive, provides a reason for acting. But this is not a sufficient statement, because the question "What is the relevant sense of the question 'Why?'" and "What is meant by 'reason for acting'?" are one and the same.'

4.1.1. Horizontal bivalence

To begin with, it can be established on the basis of what was discussed in Section 3 that the concept of intent in criminal law is essentially a *bivalent* one. It is primarily to this property that the concept of intent owes its practically unfathomable complexity. On the one hand, intent typifies or characterizes an action or an omission. Intent can be regarded as a specifically legal meaning or value attached by the criminal law system to cognitive and affective forms of intentional directedness between a conscious subject and an object in the intersubjective life-world. Intent is *subject-extrinsic* in so far as it denotes the intersubjectively apprehensible modality *of* a certain action. On the other hand, intent denotes the acting subject's relation *to* the action performed. Intent is *subject-intrinsic* in so far as it lays the foundation whereupon the imputation of full criminal liability ultimately has to be able to rest.

In the face of this duality within the meaning of intent, one must not succumb to the temptation of duplicating the concept of intent in order for the criminal law system to be able to incorporate, at its own discretion, one of the two concepts and leave aside the other. The criminal law's concept of intent is a juridical species of the pre-legal genus intentionality. Given that the concept of intentionality encompasses all forms of intra-mental directedness towards extra-mental objects, intentionality cannot be understood as a 'thing' which, though it may or may not be directly observable, is nonetheless identifiable in some way, and which accordingly could be localized 'somewhere', e.g. in the psyche of an acting subject or in the act performed by the subject. The criminal law system cannot allow itself to reduce its concept of intent solely to either the internal, subjective moment, or the external, intersubjective moment of the concept. Both moments of the concept are not contingent features, but are *essential* to the meaning of both the pre-legal concept of intention and the criminal concept of intent. My arguments underlying this thesis on the nature of intent in criminal law will occupy the remainder of this subsection.

The *subject-extrinsic* aspect of intent ensues from the fact that the human subject unavoidably directs himself towards the socially dimensioned outer-world, comprising an endless stream of apperceptible objects, in every utterance whereby he gives himself to understand in the public sphere, that is: whenever he speaks, writes, acts. Intentionality essentially *is* this directedness and cannot be conceived of as some kind of unilateral transference of meaning from the subjective sphere upon the intersubjective world, as if the subject could authoritatively impose the subjective meaning of his utterance on the world. The subject is directed towards the shared life-world both cognitively and affectively. On the basis of the pregiven, symbolically ordered, social life-world the cognitive and affective aspects allied within the subject's intention can be attributed to the acting subject by other subjects. Intentionality implies reciprocity and with that it implies movement in two directions. The human subject necessarily acts out of his subjective position, but his utterances are only understandable and even *conceivable* as meaningful utterances by virtue of the pregiven symbolic order of the life-world in which the subject finds himself 'inscribed'.

All this applies equally to the criminal legal specification of the pre-legal, general concept of intentionality: the criminal law's concept of intent. Intent is not merely the 'psychic portal' of the action presented to the court for legal scrutiny; it is not tantamount to a certain quality of the set of purely subjective ideas and purposes which the defendant intended to carry out in action. Intent encompasses also the intersubjectively accessible understandability or meaning, materialized in the action, on the authority of which the action under consideration may *juridically* 'count as' an intentional action. The concept of intent is expressive of a specifically legal value, which the criminal law system confers to the intersubjective meaning (or intention) of human actions. Intent thus constitutes the cardinal criminal legal particularization of the general,

pre-legal concept of intention, the latter in turn representing a concrete manifestation of the abstract notion of intentionality.

Unsurprisingly, also the 'method' with which or the 'route' along which it can be ascertained whether or not a certain action can *criminally* be taken to count as an intentional action constitutes a legal particularization of the route along which, in a very general sense, the meaning of an object is apprehended. This particularized route, referred to here as the 'normativising method', is attended upon by a form of reduction. In practising the normativising method one generally directs one's attention primarily to a set of external signs or indications in order to establish whether or not a certain action can be characterized criminally as an intentional action;[79] to that extent, one passes over the subject-intrinsic aspects which relate to the way in which the subject internally animated his action with a certain intention.[80] The normativising method rests ultimately, in a phrase coined by Ricoeur, upon an 'agentless semantics of action': the intention with which a subject has performed his action can be established on the basis of social, publicly accessible, constitutive norms alone, that is: without having to take into consideration the deep and obscure problematic pertaining to the subjective relation of the action to its agent.[81] The subject-intrinsic aspect, though still presupposed and hence not negated, is placed between brackets.

However, the criminal law cannot content itself with such a non-agent based account of agency. The criminal law system's orientation towards imputation, as discussed in Section 2, necessitates the presupposition of a *subject-intrinsic* moment within the criminal concept of intent, in addition to the aforementioned subject-extrinsic moment therein. The criminal law system is an intentional system to the effect that its different operations are directed – some, admittedly, in more direct and unconcealed ways than others – towards the imputation of criminal liability to individual persons. The offender's culpability or internal responsibility is what *grounds* his liability to state-inflicted punishment. An important implication ensuing from this seemingly trivial contention is that the products of the process of truth-finding or proof-furnish-

79 Mooij emphasizes that the criminal law is primarily operative on the level of 'external reality', as can be seen from the way it conceptualizes the different forms of *mens rea*. Intent, recklessness and negligence are forms of 'causal guilt' or 'action-inferred culpability' (supra note 14, pp. 257-258): 'This refers to the way the act is performed: intentionally, well-planned, willingly taking a risk. Even though remaining at the level of the act itself, the internal quality of the act (*mens rea*) – in the sense of knowing – is also included, be it that this internal quality is often reconstructed based on external behaviour and circumstances (*actus reus*). Thus we recognise a circular process where, at the level of the act itself, knowing – as a type of intent – is taken account of in the substantive criminal law by rendering this internal quality external. (…) The emphasis on the act is quite understandable, since modern systems of law administration go back to a topic much debated during the Enlightenment. This debate centred on the finding of philosophical pluriformity and lack of unanimity on the question of how to shape one's life. (…) In keeping with the liberal ethics that have grown into a dominant force since, the criminal justice system would have to offer maximum protection of a person's private, internal life sphere. People are free in thought and emotion – only their actions could be subject to punishment. When, by introducing a subjective, mental element, the internal quality is taken account of, in order to avoid a purely act-based criminal law, however, this internal quality is rendered external as much as possible, true to the primacy of modern law: protection of the private sphere.' See also De Jong, supra note 1, pp. 355-360, 430-437 and *passim*.

80 The Dutch Supreme Court has phrased the method in accordance with which courts arrive – or are supposed to arrive – at the conclusion that a certain action has been performed intentionally or possibly negligently in the following way (Hoge Raad 25 March 2003, *Nederlandse Jurisprudentie* 2003, No. 552; my translation, FJ): 'Whether or not it can be concluded in a specific case that the defendant acted with advertent negligence or with conditional intent [*dolus eventualis*] shall – in the event that the statements made by the defendant and/or for example (any) statements made by witnesses do not provide an insight into what has occupied the mind of the defendant at the time of the action – depend on the factual circumstances of the case. In this connection, the character of the action and the circumstances in which it was performed constitute relevant criteria. Certain actions can be considered, on the basis of their outward appearance, to be directed towards a certain result to such a strong degree that – save contraindications – it cannot but be the case that the defendant must have approved of the considerable possibility that the result in question would occur.' This formulation has become part of the standard formula for *dolus eventualis* within Dutch criminal law.

81 See Ricoeur, supra note 51, pp. 56-87. According to Ricoeur the predominance in analytical philosophy of non-agent-based accounts of action can be explained in terms of its focus on truth-conditions for action descriptions (supra note 51, p. 72): 'In my opinion, it is the exclusive concern with the truth of the description that tends to overshadow any interest in assigning the action to its agent. Assigning the action to an agent poses a problem of veracity and no longer a problem of truth, in the descriptive sense of the term.'

ing function as the 'raw materials' that are presented for further processing during the subsequent phases in the deliberative chain at the end of which the judge reaches his judgment. Already during the proof-furnishing phase the mentioned materials have to be 'cut out' in such a manner as to display the necessary properties that make them *fit* for entering the judge's deliberation on the ultimate question of whether or not the defendant is liable to punishment.

In connection with the concept of intent in criminal law this means that the significance of the subject must not be ignored or become too marginalized, neither on the substantive level of the meaning of the concept of intent, nor on the methodological level of the furnishing of proof of intent. It is impossible for a concept of intent reduced entirely to its subject-extrinsic moment to be capable of providing the foundation upon which the imputation of individual, criminal liability can come to rest. The act of imputation of criminal responsibility to persons necessarily depends on certain ways of being attentive to the narrative and practical identity of the 'indirect object' of the act of imputation. In Subsection 4.2 I will explain *in what way* the judge, in my view, should be attentive to the defendant's practical identity in the process of furnishing the proof of intent. Meanwhile, the arguments presented so far lead up to an important interim conclusion concerning the nature of intent in criminal law: just as the general, pre-legal concept of intention, its criminal legal particularization is characterized by both a subjective and an intersubjective aspect. To this extent the criminal legal concept of intent runs analogous to, that is: it *parallels*, the bivalent nature of intentionality. It is equally clear, however, that the criminal law system *particularizes* the pre-legal concepts of intention and intentionality in significant ways, that it tailors these concepts to its own particular requirements, and that it thus also 'distorts' the pre-legal concepts to a certain degree.[82]

4.1.2. Vertical bivalence

Here, the criminal concept of intent's *second* bivalent characteristic comes to the fore: it is both an analogue of and a deviation from the common, pre-legal concept of intention. The criminal legal concept of intent and its pre-legal counterparts have different contours. The criminal concept fixates the pre-legal concepts of intention and intentionality in a 'formal' meaning. This juridical formalization too can be elucidated with reference to the criminal law's orientation towards the imputation of criminal liability.

The *connection* of the criminal concept of intent with the general, pre-legal concept of intention lends the concept of intent a *protective* aspect. The recognition that the concept of intent is characterized, as is its pre-legal equivalent, by both a subject-extrinsic and a subject-intrinsic moment renders implausible any theory on account of which intent would designate not more than the social meaning of an action as dictated solely by the efficacy of intersubjective, constitutive norms. Intent also encompasses the way in which an agent subjectively 'inspired' his action with an intention. For it is on that condition that proof of intent can serve as a basis on which the final judgment regarding the subject's individual culpability can be founded. The *distance* between the pre-legal concept of intention and the criminal concept of intent, by contrast, is *instrumental*. The general concept of intention is semantically 'distorted' as a consequence of its being incorporated into the criminal law system and its being adjusted to the functions of the criminal law: it forms part of the criminal law system's counterfactual symbolic order.

In order to fulfil its functions in society, criminal law is in need of practicable concepts whose meanings are outlined to a sufficient degree of precision, even at the price of creating a

82 See De Jong, supra note 1, pp. 351-371.

counterfactual gap between the criminal concept of intent and its pre-legal equivalent. A clear example of a doctrinally outlined concept is constituted by the civil law tradition's concept of conditional intent or *dolus eventualis*. In different respects, this juridical construct answers the criminal law's need for sharply defined concepts. Due to the construct of *dolus eventualis* the criminal concept of intent has a wider 'extension' or scope of applicability than has the pre-legal concept of intention.[83] *Dolus eventualis* therefore constitutes an important instrument or aid for the furnishing of proof of intent (and for the formulation of the grounds for the proof of intent to be stated in the court's sentence). However, the development of the construct of *dolus eventualis* has not only led to a significant semantic widening of the concept of intent. It has also resulted in a rather precise doctrinal demarcation between the concept of intent and the concept of (advertent) negligence and, consequently, in a further, more detailed circumscription of the concept of intent.[84]

4.2. Proving criminal intent

4.2.1. The need for prudence

From what has been discussed in Section 2 it can be deduced that the criminal law, in all its formality, cannot afford to deviate too much from the everyday life-world in all its materiality.[85] The tension between the criminal law's distance from the pre-legal world, on the one hand, and the need for a sufficiently firm connection with this social life-world, on the other, is intrinsic to the so-called *counterfactual* character of the criminal law system. The criminal law is characterized not only by the *fact* that the ideal substance of its norms and standards does not correspond perfectly to social reality, but also, and more importantly, by the *awareness* of this fact, that is to say: the awareness that the criminal law system assesses facts stemming from the social life-world in terms of legal norms and concepts that together constitute a self-referential and *idealized abstraction* of the social life-world.[86]

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83 Owing to the development of the construct of *dolus eventualis* proof of intent requires only a relatively minor intentional contribution on the part of the defendant to the occurrence of the results of his action. According to Dutch substantive criminal law it suffices for the proof of (conditional) intent to ascertain that the defendant knew of the considerable chance that a certain consequence could result from his action, and also approved of, or reconciled himself to, the possible occurrence of that result. The defendant therefore need not have been intentionally directed towards bringing about the results of his action *directly*, but need only have directed himself intentionally towards the *chance* that these results could be brought about by his action. See De Jong, supra note 1, pp. 311-383. In German criminal law the concept of *dolus eventualis* has similar traits; see Taylor, supra note 5. The concept of *dolus eventualis* furthermore bears similarities to the common law's concept of recklessness, commonly taken to designate foresight of a probable or possible consequence of an action. An important difference between both concepts lies in the fact that while *dolus eventualis* is characterized by both an intellectual and a volitional requirement, recklessness only contains an intellectual requirement. Recklessness in the common law is therefore not a species of the genus intention, but a *sui generis* type of *mens rea*. For a very large number of criminal offences (including, in the United Kingdom, that of manslaughter) recklessness is a sufficient condition for proof of *mens rea*. Any difference in culpability between what the common law regards as intentional action, on the one hand, and reckless action, on the other, is then marked only in the sentencing; see R. Duff, *Intention, Agency, and Criminal Liability. Philosophy of Action and the Criminal Law*, 1990, p. 142.

84 This precise doctrinal outlining of the meaning of intent of course does not alter the fact that, in specific cases, it can often be very hard to draw the line between intent and negligence.

85 This is of course a rather open statement. But the general tenor thereof can be seen reflected in Raz's analysis of the different conditions for the legitimate authority of law. According to Raz, adjudicative legal institutions pass judgments that consist of 'authoritative reasons for action'; these reasons for action are 'pre-emptive' reasons in the sense that they are 'not to be added to all other relevant [or 'first-order'] reasons when assessing what to do, but should exclude and take the place of some of them' (J. Raz, *The Morality of Freedom*, 1986, p. 46). However, this 'pre-emptive thesis' is preceded by the 'dependence thesis' (pp. 42-53) according to which the authoritative and pre-emptive 'second-order reasons' should – ideally – *reflect* the way in which subjects would have decided to act on the basis of the relevant so-called 'first-order' reasons, being the reasons that applied directly in the situation of the addressees of the judgment; cf. J. Raz, *Ethics in the Public Domain. Essays in the Morality of Law and Politics*, 1994, p. 372; Raz, supra note 37, pp. 16-19.

86 See De Jong, supra note 1, pp. 169-178, 221-244. On the relevance of the concept of counterfactuality for the criminal law, see R. Foqué et al., *Instrumentaliteit en Rechtsbescherming. Grondslagen van een Strafrechtelijke Waardendiscussie*, 1990, pp. 138-140. The self-referential character of the criminal law system's different concepts and norms is rather manifest in the tautological criteria used by the

We do not have available a 'higher order' standpoint wherefrom the 'ideal states of affairs', referred to by the criminal law's norms, could be defined to everybody's full satisfaction, and wherefrom the legitimacy of the different judgments arrived at by the application of these norms could be guaranteed.[87] This ultimate and undissolvable deficit in the legitimacy and justifiability of criminal judgments implies that the criminal law system's autonomy cannot be absolute or unrestricted. Just as the human subject's inscription in the symbolic order of language enables him to dissociate himself from the world and from himself, in order to effectuate his relative personal autonomy, so too the criminal law system enjoys a certain autonomy and independence from society, as a consequence of its own counterfactual symbolic order. But, contrariwise, just as the subject's personal freedom is 'bound' or relative, so too the criminal law system's autonomy is a restricted autonomy. Although it is undoubtedly true that the criminal law shapes its own image of reality, the criminal law cannot avoid *referring*, with every application of its norms and concepts, to the extra-legal life-world of intersubjective relations, which, according to its function, it is supposed to regulate.

Hermeneutics' central aim can be said to be the furnishing of an objective understanding of subjective utterances. According to an important hermeneutic insight, subjective, internally 'inspired' human utterances do not remain enclosed in their subjectivity, but instead break loose in the objective and intersubjective sphere, where they become available for others to 'read' and interpret. This means that they also in principle become amenable to possible legal encoding, to judgments of imputation, and to their incorporation into the systematic world of the criminal law. However, the reverse movement is equally important: the criminal law's different intentional utterances do not remain enclosed within the criminal law system, but produce real consequences in the extra-legal world. The act of imputation therefore ought to be amenable, as much as possible, to an appropriation by the addressees of the judgment. The criminal law system performs its operations on the crossroads of a factual world and an idealized, normative world. Considering its counterfactual character, the criminal law can never be expected to be able to guarantee the 'absolute objectivity' of any of its judgments. The constant *awareness* of this fact calls for *prudence*, for the putting in place of a 'proviso' or a 'caveat' regarding the definitive rightness and justifiability of the criminal law's different operations.[88]

This raises the following question: how can and should this proviso find expression in the practical context of the furnishing of proof of intent? The answering of this question shall occupy the remainder of this section. Here the focus is moved from intent as an *object* of acts of judging to the *act* of judging itself. Criminal judgments lay claim to being authoritative and legitimate; in the remainder of this section our attention will be focused on some of the normative implications that result from the criminal law's claim to legitimate authority. It will be argued, firstly, that criminal intent functions as a pivoting point between the pre-legal, empirical life-world, on the one hand, and the doctrinal, counterfactual world of the criminal law system, on the other,

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Dutch Supreme Court to define the concept of criminal participation (one of the forms of complicity that are distinguished in Dutch criminal law) as understood under Article 47, Section 1, of the Dutch Criminal Code. The defendants must have cooperated *so* consciously, closely and/or fully, *that* one can speak of criminal participation in the sense of the law. See e.g. Hoge Raad 18 March 2008, *Nederlandse Jurisprudentie* 2008, No. 209.

87 For the term 'ideal states of affairs', see G. von Wright, 'Is and Ought', in S.L. Paulson et al. (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, 1998, pp. 365-382.

88 Van Roermund, supra note 21, p. 182: '[L]aw is a historically permanent caveat of politics.' In De Jong, supra note 1, pp. 169-250, I developed an argument on account of which it is stated that the undissolvable deficit – discernable on the meta-juridical level of philosophical reflection on the (criminal) law – in the justifiability or *legitimacy* of the results of judicial adjudication is repeated on the intra-juridical level of criminal legal doctrine pertaining to the principle of *legality*. With reference to modern hermeneutical theories of judicial construction it is argued that this principle represents a counterfactual ideal, the realization of which cannot be completely secured. See also Mooij, supra note 14, pp. 224-227.

and, secondly, that the principle of legality provides the key to answering the question how judgments on the proof of criminal intent can be prevented from departing too strongly from the 'teleology' underlying the criminal law system, i.e. the reasons we have for employing the concept of intent in criminal law.

4.2.2. The pivotal function of criminal intent

As was shown in Subsection 4.1, the concept of intent displays bivalent traits in two directions. Intent is both a subject-intrinsic and a subject-extrinsic phenomenon, both a mental and a normative phenomenon. Furthermore, the criminal concept of intent presupposes, and is 'impressed' with, the general, pre-legal concept of intention which in turn lies embedded in the wide field of intentionality; to a certain degree, however, the criminal concept of intent also deviates from the pre-legal concept, as a result of the fact that the criminal law system fashions *its* concept of intent in accordance with its own demands, that is: in accordance with the very *reasons* it has for employing a concept of intent in the first place. Here we are faced with the fact, briefly touched upon in Subsection 2.4, that the (criminal) law's different concepts and norms establish a specifically *juridical* symbolic order, on top of the symbolic order of colloquial language which transforms the natural world into a social life-world. The criminal law, on that account, is symbolic to the second power, truly 'counterfactual'.[89] How are we to picture for ourselves this criminal, counterfactual reality, or, put differently, how are we to conceive of the objects towards which criminal intent is directed?

The answer to this question lies in the recognition that intent, as a rule, has to accompany the action (*actus reus*) undertaken by the offender (or the omission) and sometimes also other elements in the definition of a criminal offence.[90] The elements of which the definition of a criminal offence is composed constitute, together with the different doctrines that make up the 'general part' of substantive criminal law, the criminal law system's sphere of efficacy, the criminal equivalent of the intersubjective life-world. In this connection, the concept of intent can usefully be regarded as the *pivotal point* between both spheres of reality, that is: between the concrete, everyday life-world, on the one hand, and the abstract and doctrinal world of the criminal law on the other. Intent is offence-related in the sense that it derives its contours and its meaning from its objective correlates: the objects, as formulated in juridical terms in the definition of criminal offences, towards which intent is directed. The human subject is directed intentionally – knowingly and willingly – towards objects in the social life-world. His own apperceptions of his actions are the products, not of juridical, but primarily of social formation. The subject's intention in acting is, on that account, primarily related to the meaning which his action has within the social, pre-legal life-world. The question is now: how can this pre-legal apperception of the acting subject acquire criminal relevance?

In my view, attaching criminal relevance to a subject's pre-legal apperception of his action is precisely tantamount to the attribution of intent to the subject. By way of this intent-attributing judgment, the defendant's action is *juridically* labelled as an intentional action; this juridical label may, but need not necessarily overlap with the pre-legal, intersubjective meaning of the action

89 See Foqué et al., supra note 86, pp. 129-151; Foqué, supra note 52, pp. 338-341.

90 In Dutch criminal law, the elements of the legal definition of the offence towards which intent has to be directed are those elements which are 'governed linguistically' by the element of intent; see Kelk, supra note 29, p. 210-212. See also J. de Hullu, *Materieel Strafrecht. Over algemene Leerstukken van Strafrechtelijke Aansprakelijkheid naar Nederlands Recht*, 2006, pp. 209-214. In the common law tradition one distinguishes in this regard offences requiring only a 'general intention', i.e. the intentional commission of their *actus reus*, and offences requiring also a 'further intention' reaching beyond the *actus reus*. See Fletcher, supra note 29, pp. 121-122; Duff, supra note 83, pp. 38-40.

under consideration.[91] For this reason, the act of attribution of criminal intent is governed – or so I will argue in Subsection 4.2.3 – by several demands that ensue from the principle of legality. The attribution of intent connects the pre-legal meaning of an action with its juridical meaning. German criminal doctrine has adorned the above-mentioned pivotal function of the concept of intent with the melodious name: *Parallelwertung in der Laiensphäre*.[92] The principal meaning generally ascribed to the doctrine thus designated is that, according to it, the possibility of proving intent is not precluded in cases where the defendant has – or claims to have – erred with regard to the unlawfulness of his action. Proof of intent, in other words, does not require it to be established that the acting subject had been aware at the time of the offence of the punishability of his action.[93] Although it is clear that the possibility of proving intent is not conditional upon the defendant's realization of the exact *juridical* meaning of his action, it should be equally clear that the juridical meaning of the action can be pinned on the defendant only on the condition that the defendant had at least realized the *social* meaning of his action.

4.2.3. The principle of legality and the argument from teleology

In Section 2 hermeneutics was described as a body of knowledge concerning the epistemological foundations underneath any form of intersubjective communication and interpretation. We have seen that any act of interpretation – or any act of conferring meaning to an object – entails a dialectics of appropriation and expropriation. The operations of the criminal law system provide many examples of this mechanism. The criminal law system contains concepts and norms on the basis of which extra-legal actions are bestowed with juridical meanings. To this extent the criminally processed action is appropriated by the criminal law system and expropriated from its original 'author', the acting subject who is called to account for his action before the court. We have seen in the previous subsections that this mechanism is also manifest in the interpretative context of the furnishing of proof of criminal intent. Through the court's judgment on the proof of criminal intent the defendant's intention in acting is *juridically* labelled as criminal intent and thereby incorporated into the doctrinal reality sphere of the criminal law; this juridical label may, but certainly need not overlap precisely with the acting subject's pre-legal intention.

In order for the legal concept of intent to fulfil its pivotal function described in the previous subsection, the legal meaning of the concept of intent has to reflect or 'parallel' the defendant's pre-legal intentional directedness to a sufficient degree. From this it follows that the semantic issue pertaining to the contents or definition of the concept of intent and also the methodological or interpretative issue pertaining to the furnishing of proof of intent are governed not primarily by the principle of personal guilt or culpability, but first and foremost by the *principle of legality*.[94] The criminal law system fixates aspects of the world in formalized meanings. The

91 See Mooij, supra note 14, p. 274: 'Rules of experience valid throughout a language community will determine whether an act should be labelled as intentional or accidental – inside this community. Within a dogmatic and, subsequently, jurisprudential setting, however, these concepts may be refined, thus acquiring a different (and sometime a very different) connotation.'

92 See A. Kaufmann, *Die Parallelwertung in der Laiensphäre. Eine sprachphilosophischer Beitrag zur allgemeinen Verbrechenslehre*, 1982; W. Schild, 'Der strafrechtliche Vorsatz zwischen psychischem Sachverhalt und normativem Konstrukt', in R. Jakob et al. (eds.), *Psyche, Recht, Gesellschaft*, 1995, pp. 119-140, pp. 131-132, 135-136. It should not come as a surprise that this doctrine was developed in a legal system stemming from the civil law tradition, considering that the civil law tradition is generally characterized by its relatively formal statutory definitions of criminal offences, evoking a somewhat 'bureaucratic' conception of the rule of law or the principle of legality. Cf. note 97, infra.

93 This is the principal rule to which there are different exceptions; for the Dutch law on the matter, see De Hullu, supra note 90, pp. 209-212.

94 The question whether, and to what extent, the defendant can be said to have had the possibility of acting differently, or of refraining altogether from acting as he had done, should be distinguished from the question of whether or not the defendant has acted intentionally. Proof of intent does not establish the defendant's culpability or blameworthiness; intent only provides the foundation for the *presupposi-*

language of (criminal) law, including its jargon and its conceptual distinctions, is not a completely autonomous and self-referential artificial language, but it clearly does deviate from colloquial language. This is of course quite unavoidable, as it is part of the criminal law's function to *abstract* (in the Luhmannian sense of: 'seeing away from', 'leaving out') from the inexhaustible variety of events and incidents that take place in the intersubjective life-world, in order to regulate that same life-world by means of a system of general legal norms. But inherent in this process of formalization is a potential dysfunctional tendency which has to be prevented from actualizing itself.

As was noted in Subsection 1.3 the notion of legality serves as a demarcation criterion: it is the principle on the basis of which it is decided what phenomena can, and what phenomena cannot be deemed 'legal' or in conformity with the law.[95] But this definition of legality as a *principle* of criminal law is of course too poor. The principle of legality is a 'system-immanent' principle in that it identifies instances of (criminal) law: according to it, certain phenomena (e.g. certain interpretations of legal norms or concepts) count as parts of the criminal law system, and others do not. But in view of the fact, discussed in Subsection 2.4, that the criminal law system constitutes a counterfactual, doctrinal world, symbolically disassociated from the empirical life-world, the principle of legality fulfils its system-immanent purpose with an eye to an important system-transcendent value: legitimate authority. The principle of legality ultimately serves to prevent the criminal law's symbolically structured, doctrinal and counterfactual reality from alienating too strongly from the pre-legal, intersubjective life-world. It provides the key to answering the question, posed in Subsection 2.4.2, in what way the criminal law system can and should – *de lege ferenda* – live up to its claim to legitimate authority with regard to the concept of criminal intent.

The principle of legality can be taken to serve the purpose of safeguarding the quality of the communication of the law to the addressees of the law. The quality of the way in which the law is communicated to the subjects of the law is partly constitutive of the *confidence* which citizens have in legal authorities.[96] This confidence is frustrated when the law becomes too remote from the way ordinary people understand their own conduct. When the law alienates too much from the pre-legal life-world it is rendered inaccessible to its addressees. The principle of legality is that aspect of what in the common law tradition is referred as the 'rule of law', on account of which it is required that the law be *predictable*. The law should be clearly formulated and made publicly available so as to ensure that all subjected to the law are able to conduct their lives without running the risk of being exposed to arbitrary state action; in line with these requirements addressed primarily to the legislator, the judge or court, in his or its turn, should not 'create' judgments *ex nihilo*, but should instead base them, as much as reasonably possible, on the pre-established provisions of the law so as to ensure that his/its judgments contain reasonably *predictable*, and not arbitrary promulgations of the law.[97]

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tion of culpability and blameworthiness. This presupposition of culpability, not the proof of intent, can subsequently be challenged and possibly nullified in the event that a certain 'excuse' happens to apply. See De Jong, supra note 1, pp. 297-308, 316-383.

95 Cf. Dworkin, supra note 4, p. 170: 'A conception of legality is therefore a general account of how to decide which particular claims of law are true: Hart's sources thesis is a conception of legality.'

96 F. Allen, *The Habits of Legality. Criminal Justice and the Rule of Law*, 1996, p. 17. See also Mooij, supra note 14, p. 234: '(…) the validity of a law system, rather than being dependent on power, becomes linked to the recognition of a legal order by legal subjects (*rule of law*). This fundamental prerequisite of separation essentially transfers the law from the sphere of power, and the dimension of the imaginary, to the symbolic dimension. That said, its actual realization has remained faulty, bound as it is to both time and place.'

97 This requirement, addressed to the adjudicating judge, constitutes the counterpart of another important requirement issuing from the principle of legality which is directed to the legislator: the *lex certa*-requirement or *Bestimmtheitsgebot*. For a detailed discussion, see De Jong, supra note 1, pp. 178-195, 221-230, 244-250. The account presented above reflects what Raz calls the bureaucratic model of the rule of law; see Raz 1994, supra note 85, pp. 370-378, p. 371: 'This view of justice is bureaucratic because it concerns the conduct of bureaucratic

It is important here to emphasize that the foregoing statements on the function of the principle of legality should not be taken naively. We have seen in previous sections that the criminal law system assesses facts stemming from the social life-world in terms of legal norms and concepts that together constitute an *idealized abstraction* of the social life-world. Legal norms receive their actual meaning at the occasion of their application to a set of facts. This implies that the norms of the criminal law, at their content level, are necessarily characterized by a fundamental indeterminate quality, a lack or void, which is exactly the quality needed for the norms to be amenable for interpretation.[98] Moreover, we have seen that we do not have available an external or a 'higher order' standpoint wherefrom the legitimacy of the different judgments arrived at by the application of legal norms and concepts can ever be guaranteed. What we are left with is nothing more – but also nothing less – than an *aspirational ideal* of legality: by adhering to the principle of legality a legal community commits itself to keeping faith with its past, to being guided by publicly available standards already in place – but in full awareness of the fact that, due to the indeterminate quality of legal norms and concepts, no judgment can ever be *fully* or completely justified.[99]

This ultimate and undissolvable deficit in the legitimacy and justifiability of criminal judgments implies that the criminal law system's autonomy cannot be absolute or unrestricted. Although it is undoubtedly true that the criminal law shapes its own image of reality, the criminal law cannot avoid *referring*, with every application of its norms and concepts, to the extra-legal life-world of intersubjective relations, which, according to its function, it is supposed to regulate. The principle of legality, on this account, raises barricades against expanding the semantic scope of the concept of intent too drastically, and against ways of furnishing the proof of intent which lay too heavy emphasis on intentionality's subject-extrinsic moment.[100] At this point an important but difficult question announces itself: how should the judge's legal interpretation concerning the proof of criminal intent, on the one hand, and the defendant's own interpretation of his intention in acting, on the other, be brought into conformity with each other? The answer that I suggest is that the court's deliberation with regard to intent is divisible into two steps that correspond to the first and the second requirement for the imputation of criminal liability discussed in Subsection 2.3.

The first requirement pertains to the question of proof; the second pertains to the question of whether or not a proven action can be legally 'classified' as a criminal offence on the basis of the applicable provisions of substantive criminal law. The first matter of importance is that *proof*

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institutions in their relations with isolated individuals. So understood, the doctrine concerns law-making and dispute resolution by anonymous strangers inhabiting impersonal institutions based on abstract principles and elaborate procedures. It does more than presuppose this bureaucratic context. It positively requires it. It argues for an implementation of the rule of law in a way which requires elaborate bureaucratic machinery with meticulously observed and policed procedures, which can be relied upon to be fair even when used by anonymous officials, and which require for their success anonymous impartial institutions, inhabited by impartial strangers.'

98 Mooij, supra note 14, pp. 224-228.

99 Dworkin, supra note 4, pp. 13, 183-184. Dworkin rightly terms the aspirational concept of legality a contested concept (p. 5): '[W]e agree that the rule of law is desirable, but we disagree about what, at least precisely, is the best statement of that ideal.'

100 It should be noted that this account is based on a number of normative statements (of the sort which Raz terms 'statements from a legal point of view'; see Raz, supra note 76, p. 170; and see Bix, supra note 7, pp. 183-184). The account, therefore, is compatible – as was indicated also supra in the introduction – with different ways of conceptualizing intent in criminal law, and with different ways in which the concept of intent can be applied by adjudicating institutions in specific cases. In De Jong, supra note 1, pp. 351-371, I argued that the Dutch case law on intent shows tendencies towards emphasizing the objective, subject-extrinsic moment of the concept of intent, and that the concept of intent seems primarily to be indicative of the criminally relevant meaning *of* an action, while it expresses the relationship of a subject *to* his action – i.e. the subject-intrinsic aspect which grounds the subject's blameworthiness or culpability for the action under consideration – only in a derivative way. These tendencies or developments do not in themselves *provide* the argument on account of which it is stated that the principle of legality provides the means to curb both the semantic scope of the concept of intent and the interpretative process of the furnishing of proof of intent. But they do enhance the force of the argument.

of intent can be established only on the minimal condition that the intention externally 'observed' by means of the normativising method can reasonably be *assumed* to parallel the defendant's own apperception of his action. This first step impels the adoption of an *individualizing* interpretative strategy: the court's judgment on intent needs to fit in with the way in which the defendant can reasonably be held to have 'directed' himself intentionally towards the pre-legal life-world. By way of this individualization, the proof of intent can be 'cut out' in such a manner as to display the necessary properties that make it *fit* for entering the judge's deliberation on the ultimate question of whether or not the defendant is liable to punishment. In this way, the practical and *narrative identity* of the defendant can be taken into consideration in order to prevent a complete eclipse of the subject-intrinsic moment of the concept of intent.[101]

The defendant's intention is primarily directed towards the social world, not towards the doctrinal world of the criminal law. In the first step of the judge's deliberation on intent it is ascertained in what manner the defendant has intentionally expressed himself, i.e. the way in which he has intentionally 'given himself to understand' in the social life-world. In a second step, the adjudicating judge needs to connect this with the way in which the *criminal law system* expresses itself or gives itself to understand in its various legal provisions which define criminal offences. This is exactly what happens when the judge attributes *criminal* intent to the defendant. To put it somewhat exaggeratedly: the judge confronts an aspect of the defendant's concrete perception of reality with the abstract world of the criminal law's different concepts, in order to assess whether and to what extent the two 'horizons of understanding' can be brought to coincide under the common denominator of intent. By means of the establishment of intent the defendant's perception of the world is brought into contact with the criminal law's way of perceiving the world. In this way the pre-legal life-world is, as it were, channelled into the doctrinal, normative world of criminal concepts. If this succeeds, the judgment on intent is most likely to be susceptible to acceptance or appropriation by the addressees of the judgment. And, consequently, its authority and legitimacy are most likely to be recognized.

5. Concluding remarks: mind the gap, please

The foregoing discussion has made explicit a number of important presuppositions underlying the criminal law on the basis of which it is possible, I think, to build a reasoned theory of the concept of intent in substantive criminal law. The different arguments presented in this article were grounded on the consideration that interpretations should be attentive to the very reasons we have for paying attention to the object of interpretation. This consideration has impelled the adoption of a hermeneutical, teleological perspective. Our hermeneutical inquiry into the *nature* of the concept of intent in criminal law has resulted in the very basic, and hence not very surprising, conclusion that the criminal concept of intent is a bivalent concept in two respects. Firstly, intent, like its pre-legal equivalent, is at the same time both subject-intrinsic and subject-extrinsic. This implies that a subjective utterance can in principle be taken to 'count as' a specific act intersubjectively, i.e. as an act with a certain, intersubjectively recognizable meaning, by virtue of intersubjective or constitutive standards in society. This point was illustrated with some

101 Between the objective sphere of truth-finding and the normative, prescriptive sphere marked by the imputation of criminal liability there lies an epistemological gap. The gap between the alethical domain of statements on facts ('is') and the deontological domain of statements on responsibility and guilt ('ought') is bridged – as was noted in Subsection 2.4.3, supra – by the mediating efficacy of a narrative dimension, laying bare a wide axiological sphere where facts and norms can only exist in interdependent reciprocity. This view cannot be elaborated upon further here; for references, see note 51, supra. For an application of this view to the criminal law, see De Jong, supra note 1, pp. 72-78, 195-221, 371-383.

remarks on the so-called 'normativising method' that is practised in the furnishing of proof of intent.

The exploration of the theoretical foundation underlying this interpretative method has shown that the intersubjective meaning *of* an action can be identified with the intention of the acting subject materialised *in* this action. This implies that when applying the normativising method, the underlying intention is conceptually narrowed down to that aspect of intentionality that materialised in the action under consideration. In other words: the normativising method concentrates on the 'subject-extrinsic' aspect of intentionality and puts the 'subject-intrinsic' aspect thereof between brackets. The normativising method thus has its foundation in a theory of action, within which the position of the acting subject is threatened by a marginalisation that tends towards an eclipse of the notion of subjectivity. I have argued that a concept of criminal intent characterized by a complete eclipse of any reference to the subject-intrinsic relation between the subject and his action is incompatible with the reasons we have for employing the concept of intent in criminal law.

This brings the second bivalent property of criminal intent within sight. The concept of intent in criminal law presupposes and is linked to the general, common meaning of the concept of intention, which in turn is embedded in the wide field of intentionality. However, as criminal law specifies the concept of intent in conformity with its own requirements in order to have the concept fit in with the criminal law's general orientation towards imputation, it also deviates from the pre-legal concept of intention to a certain degree. The criminal law is commonly taken to fulfil the function of contributing to the stabilization of normative expectations within society. Following political decision-making, the criminal law canonizes as 'legal goods' certain normative expectations in society, which it is subsequently expected to 'immunize' against possible violations in the form of criminal offences that take place in the social life-world. In order for this immunization process to have the required effect, the criminal law system is in need of practicable concepts whose meanings are outlined to a sufficient degree of precision, even at the price of creating a counterfactual gap between the different criminal concepts and their pre-legal equivalents.

The principle of legality serves the purpose of securing the predictability of the criminal law. The value of the law's predictability can only be safeguarded on the condition that the concepts employed by the criminal law system are defined to a sufficient degree of precision. As a consequence of this, the criminal concepts often have more precise meanings than have the rather diffuse, pre-legal concepts of which they are legal particularizations. The criminal law's own concept of intent illustrates this point. However, the principle of legality also stipulates the requirement that legal concepts do not become too remote from everyday concepts. I have argued that it is exactly on the basis of its twofold bivalence that the concept of intent in criminal law is to be regarded as a *pivoting point* between the factual, intersubjective and pre-legal social world, on the one hand, and the normative, doctrinal world of the criminal law, on the other.

There is a symbolic interval in place between the normative world of the criminal law and the pre-legal life-world of intersubjective relations. The symbolic order of the criminal law is an abstraction of the empirical life-world including its various social practices. Facts and circumstances stemming from the intersubjective life-world are legally encoded or formalized into cases suitable for criminal processing. Through the legal encoding or formalization of initially pre-legal facts and actions these facts and actions are appropriated by the criminal law system and expropriated from the parties immediately concerned. And this mechanism entails a *loss*: it is impossible for any system of universal and *per definitionem* abstract legal norms to do *full* justice to the inexhaustible variety of concrete events and incidents that take place in the intersubjective

life-world. This implies that a more philosophical consideration of the nature of the principle of legality brings to light the paradoxical insight that no juridical regulative system can ever be supposed to be *perfectly* legitimized.[102]

The criminal law system cannot allow itself to put this undissolvable deficit within sight of its environment too prominently. But this does not preclude the possibility of activating within the criminal law system a permanent *awareness* of the fact that all law's claims to legitimacy and definitive rightness ought to be accompanied by a certain 'proviso'. The permanent deficit in the legitimacy and justifiability of criminal judgments burdens the adjudicating judge with a permanent 'uneasy conscience' which encourages him to constantly keep a nuanced eye for the singular in applying the abstract concepts of the criminal law. Legal concepts often have a tendency to expand their 'extension' or scope of applicability. This process needs curbing. The concept of intent, as defined by criminal law in accordance with the functions which the criminal law system is taken to fulfil in society, ought not to be bestowed with a meaning too far removed from the pre-legal concept of intention.

I have argued in this connection that the principle of legality impels the adoption of an *individualizing* interpretative strategy: the court's judgment on intent needs to fit in with the way in which the defendant can reasonably be held to have 'directed' himself intentionally towards the pre-legal life-world. Hence, the *narrative identity* of the defendant needs to be taken into consideration in order to prevent a complete eclipse of the subject-intrinsic moment of the concept of intent. If this succeeds, the court's judgment will most likely be susceptible to acceptance or appropriation by the addressees of the judgment. And, consequently, its legitimacy is most likely to be recognized. The principle of legality provides the lubricant by means of which the compatibility between the doctrinal world of the criminal law and the extra-legal life-world can be safeguarded, and by means of which the pivoting point between these worlds can be prevented from rusting.

102 For a detailed discussion, see Van Roermund, supra note 21. The *awareness* of this undissolvable deficit can be taken to be rooted ultimately in modernity itself. Modernity can be conceived of as the experience of the breakdown of the harmonious *épistèmè* characteristic of the classical and pre-modern world. Since the beginning of the modern era man has become accustomed to thinking in terms of a *distance* or interval between the human subject and the world of which he forms a part. Modern hermeneutics links in with this way of thinking in that it focuses on the borderline between the experiences of familiarity and strangeness, proximity and distance. This ambivalence is already inherent in language, that structures and orders reality symbolically: language denotes aspects of reality, but in the process of denoting something also gets lost. The deficit that appears as the result of the symbolic order of language is permanent. The human subject is subjected to the order of language, but this subordination also enables him to 'project' his existence in relative autonomy. See also K. Raes, 'Legality and the Mirror of Language. Some Remarks on Law's Textuality', in R. de Lange et al. (eds.), *Plural Legalities. Critical Legal Studies in Europe*, 1991, pp. 209-225; and Mooij, supra note 14, pp. 183, 237-239, 249-250.