Chapter 1

Overarching Thought: Criminal Law Scholarship in Utrecht

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1 Preliminary notes

1.1 The different Utrecht Schools: a note on periodization and terminology

The many different contributions to the present book are dedicated to past, present, and future research of the so-called 'Utrecht School' in the fields of criminal law, criminology, and forensic psychiatry and psychology. The academic institute at Utrecht University where these scholarly disciplines are gathered and, to some extent, integrated celebrated its eightieth anniversary in 2014. On October 1st 1934 Willem P.J. Pompe founded the 'Criminological Institute'. Pompe was a highly acclaimed criminal law scholar. He initiated and epitomized a specific and rather influential academic movement, based on multidisciplinary cooperation between jurists, criminologists and psychiatrists. This is why, in 1974 – forty years after its formation, eleven years after Pompe's retirement, and six years after his death – the Institute was renamed after its founder: *Willem Pompe Instituut voor Strafrechtswetenschappen*.

Although it developed rather spontaneously, and not as a result of a prefigured intention of creating a certain school of thought, the movement initiated by Pompe was indeed, in 1959, labelled by the French criminal law scholar Jacques Léauté as 'a new school of criminology: the Utrecht School' (*Une nouvelle école de criminologie: l'école d'Utrecht*).[1] Ever since, the term Utrecht School has been used to designate the multidisciplinary cooperation that was epitomized by Pompe. This term – 'Utrecht School' (*Utrechtse School*) – easily causes confusion, however, because it has been, and is being, used to refer to also *other* schools of thought that have developed in Utrecht, that is: schools that differ from the movement initiated by Pompe, although they certainly are related to it in notable respects.

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1 Léauté, 1959.

Firstly, within the relatively broad context of the history of psychology and the other human sciences, the term Utrecht School is taken to refer to an assembly of predominantly phenomenologically-orientated Dutch psychologists, pedagogues, psychiatrists, criminologists, and jurists, who became authoritative intellectuals after the Second World War, not only within but also beyond the boundaries of their own disciplines.[2] The names of the psychologists F.J.J. Buytendijk, D.J. van Lennep and J. Linschoten, the psychiatrists H.C. Rümke, H.J. van den Berg and P.A.H. Baan, the criminologist G.Th. Kempe, the pedagogue M.J. Langeveld, and the jurist W.P.J. Pompe were the most notable ones connected with this assembly. In the remainder of this chapter, we will refer to this wider scholarly collaboration as *the Utrecht School 'in the broader sense'*.

Secondly, within the somewhat narrower context of Dutch criminal law scholarship (which is the context with which we will be occupied mostly in this chapter), the term Utrecht School is primarily taken to refer to the aforementioned multidisciplinary academic movement that was initiated by Pompe in the 1930s. The three main figures behind this 'delinquent-centred' movement were, apart from Pompe, the criminologist Kempe and the psychiatrist Baan. In addition, R. Rijksen and B.V.A. Röling, who later became a pioneer in the field of polemology (war studies) at the University of Groningen, were important figures within this movement. This influential multidisciplinary cooperation between jurists, criminologists and psychiatrists will henceforth be referred to as *the 'old' Utrecht School*.

The old Utrecht School had its heyday roughly between 1950 and 1963. After an interval of approximately seven years, the Institute welcomed a new academic movement that gave rise to a second heyday between 1970 and 1980. This movement was epitomized by the jurist and sociologist A.A.G. Peters, who initiated a strongly socio-critical approach within criminal law scholarship, aimed at the emancipation of the delinquent individual. In the remainder of this chapter, we will refer to this scholarly movement as *the 'new' Utrecht School*. As was the case with the old Utrecht School, it was people from outside who first attached the label 'school' to Peters' movement.[3] During the 1980s, the era of 'grand narratives' or 'ideologies' was considered to have come to an end. This does not mean, however, that a certain *esprit de corps* did not continue to inspire the Institute's staff members. Since 1980, the Institute has however no longer collectively manifested itself to the outside world as a 'school'.[4]

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2 Weijers, 1991, p. 9; see also Abma, Bos, Koops & Van Rinsum, 2009.

3 Nagel, 1981; Remmelink, 1980.

4 This is why in our exposition throughout this chapter, the days of the new Utrecht School end around 1980. However, a number of scholars at the Institute carried further the so-called 'juridification movement' initiated by Peters in the 1980s and later (see subsection 3.4, *infra*), which is why some authors include also these later developments in their description of the new Utrecht School. See Remmelink, 1980.

1.2 The Classical School and the Modern School: a note on international orientations

At the time when the Institute was founded, the intellectual – and partly also political – rivalry between the so-called Classical School (chiefly inspired by the writings of Cesare Beccaria and Montesquieu) and the so-called Modern (or New) School (inspired by the writings of Cesare Lombroso and Enrico Ferri) had all but ended. The Dutch Criminal Code, that came into force in 1886, was still typically a product of the Classical School; in the early decades of the twentieth century, however, several new provisions were added to the Code that were clearly founded on ideas that had been brought forth by the Modern School.[5] The antagonism between both schools also strongly coloured the views of the members of the old Utrecht School. For this reason, and also because we will refer to the Classical and the Modern School on different occasions in the following sections, it seems useful to spend, however sketchily, a few words here on both these international schools of thought.

Particularly Pompe had anticipated already early that the very abstract and universalistic views regarding the delinquent that prevailed within the Classical School would be challenged increasingly by the newer insights produced by the Modern School concerning the concrete delinquent individual.[6] The Classical School focused its attention primarily on the *criminal act*, and not on the delinquent. The delinquent person was commonly presupposed to be an independent, self-confident citizen.[7] His autonomous position vis-à-vis the state was to be *protected* by means of legal safeguards, which were provided in the legalistic framework that prevailed well into the nineteenth century. The strictly interpreted principle of legality was considered to be of paramount importance, not only with respect to the question of what qualifies as a criminal offence (*nullum crimen sine lege*), but also with respect to the imposition of penal sanctions that had to be regulated clearly and uniformly (*nulla poena sine lege*). The justifying ground for the imposition of criminal sanctions was primarily found in the retrospective concept of proportional *retribution*: a just and 'deserved' punishment is commensurate with the seriousness of the committed crime and the culpability of the offender.

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5 For example: special statutory provisions on juveniles aimed at treatment and education (*Kinderwetten*) were introduced in 1905 and 1921-1922; the modalities of a suspended sentence (*voorwaardelijke veroordeling*) and of parole (*voorwaardelijke invrijheidstelling*) were respectively introduced and broadened in 1915; new statutory provisions on mentally disturbed delinquents (*Psychopathenwetgeving* – that formed the basis for the development of the current system of compulsory psychiatric treatment) were introduced in 1925 and 1928; the rehabilitation or re-socialization of the offender became one of the central aims of the prison sentence in 1951. See Van Kalmthout, 1990.

6 In fact Pompe anticipated this already in his doctoral dissertation (Pompe, 1921); see Fijnaut, 2014, p. 444 and p. 463.

7 In his inaugural lecture (Pompe, [1928] 2008a), Pompe described the classical portrayal of the delinquent individual as a combination of two 'types': the *citoyen* and the *bourgeois*.

The Modern School, on the other hand, was less concerned with the criminal act, but all the more with the *delinquent individual*. This notable shift of focus was accompanied by an equally important shift in the ideology regarding the function of the criminal law. The emphasis no longer fell on the function of protecting citizens against possibly arbitrary interferences by the state with their private lives, but on the function of defending society against crime and delinquents (*défence sociale*).[8] For an adequate protection of society against criminals, it was thought necessary not only to introduce a far more lenient interpretation of the legality principle, but also to remove the rigidity of the rules on sanctioning. The justifying ground for the imposition of criminal sanctions was primarily found in the prospective concepts of (special) deterrence and prevention: the type and severity of the imposed sanction should not be uniformly regulated but should be determined according to the individual characteristics of the delinquent in question and his situation.

It is clear that the old Utrecht School – advocating as it did a strongly 'delinquent-centred' research focus, and urging criminal law officials to pay far more attention to the individual characteristics of delinquents – was strongly influenced by the Modern School. In general, the research of the old Utrecht School showed a wide international orientation, considering the many references to German, Italian, French, and American publications.[9] The same can be said of the new Utrecht School, although it derived its inspiration from very different theories (as we will see in Section 3). What connects the old and the new Utrecht School, however, is that both Schools considered the classical protective notions to be of paramount importance for the legitimacy of the criminal law. While it is true that particularly the members of the old Utrecht School were sympathetic to a number of central attainments of the Modern School, the prevailing view has always been that only *the law* – and hence not insights stemming from criminology or any other science, however valuable they may be – can afford legitimacy to state actions in the field of crime control, not by affording power to the state, but by limiting the state's powers.[10]

In fact, a 'combined' or 'united theory' – combining views from the Classical School and the Modern School – has been the dominant view in the Netherlands, at least since the middle of the twentieth century.[11] This theory makes a sharp distinction between the justificatory *ground* for punishing and the different possible *aims* of punishing. On the one side, proportional retribution

8 Although, as is convincingly argued by Groenhuijsen and Van der Landen (1990, p. 24-29), someone like Franz von Liszt (1851-1919), who epitomized the Modern School and founded the I.K.V. (*Internationale Kriminalistische Vereinigung*) together with the Dutchman Gerard Anton van Hamel and the Belgian Adolphe Prins in 1889, certainly also highly valued the principle of legality and other classical notions that protect the individual delinquent against the punitive measures of the state. See also Vervaele, 1990; Fijnaut, 1986, p. 2-3.

9 Fijnaut, 2014, p. 464.

10 Brants, 1999, p. 11.

11 See Kelk, 1994, p. 5-9.

is considered as the one and only legal ground for punishment and hence for the criminal law as such. Within the limits indicated by proportional retribution, however, it is possible to pursue certain (utilitarian or consequentionalist) aims, such as general and special prevention, rehabilitation, socialization et cetera. In other words: on the other side, the possibility is recognized to adjust the punishment *below* the maximum indicated by the retribution, when considering the personal background, the social and individual situation of the perpetrator and/or the goals of the penalty.

1.3 The structure of this chapter

Our focus in this chapter is on the *criminal law research* as it has taken shape at the Willem Pompe Institute between the year of its formation and, roughly, the year 2010. This means that we will say relatively little about the Institute's history of eighty years of criminological research and research dedicated to forensic psychiatry and psychology. Other chapters in this volume deal more elaborately with these two academic disciplines that have traditionally also formed constitutive elements of the Institute's research tradition.[12] However, considering the fact that the Institute has always strongly propagated the value and importance of multidisciplinary and – at times – interdisciplinary research, it is impossible to consider the history of criminal law scholarship in complete isolation. In the relevant contexts, we will therefore also venture a number of remarks on developments relating to criminology and forensic psychiatry and psychology.

In Section 2 we describe the most important developments in the history of the Willem Pompe Institute from a predominantly chronological perspective. Following on from our earlier preliminary note on periodization, we divide the Institute's history into three main phases: first, the period of the old Utrecht School (1934-1963, including both the start-up phase between 1934 and 1948 and the heyday between 1948 and 1963); second, the period of the new Utrecht School (1970-1980); and third, the period as of 1980. We will pay relatively much attention to the heyday of the old Utrecht School and of the new Utrecht School. The more recent period will be dealt with more briefly.

In Section 3 we take a more thematic and diachronic approach. We will examine what we consider to be three constant traits that can be discerned within the Institute's rich research tradition. The three constants are referred to with the catchwords: 'overarching (bodies of) thought', 'critique', and 'humanity and solidarity'. For each of the three constants we shall try to work out what were the more specific meanings that were lent to these constants and the associated notions in different periods of the Institute's existence. We should already remark at this point that the tripartite exposition is somewhat

12 See the contributions by Frank Bovenkerk, by Dina Siegel and Damián Zaitch, and by Frans Koenraadt to this volume.

artificial, at least to the extent that – as a matter of course – these rather wide-ranging notions have been interpreted differently in different phases. Nonetheless, we believe that the mentioned catchwords will help to illuminate the most important preoccupations of criminal law scholarship in Utrecht over the many years.

As a consequence of the double axis structure (chronological and thematic) that we have chosen for our exposition of the Institute's history, the occurrence of some overlaps in several passages has sometimes been unavoidable. We have, however, tried to limit the number of disturbing duplications as much as possible. We describe the history of the Willem Pompe Institute until approximately the year 2010; incidentally we have also drawn more recent developments into our exposition. Section 4 rounds up our discussion with some concluding observations pertaining to lessons from the past and to contemporary and future challenges.

2 Chronological characterization: a history of the Institute

2.1 The origin of the Criminological Institute

Before Willem P.J. Pompe, Professor of Criminal Law at Utrecht University and successor of David Simons since 1928,[13] founded the 'Criminological Institute' in 1934, he had been an advocate for several years. Pompe was a Roman Catholic and at the same time a convinced socialist. Therefore he was highly interested in the Roman Catholic Workers' Movement. The times – in 1934 – were gloomy: the enormous crisis after the Wall Street crash in 1929 and the advent of Hitler's Third Reich. A severe and stirring period dawned, in economic and social, but also in international political respects. Inevitably Pompe[14] was soon confronted with the extremely unfavourable consequences of this bad situation in his early professor days, not in the least he lacked financial means.

However, Pompe felt highly responsible for the development of 'criminal law' – not only as a science in itself, but also in connection to other relevant sciences such as criminology, sociology and psychiatry on the basis of empirical studies. This close-felt connection between these areas was for him the reason to call himself a 'lawyer-criminologist'. In his newly created institute he wanted to combine all sciences concerned in order to reach a multidisciplinary cooperation resulting in multidisciplinary research. This was also the reason for the name: 'Criminological Institute' instead of, for instance, 'Institute of Criminal Law'.

13 See Stijn Franken & Petra van Kampen in this volume.
14 See for a sketch of Pompe's life: Kelk, 1986a.

He was also concerned with the fate of young academics who were interested in scientific research, but could not find paid jobs in this field. All of this must be seen against the backdrop of a world in a time full of evil and wickedness; a world which urgently needed serious criminological analyses and conclusions. Pompe made a virtue of necessity in a clever way: he arranged a modest allowance from the then existing Foundation for Expanding the Employment of Academics for young researchers. The idea of a research centre was born, and Pompe also succeeded in finding accommodation for it in several temporarily empty rooms of the Utrecht remand centre.

In his quality as the Institute's founder and director, Pompe requested his first two PhD students to be his assistants, firstly B.V.A. (Bert) Röling, later on a pioneer of polemology (war studies) in Groningen. Röling wrote his thesis in 1933 on the – in his eyes undesirable – measure of keeping habitual criminals in custody for many years; a measure which did not come into force after all.[15] This very severe measure was an example of the so-called 'Authoritarian Current' in criminal law in Europe during the interbellum. Pompe's second assistant was G.Th. (Ger) Kempe, the later Professor of criminology in Utrecht, who obtained his doctorate in 1936 for his thesis: 'Criminality and religious community'.[16] These two were the starting point of many studies[17] and theses,[18] most of them of a sociological-criminological nature. In fact Pompe was a pioneer in the modern policy of appointing PhD candidates. The Institute's staff members also started giving courses and lectures to Utrecht university students.

During the Second World War, Kempe participated in the resistance to the German occupiers; he was involved in rescuing Jewish children. He was once arrested by the Germans, but luckily he was only held for a short time. In 1943 Pompe resigned as a protest against the occupation and he went into hiding. In this period in hiding he studied the question of how the law should be and how things should be organized after the war. His views were expressed in his book 'The new era and the law'.[19]

> In it Pompe reflected on the social characteristics of the recent period and on the question in which direction society should be led after the war. His point of departure was that wartime itself was a time of transition, or even complete turmoil. In his sketch of contemporary culture Pompe saw the degeneration of society as a consequence of (breaking down) nineteenth century individualism of citizenship and he recognized the breakthrough of a new spirit that would be focused on society as a whole: the concept of 'the citizen' would be replaced by the concept of 'the labourer' – self-supporting and serving society.

15 Röling, 1933.
16 Kempe, 1938 (Dutch: *Criminaliteit en kerkgenootschap*).
17 A list of these studies: Kelk, Moedikdo, Moerings & Swart, 1984, p. 323-324.
18 A list of all doctorate theses: Kelk, Moedikdo, Moerings & Swart, 1984, p. 325-326.
19 Vrij Nederland, 1945 (Dutch: *Het nieuwe tijdperk en het recht*).

After the war Pompe was appointed judge in the Special Court of Cassation – a temporary tribunal especially instituted for cassation trials of war crimes. According to reports, Pompe was offered some other high positions at that time, such as Minister of Justice and a member of the Dutch Supreme Court, but he emphasized repeatedly his preference to be and to remain the person he was: Professor of criminal law in Utrecht. To this position he remained true. He was very proud of his lifework, the Institute, and was never able at all to say goodbye to it.

2.2 The cooperation between Pompe, Kempe and Baan: the origin of the Utrecht School

Together with Kempe and the forensic psychiatrist P.A.H. (Pieter) Baan, Pompe initiated a multidisciplinary way of studying criminal law; in the Netherlands the notion dawned that this movement deserved attention. Generally, the onset of this interdisciplinary cooperation is set around 1948. Much later, namely in 1959, this cooperation was coined 'the Utrecht School', by a Frenchman, Jacques Léauté, a professor in Strasbourg.[20] This clearly displays that the Utrecht scientists also made quite an impression abroad, probably through their papers and lectures presented at international conferences and through their international publications.

In fact, the fundament for the thoughts of the old Utrecht School can be found in Pompe's inaugural address in 1928: 'The person of the perpetrator in criminal law'.[21] In this lecture Pompe showed himself to be a sensitive and analytic observer in his search for the importance and the contours of the individual human being in criminal law and especially the critical restrictions these pose for the law. This shows the kinship he felt with his predecessor David Simons, who always defended the principal point of view 'no punishment without culpability'. This is essential for the humane face of criminal law. Famous was Simons' valedictory address, especially because of his last words: 'Criminal law will be humane, or not be at all.'[22] This was exactly what Pompe had in mind.

The well-known Leiden Professor of criminology Willem Nagel wrote an extensive article about the Utrecht School (in 1963)[23] and he assessed the start of this School between the inaugural lecture of P.A.H. Baan as *lector* (in the previous Dutch university system a lector had a ranking just below that of a professor; it was equivalent to the English senior lecturer) in 1947

20 Cf. Léauté, 1959a.

21 This lecture is published in: Pompe, (1928) 2008a (Dutch: *De persoon des daders in het strafrecht*).

22 Simons, 1928.

23 See the biography of Willem Nagel by Kees Schuyt (Schuyt, 2010); on his relation to the (old) Utrecht School, see Schuyt, 2008.

and his inaugural lecture as professor in 1952.[24] Both lectures were entitled: 'Overarching thought', referring to the multidisciplinarity with which he positioned himself between psychiatry and law.

Paul Moedikdo, a senior lecturer in criminology at the Institute and also a good and faithful friend of Kempe, determined the beginning of the Utrecht School more precisely in 1948, when Kempe and Baan collaborated in a study-week for probation officers. For the first time Kempe publicly announced his theoretical reflection about the social reports to inform judges, a field in which Kempe himself practised from the 1930s onwards. Kempe reasoned that 'the reporting social officer had to put himself in the suspect's shoes' by using a psychological process of 'feeling and empathizing' with the person concerned, whereas Baan in his contribution on reporting on sexual offenders argued in favour of viewing this type of delinquent as 'somebody who is standing in the world in a different way from normal people, who has a diverging Modus of Being, but who nevertheless with this diverging Modus of Being also experiences his erotic reality.'

Indeed, it is this kind of approach and wording which may be considered representative of the typical 'Utrecht' writings published over the years. See also Kempe's inaugural lecture: 'Guilty Being' with the focus on being guilty in the world, implicit in the act of the perpetrator.[25] Because of his wrongdoing the perpetrator with his sense of guilt experiences the world differently, with changed feelings and perceptions. And the psychiatrist, the psychologist, the probation officer, but also the judge and the public prosecutor – everyone on the basis of his own task in the process – has to do their best to put themselves as much as possible in the perpetrator's new position and have to 'encounter' him. They have to meet each other as well – in the interest of the position of the accused as well as of the humanity of the process and the trial as a whole. This accumulation of all sorts of encounters was the rationale of their multidisciplinary cooperation. This is what Baan referred to when he presented the beautiful image of 'overarching thinking'. We may consider this as the symbolic core of the Utrecht scientific concept of combined criminal law sciences.

2.3 The heyday of the Utrecht School between 1948 and 1963

The delinquent centred

The researchers had a common denominator for their professional efforts: the ideal that the delinquent in the judicial system was to be treated as an *equal*, a fellow human being and absolutely not an abject object, which was often still

24 Baan, 1947 and 1951 (Dutch: *Overkoepelend denken*).
25 Kempe, 1950 (Dutch: *Schuldig Zijn*).

the practice in those days. Their so-called 'delinquent centred' way of thinking predominated.

Particularly Kempe was so shocked by all atrocious war experiences that he felt the urgent necessity of fundamental changes to the administration of justice:[26] from the Utrecht point of view the subjective experience of the justiciables was never to lead to bitterness, but had to make them susceptible to reform and rehabilitation. This is most urgent and salient during imprisonment. Kempe had great hope that an extension of the efforts of probationary services would be very beneficial and effective and he advocated this very actively both in lectures and publications. In his vision it was the common task for both criminology and probation to fathom delinquents more thoroughly in order to influence them in a positive direction, but with different implications for both disciplines, namely respectively in a theoretical and in a practical sense.

The mentally disturbed criminal was also a subject of special concern and care for the Utrecht researchers. Due to the great efforts of this group, particularly to the idealism and inventive activities of the always energetic Pieter Baan, the Psychiatric Observation Clinic for the Prison System, later named the Pieter Baan Centrum, was founded in the late 1940s.[27] In this clinic suspects on remand are subjected to a multidisciplinary examination of their mental state and their command of free will in relation to the serious crime(s) they (allegedly) committed. The judge can take these reports into account in deciding on the degree of accountability of the suspect. A residential clinic – the Van der Hoevenkliniek – was built for the treatment of criminals who had been sentenced to compulsory treatment (the Dutch measure *terbeschikkingstelling*) because of a lack or a low degree of mental accountability. Both clinics – located in Utrecht – have been and still are very important institutions in favour of a just approach to mentally disturbed delinquents by the judiciary.

A very essential characteristic of the Utrecht concept was the great value that was attached to the combination of creating theoretical conceptions and gaining personal practical experiences. For example, Kempe was functioning as a social probation reporter, Pompe as a deputy judge, Baan as a forensic psychiatrist, therapist and reporter, J.C. (Han) Hudig as a juvenile court judge, and moreover some of them were members of advisory councils or supervisory boards of the Ministry of Justice and other related institutions (Pompe and Kempe). They all did some practical work in their spare time to confirm and perhaps strengthen their own insights.

The people involved in the Utrecht School

The Utrecht movement was primarily based on the cooperation of Pompe, Kempe and Baan, but in the course of time new researchers joined them, often ex-Utrecht students and scientists who had achieved their doctorate under the

26 Janse de Jonge, 1991, p. 89-125 (about Kempe).

27 See Frans Koenraadt's contribution in this volume.

supervision of Pompe or Kempe, as well as assistants from elsewhere who were especially interested in research projects of the Utrecht Institute. Relevant offspring of the Utrecht School were: J.C. Hudig (Professor of juvenile law and youth protection; she wrote her PhD under Pompe's supervision), R. (Rijk) Rijksen (Professor of penology and penitentiary law, who also wrote his PhD with Pompe as his supervisor), and later on G.P. (Peter) Hoefnagels (Professor of criminology in Rotterdam, who wrote his PhD under Kempe's supervision). Hudig was the first female judge in the Netherlands and also a well-known juvenile court judge.

C. (Cees) Bronkhorst was also an important disciple of Pompe; his excellent PhD thesis was about 'force majeure' – a high profile theme in 1952 criminal law. He was generally thought to be Pompe's successor, but in a late-1950s lecture for the staff of the Institute he posed several dissenting opinions on the Utrecht School's view on the (in)humanity of criminal law. Thus at once he lost this honourable prospect. Pompe was furious and inexorable; it was a very painful history.[28] Bronkhorst moved to Tilburg University and was appointed Professor of criminal law there.

It shows clearly that Pompe *cum suis* were very strict and firm believers of their own doctrines and could not foster much flexibility in accepting differing thoughts and views. This attitude was *ex post* rather amazing, but probably it was in accordance with the context of the paternalistic way of thinking at that time. Over the years many lawyers, behavioural scientists, (social) psychologists, pedagogues, criminologists and sociologists have been employed in the Institute either as a teacher or lecturer, as a PhD student or as a member of a research project or as a student assistant. Some student assistants were even engaged in teaching. This leads to the conclusion that many people did participate in the 'Pompe culture' in the course of several decades.

> Someone who stands out is W.M.E. (Willy) Noach (1917-1985),[29] who worked at the Institute from 1956 onwards as managing director. Before this he had been Professor of criminology at the University of Indonesia in Djakarta. On his return to the Netherlands Noach obtained a personal lectorate in Utrecht, beside the chair of G.Th. Kempe. In 1980 his lectorate was changed into a chair until 1983, when he became emeritus professor. His main subjects were, among others, victimology and traffic legislation. He had written his PhD thesis under the supervision of Professor J.M. van Bemmelen (Leiden University) about the Special Criminal Jurisdiction after the Second World War.

Pompe's views

Pompe's ideas constituted the starting point for the Utrecht movement that formed and educated many generations of researchers, teaching staff members

28 See about this incident: Hoefnagels, 1994.
29 See Kelk, 1985.

and law students to a high degree. As a thoroughbred lawyer Pompe felt much affinity for the Classic School on the grounds of its intrinsic values, such as the protecting principles of justice (the principles of legality, culpability, proportional retribution et cetera), which represented humane thoughts. Pompe insisted on a strict interpretation of the law along the lines of the principle of legality, leaving no room for too normative or objectifying assessments of the offender's malicious intentions, wrongdoings or negligence, and neither for the application of a too subjective version of the doctrine of an attempt at performing a criminal act.

Furthermore, in his thinking the proportional retribution is *the essence of the penalty* and is inseparably bound to it. But the retribution has to be interpreted in a positive sense by the notion of 'making amends' – a restitution for the wrongs committed has to be made by the perpetrator through his penance: after this penance he will be accepted again by society. This view can be observed in the proposal for an advisory committee presided over by Pompe in 1957, intending to speed up the conditional release especially of long-term prisoners: the proposal contained the possibility to release them after the execution of one third of the imposed penalty instead of the then legally prescribed two thirds. Pompe regretted the negative reaction of the Minister of Justice, who refused to adopt this proposal.

Pompe took the doctrine of the 'good conscience' of criminal law very seriously. Hearsay has it that Pompe personally visited an armed robbery suspect in his prison cell to tell him not to agree with the conviction, especially with regard to the imposed sanctions. The case was dealt with by the Dutch Supreme Court in 1957 and the final decision was named after the man's nickname: 'Zwarte Ruiter'.[30] After his conviction for armed robbery he was sentenced to both fifteen years imprisonment and compulsory treatment for a non-specified time. But the prison term has to be determined proportionally with the assessed degree of accountability, which will more or less match with the degree of culpability. So a low level of accountability usually leads to a shorter prison term, and this certainly has to be the case when there is a combination of liberty-depriving sanctions. In this context a prison term of fifteen years is relatively very long, if not too long. That was Pompe's message concerning 'Zwarte Ruiter'.

Apart from his classical views Pompe showed himself to be completely accessible to social scientific insights. In this respect Pompe had at first sight a similar interest as the protagonists of the Modern School, but the difference was that he was at the same time concerned with the legal protection of citizens and the legality principle. He was a representative of the 'combined' or 'united theory': on the one side retribution is the legal ground for punishment, but on the other side the possibility is recognized to lower punishment *below*

30 Supreme Court (HR) 10 September 1957, *NJ* 1958, 5, with note by Pompe. *Zwarte ruiter* means 'black horseman'.

the maximum indicated by the principle of retribution, when considering the personal background, the social and individual situation of the perpetrator and/or the goals of the penalty, like general and special prevention, rehabilitation, socialization et cetera.

Pompe's concept of retribution was, to be clear, quite different from Kant's strict categorical imperative. Pompe's view was – in line with the development in his scientific thinking – gradually enriched. In his view it is inherent in retribution that a human being with a free will and the ability to influence this will has to be held responsible for his acts by punishment and has to have the opportunity to regain the faith of the community: in this way penance recovers its meaning of 'making amends'.

In Pompe's view this concept is also of importance during the execution of the penalty itself; he emphasized this again in his valedictory address in 1963.[31] Earlier, in 1947, he advocated retribution in the perspective of mercifulness (charity): 'Mercifulness can save us from highhanded ways of doing justice': vigilance is a great evil. Comparable was his warning that retribution must never be reduced to general preventive deterrence – this undervalues human beings and comes down to training dogs.[32]

Pompe's special colouring of criminal law was called 'ethical humane' by A.A.G. (Antonie) Peters, the later Utrecht Professor of criminal law and the sociology of law.[33] This qualification was also related to Pompe's critical ideas on the criminal process. He denounced the well-known phenomenon in the Dutch criminal process that the judge, who is used to forming his opinions already before the session in court on the basis of the data collected in the preliminary investigation, proves to have difficulties with the unprejudiced attitude he is supposed to show.[34]And with regard to the penitentiary stage Pompe stressed, for example, that prisons 'must not breed desperados',[35] who through a lack of perspective and despair are doomed to be a danger both to themselves and to others.

Research and publications

The heyday of the Utrecht School encompassed research projects resulting in important publications, as well as monographs such as Kempe's 'Probation in our society',[36] Rijksen's research on the opinions of prisoners[37] and the detention situation of long-term prisoners in the 'Koepelgevangenis' in Breda.[38] Furthermore, the Institute had its own 'Green Series' of internally produced

31 Pompe, (1963) 2008b.
32 Ibid., p. 103.
33 Peters, 1993d, p. 130.
34 Pompe, 1959b.
35 Pompe, 1957b, p. 93.
36 Kempe, 1958 (Dutch: *Reclassering in onze samenleving*).
37 Rijksen, 1958.
38 Rijksen, 1967.

theses and books containing collected articles and lectures that were given yearly in the month of May.[39]

Furthermore, all wrote textbooks: Pompe's beautiful and conscientiously balanced 'Textbook on Dutch criminal law',[40] Kempe's 'Introduction to the study of criminology',[41] which started out as an adaptation of a book under the same name by the famous criminologist W.A Bonger (1954), Rijksen's booklet 'Under lock and key',[42] J. Kloek's 'Dialogue with the criminal psychopath',[43] et cetera. And they also gave lectures and courses, for example to prison warders, probation officers and so on.

Moreover, Pompe and Röling (until Röling devoted himself entirely to the science of polemology after he founded the Groningen Polemological Institute in 1962) wrote subtle annotations to rulings of the Dutch Supreme Court that were published in the journal *Nederlandse Jurisprudentie*, frequently concerning fundamental and principal questions in criminal law. They were influential. Röling, for instance, was the creator of the concept of the 'functional perpetrator' – essential in the field of budding economic criminal law in the 1950s. Pompe made in-depth studies on the degrees of the perpetrator's state of mind at the very moment of his act: depending on the details of the situation concerned, what conditions influenced conscious intent or conditional intent, and did the perpetrator act with an advertent or inadvertent form of negligence (*culpa*)?

The importance of the Utrecht School

The Utrecht scholars were held in high esteem and perceived as authorities, particularly in the fields of probation and forensic psychiatry, but also by the judiciary. They regularly delivered lectures to societies of lawyers and other interested people. And besides their educational tasks they were also members of committees of social and political importance, such as the Fick Committee advising on the reform of the prison system in 1947, the Central Council for the Administration of Justice, which is an independent advisory committee on information for authorities about the citizen's criminal records, et cetera.

At the end of the 1950s the Utrecht School was fading out. Pompe's valedictory address in 1963 has been considered a full stop. It was Pompe's mental testament in several respects, under the title: 'Criminal law and trust in fellow human beings'.[44] The name 'Utrecht School', as mentioned before, was given by the Strasbourg Professor Jean Léauté, in fact more or less *ex post*. Pompe died in 1968.

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39 See for a list of these lectures: Kelk, Moedikdo, Moerings & Swart, 1984, p. 326-327.
40 Pompe, 1959a (Dutch: *Handboek van het Nederlandse strafrecht*; first printed 1935).
41 Kempe, 1967 (Dutch: *Inleiding tot de criminologie*).
42 Rijksen, 1968 (Dutch: *Achter slot en grendel*).
43 Kloek, 1968 (Dutch: *Dialoog met de criminele psychopaat*).
44 Pompe, (1963) 2008b (Dutch: *Strafrecht en vertrouwen in de mede-mens*).

There is a general acknowledgement of Pompe's eminent importance for Dutch criminal law and for the way in which he shaped his professorship during thirty-five years – inventive, authoritative and outstanding. Moreover, he was an impressive and charismatic personality. This granted him the stature of the Grand Old Man of Dutch Criminal Law. Because of his prominent leadership 'his' Institute would be renamed in 1974, on the occasion of the fortieth anniversary of the Institute, the *Willem Pompe Institute*.

2.4 The period 1963-1970: reverberation of the Utrecht School and rising social turbulences

The old generation was gradually retiring and being replaced by successors. Pompe was succeeded in 1963 by his old disciple W.C. van Binsbergen, who among other things had been a public prosecutor and had worked in Brussels. It was striking that Van Binsbergen already in his inaugural address[45] asked attention for questions about the attribution of power to point out contraventions and to determine sanctions in the law of the – then – European Community. He was one of the first Dutch lawyers to deal with the Europeanization of criminal law.

Furthermore, P.A.H. Baan was succeeded in 1957 by J. Kloek, also the psychiatrist-director of the Observation Clinic, later renamed the Pieter Baan Centre. Kloek's 'demonstration' lectures, involving talks with clinical patients for the sake of illustrated teaching, attracted many students also from other universities. Kempe remained Professor of criminology until 1976, when he retired. Rijksen and Hudig were also still in their function. Rijksen died in 1978[46] and Hudig said farewell in 1972. She died in 1996.[47] During her professorship multidisciplinary research was carried out (by Miek de Langen and Nel Rijksen) in the field of juvenile law and youth protection, but after Hudig was succeeded by M. Rood-de Boer the chair became more oriented towards a civil law approach to juveniles.[48] The spirit of the old Utrecht School was still kept going.

In 1969 Van Binsbergen suddenly left because he was appointed Attorney General at the Appeal Court in Leeuwarden. He was not the only professor in the Netherlands who left the university in that period. The social developments in the 1960s and especially the democratizing movements everywhere were to blame, impacting labour relations and relations at the university alike. These movements were intended to break down all antique and calcified, authoritarian structures of power in society and to firmly establish a new human image of the autonomous citizen. The famous years 1968-1969 with the occupation of the

45 Van Binsbergen, 1963, p. 6-9.
46 See Kelk, 1978b.
47 See Kelk, 1996. See also Ido Wijers, Stephanie Rap and Kristien Hepping in this volume.
48 For a detailed overview of the 'Utrecht' approach to juvenile criminal law, see the contribution by Ido Weijers, Stephanie Rap & Kristien Hepping to the present volume.

Amsterdam University board office ('het Maagdenhuis') topped everything: throughout Western Europe many student movements arose in order to gain a say in university policy, sometimes ending in revolt. All this started in Paris. The workers' movements followed and progressively a social snowball effect became manifest.

These events, of course, had implications for the legal system, especially criminal law and the administration of criminal justice, which are traditionally based on the classic relations of power, and for the structure of the educational system, certainly at universities. At the same time, in September 1969, the Utrecht law faculty was starting a new teaching system via smaller groups of students, which were counselled by young teachers. So the teaching staff of the Institute had to be extended with a number of people. And the Institute itself was searching for a new élan after a less spectacular episode since the end of the old Utrecht School.

2.5 'The new Utrecht School' with an emphasis on juridification (1970-1980)

Not long before a fresh sound coming from the USA had been heard: the sound of the civil rights movement. The very thought that many categories of socially deprived people urgently needed reinforcement of their legal position regarding their work, living, study, school and other situations, was considered as an appropriate supplement to the democratization movement. So the general thinking about law took a more emancipatory direction. After the departure of Van Binsbergen the search in Utrecht started to find a good successor to 'Pompe's chair'. One of the applicants was Antonie (Toon) Peters, who had defended his PhD thesis at Leiden University in 1966 on the theme: 'Intent and negligence in criminal law'[49] and had also completed a sociology (of law) study in Berkeley, among others under the supervision of Professors Philip Selznick and Philippe Nonet. Peters was appointed as Professor of criminal law in Utrecht in 1970.

Peters (1936-1994) had developed a strong theory about the true legal content or nature of criminal law (see subsection 3.3). This theme was the subject of Peters' inaugural address in 1972. To Peters' view the most important condition for a socially adequate and fair criminal law is formed by the structure of the procedure. This has to offer a fruitful forum for discussion – in his opinion – where the weak position of the individual citizen in his legal battle against the powerful state's authority can be strengthened under the influence of the action of principles of law, which have the property of being on the side of the weak and thus have to be interpreted in such a way and to be brought into practice charitably (see also subsection 3.3). In this sense the principles of law have a relatively autonomous stature.

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49 Peters, 1966 (Dutch: *Opzet en schuld in het strafrecht*).

Legal protection was in Peters' opinion the core of the legal content of criminal law. Certainly the lawyer who provides legal assistance is supposed to have creative, excellent and ingenious insights and skills. In order to confront education as well as research in the field of criminal law and criminal procedure with all those notions, Peters employed two part-time practising lawyers: Ties Prakken and Pieter Bakker Schut.[50] Through the increasing influence of the European Convention on Human Rights the concept of the legal content of criminal law became a very important issue.

It was remarkable how much Kempe showed himself to be enthusiastic about the new developments of refreshing changes in focus and was very well able to understand the old Utrecht ideas in the spirit of their time and to be open to new views. Sometimes he even created the impression of undergoing a kind of mental rejuvenation. When in the beginning of the 1970s angry students protested against the so-called Thousand guilders Bill (implying a huge increase in tuition fees) and for that reason occupied the auditorium of Utrecht University, Kempe did not hesitate for a moment, but walked together with Antonie Peters into the occupied auditorium and addressed the students with a sparkling plea in favour of the freedom of academic education which is also meant for poor students. This event caused a dressing down for both professors by the rector magnificus. Kempe shrugged his shoulders with great disdain and he created the impression of being 'juridificated' himself (on the notion of jurifification, see subsection 3.3, *infra*).

At the same time it was clear to all staff members of the Institute that indeed a new élan was growing. Nico Jörg and Constantijn Kelk, both young members of the teaching staff since September 1969, wrote a new study book on criminal law for undergraduate students, entitled: 'Criminal law in moderation'.[51] The old material available for students lacked clear, systematic and accessible texts. They offered not only descriptive texts, but also critical notes in the perspective of social justice and the principle that criminal law has the place of an *ultimum remedium* in the law system as a whole. They also paid attention to the new views on the legal content of criminal law. The elderly Dutch professors were somewhat sceptical about the fact that the opinions and views of the authors were openly displayed in the book. Nevertheless, the book has continued up until now and the twelfth edition was published in 2012.[52]

Besides the introduction of new scientific views, the *forms of education* also underwent changes: Peters and his staff tried to adapt the way of teaching to contemporary standards. This was in the first place the basic course of elementary criminal law and criminal procedure. In this course the students

50 Who wrote their PhDs on repsectively legal activism and the defence in the famous Baader-Meinhof trial; Prakken, 1985; Bakker Schut, 1986.

51 Jörg & Kelk, 1974 (Dutch: *Strafrecht met mate*).

52 With André Klip.

were divided into small groups of five people, who had to prepare weekly group discussions of the study material on the basis of certain questions. Their group report had to contain their reasoned conclusions of the discussions and had to be handed in and contributed to the final assessment of course.
Furthermore, the teaching team hired once per course the Amsterdam 'Werktheater' (action theatre). This theatre consisted of a company of several young and progressive actors who – criticizing the traditional theatre and therefore abstaining from scripts and stage dressing – expressed human feelings and interactions in precarious situations, like in psychiatric settings (for example, the patient in a psychiatric hospital during the therapy) or in the courtroom (for example, the accused and the judges) et cetera. The actors offered a pure and bare scene and played their roles in interaction with the public – seated in a circle around the players. There was a lot of improvisation in this 'alternative', idealistic and experimental theatre, which made the happening very vivid.
The company used to arrive at the university in an old Volkswagen minibus, packed with actors and a great number of props, and brought their messages for the pleasure of all those present. Their play was very informative and instructive for the students, because it relativized or confirmed the criminal law system with its severe rules and strong principles in an appealing and frivolous way. And the actors were happy with the academic acknowledgment. The Werktheater existed from 1970 until 2014 (of course, with a changing and rejuvenating cast).

Peters, in fact, started his own school, reaching far outside the Institute. He organized regular seminars and meetings for the staff members[53] writing their PhD theses, in order to discuss their concepts collectively. And then he also invited people from elsewhere who were interested in special themes and also writing theses themselves. Altogether it constituted a kind of intellectual community. The monthly staff meetings were also continued.

In October 1974 the institute's fortieth anniversary was celebrated. During this month five weekly evening lectures were presented by members of the Institute. The common theme of the lectures was: dilemmas in the present administration of criminal justice. This theme was elaborated in the fields of the protection of juveniles (by M. Rood-de Boer), the legal position of prisoners (by C. Kelk), discrimination during the investigation in the first stage of the criminal process (by M. Moerings) and public opinion in relation to the criminal judge (by G.Th. Kempe). The fifth evening an evaluating and reflective lecture was delivered by Antonie Peters. These five lectures were attended by an interested public, even by Pieter Baan himself, whose health was already critical. The discussions after the lectures were guided by Rijk Rijksen. The

53 They were, among others, P.J. Baauw, Th.J.B. Buiting, E. Prakken, P.H. Bakker Schut, G. Mols, A. van der Plas, N. Jörg and C. Kelk.

lectures were published in a green booklet.[54] In the same year the Institute was renamed from the Criminological Institute to: the *Willem Pompe Institute*.

In this way a more or less particular approach of criminal law was growing; and the outside world began to wonder about the eventual birth of a new or second Utrecht School. People such as the prominent Professor of criminology W.H. Nagel[55] and the prominent Professor of criminal law J. Remmelink[56] both believed this to be indeed the case. This new School, also called the 'Neo-Utrecht School', emphasized the individual approach of justiciable people, not in a psychological sense, but – different from the old Utrecht School – in a juridical sense: the main motive was juridification to protect the weak, as Peters accentuated. Again outsiders introduced the term 'School', but this was of course in line with the tradition of the old Utrecht School (see subsection 1.1).

Meanwhile the spirit of the democratization and society-critical movements of the 1970s had continued and many action and pressure groups were striving for the ideal of a better world, without wars and without authoritarianism. This was also stimulated by the worldwide resistance to the horrible Vietnam War and the role of the USA. Fortunately this war ended in 1976. This resulted in the USA, and in the rest of the Western world, experiencing a reactive culture of peaceful and freedom-loving expressions – also in sexualibus. Mainly young people preferred to lead a light and flowery lifestyle, a phenomenon which was named 'Flower Power'. They did not want to participate in the civil society with its traditional power relations. It was the time of the hippies, living in communities, smoking hashish and being involved in encounter groups to detect the inner self.

> In other Western countries anti-authoritarian movements evolved, for example in the area of education and in psychiatry. In Italy and Spain locking up patients was found to be more and more unethical within a short time (also because of the force and violence that was used in the institutions on behalf of the treatment!). This entailed some de-institutionalizing. Of course this movement was motivated by a relativizing view on the essence of a mental disturbance and the danger(s) that may eventually be expected from this. The insight dawned that mental disturbances are an improper discerning criterion between people. A well-known, rather defying slogan in those days was: 'Did you ever meet a normal person, and ... did you like it?'

Psychiatry in the Netherlands was influenced by these developments and this entailed new theories and new views on the human qualities of the psychiatric patient. Forensic psychiatry could not ignore these facts either. One of the psychiatrists engaged from the start in this development was Jan Foudraine. He

54 Kempe et al., 1974.
55 Nagel, 1982, p. 214.
56 Remmelink, 1980, p. 61.

wrote in his book with the meaningful title: 'Who is made from wood ...' on the basis of his experiences as a therapist, also in the USA:

> 'I mainly offered resistance to the labelling of people with problems and felt a strong repugnance against the botanizing of mental syndromes. I became convinced that terms such as "neurotic", "psychotic", "schizophrenic", "psychopathic", "manic-depressive" and God knows which other labels were pasted on people, and didn't have anything to do with a mysterious illness nor with anything transmissible.'

Similarly criminology was influenced by new theories. The question of the aetiology of factors – in the sense: do psychic or social or biological backgrounds explain individual criminal behaviour? – was in the past. The insight gained ground that the search for individual factors unjustly does not take the social structure into consideration, whereas it also influences deviant behaviour. More and more the pluralistic image of society became manifest, in which great differences in thoughts about norms and values may exist, so that generally formulated norms need to be interpreted continually. The labelling theory says that deviant behaviour is not generated per se, but by the way in which others react to this. The theory is not directed to the deviant behaviour itself, but to the inclination of majorities to label in a negative sense minorities or people who are seen as deviant from the standard cultural norms.

Critical criminology (also in radical versions) was born from the point of view that social class differences entail an unequal distribution of power and say in the matter. The initial emphasis was on property crimes of the socially weak persons and not on white-collar crime or organizational crime. This changed over time: the ethics of authorities and governments and the fate of victims are more the object of attention and study nowadays.

From a criminal law perspective one can say that the rather good-natured actions which sometimes took place in the domain of so-called 'civil disobedience' were very interesting. Only in exceptional cases was a mild sentence possible, more or less parallel to the thought of the 'absence of material unlawfulness', which is not an officially acknowledged ground of justification in Dutch criminal law. See, for example, the famous case of the 'Sosjale Joenit', concerning an 'alternative' social worker who had hidden a minor after he had ran away from his parental home and had deceived the police searching for the minor. This was a punishable offence (article 280 Criminal Code). The aim of the social worker was only to offer *careful assistance* to the minor and to protect him against actions whereas he still needed to be left in peace. The social worker argued to have used reasonable means for a reasonable aim. Nevertheless, the Supreme Court did not accept this argument.[57]

57 HR 3 July1972, *NJ* 1973, 78, and HR 16 October1973, *NJ* 1974, 29 (Sosjale Joenit I and II).

> However, much more serious actions could be observed then, such as the – already mentioned – occupation of the board office of Amsterdam University. The occupying students were convicted on the ground of disturbing the domestic peace. But there were also cases of aggressive political activism, for example the extremely left-wing German *Rote Armee Fraktion* (also called the Baader-Meinhof group), who did not shrink from deadly attacks on 'faulty powerful persons' (amongst them a judge). The members of this group said that they feared the revival of Nazi-minded sympathies. The opinion of the neo-Utrecht scholars was and remained that also these kinds of perpetrators, though perpetrators of political and terrorist acts, who moreover required that their legal counsel shared their ideology, were entitled to legal assistance. P.H. Bakker Schut was as lawyer who was actually involved in their defence provided by his German confraters. The Institute as a whole respected this, though several colleagues nevertheless had mixed feelings.

The 1970s were rather turbulent years, with repeated violations of the public peace and order and all the turmoil of enforcing new societal ideals. It is not coincidental that in exactly the same period, in 1971, a number of mainly young academic lecturers at different universities collectively founded a society for the reform of criminal law and the administration of criminal justice. This society was named: Coornhert Liga (after the humanist Coornhert (1522-1590), who was the instigator of the Amsterdam Rasphuis prison). This society favoured decriminalization and depenalization and argued for the humanization of criminal law because of the objections against the stigmatizing effects and harmfulness from the side of criminal justice towards the accused. The power of justice had to be much more normalized in conformity with the spirit of the time. The Coornhert Liga frequently caught the attention of the media, but its real influence on judicial policy was modest.

The Juridification movement in criminal law was gaining more support as the general juridification in society factually increased: this new legal culture would be seen more and more as fitting the spirit of the time.[58] A very important background factor was the slowly advancing European Convention on Human Rights, which had been of minor significance for a long time. The American civil rights movement mentioned before gained adherence in Western European countries because it was considered an encouragement for the new legal culture. The Utrecht disciples of Peters elaborated in their PhD theses on these developments and theories for their own special domain of law, resulting in studies such as: 'Rights for juveniles',[59] 'Rights for prisoners'[60] and 'Rights for the military'.[61]

58 See Schuyt, 1997.
59 De Langen, 1973 (Dutch: *Recht voor jeugdigen*).
60 Kelk, 1978a (Dutch: *Recht voor gedetineerden*).
61 Jörg, 1979 (Dutch: *Recht voor militairen*).

Remarkably also non-lawyers were inspired by the thought of juridification and took over this theme in their writings, like Paul Moedikdo (formally a lawyer, but in his scientific work a perfect sociologist). He wrote the book 'Sociology and law'.[62] And the Professor of forensic psychiatry Frank Beyaert, since 1975 Kloek's successor, wrote the book 'Administering justice, helping justice'.[63] Both titles portray the multidisciplinary nature of these two works, a typical Utrecht characteristic.

> The new Utrecht School concentrated on the theme of juridification and kept more or less in step with another School, developed by the Rotterdam Professor of criminal law L.H.C. Hulsman (1923-2009) at the present-day Erasmus University Rotterdam. This School was intended to introduce thoughts and notions of social justice into the criminal justice system, but with a preference for social justice that replaces criminal law. This means a plea for decriminalization to the highest possible degree. Hulsman called himself, for that reason, an 'abolitionist', at least a reductionist.[64] He advocated reducing retributive criminal law and treating the underlying problems of an official criminal act in a more positive, fruitful way. In his view the primary goal of criminal law has to be the solution of the conflict (between perpetrator and victim and/or society). This will be beneficial for all citizens, whereas the criminal law approach in his view is harmful and stigmatizing particularly for the perpetrator. Welfare institutions and probation officers were much better suited and skilled to restrain individual criminality. This way of thinking is called the Rotterdam Welfare School, quite different from the Juridification movement of the new Utrecht School. Both schools advocated humanity in the field of criminal law, the one via procedural arrangements and protective legal principles and the other via an increase in welfare and a decrease in criminal law.[65]

The edited volume of articles (written by colleagues and friends) on the occasion of Kempe's retirement: 'Law, power and manipulation' in 1976,[66] contained an excellent reflection of the thoughts of all members of the Institute about the theme juridification in all its variations and nuances in the different fields. Kempe contributed an article himself to this volume because he did not like personal homage at all. Unfortunately he already died in 1979.[67]

> The edited volume of articles was unexpectedly very successful. The first print had a circulation of 5000 copies (which is a lot for this kind of book) and 3000 more copies had to be reprinted when the first edition was sold out. Undoubtedly this was a sign of the times: the volume contained many power-critical opinions

62 Moedikdo, 1974 (Dutch: *Sociologie en recht*).
63 Beyaert, 1976 (Dutch: *Rechtspreken, recht helpen*).
64 See Hulsman, 1986; Hulsman, 1964.
65 See Kelk, 1986b.
66 Kelk, Moerings, Jörg & Moedikdo, 1976 (Dutch: *Recht, macht en manipulatie*).
67 See Kelk & Moerings, 1980.

and concepts. Certainly this was the case with Peters' contribution entitled: 'Law as false conscience' (*Recht als vals bewustzijn*), an article certainly worth reading, that achieved fame.

It was regretted by the representatives of criminal law section, but it was fortunate for himself, that Peters had the opportunity in 1975 to occupy a new chair in the sociology of law in Utrecht. And after a very complicated and long succession procedure two new professors in criminal law were appointed in Utrecht, both in 1978: Bert Swart, who wrote his PhD thesis on 'Admission and eviction of foreigners'[68] in Amsterdam, and Constantijn Kelk. Meanwhile all law faculties in the Netherlands already had two chairs for each of the principal subjects – civil law, constitutional and administrative law, and criminal law.

2.6 From 1980 onwards: extensions of criminal law, increasing punitive practices and a broader profile of the Institute

In 1984 the fiftieth anniversary of the Willem Pompe Institute was celebrated: Hulsman was the guest speaker and Kelk, as chairman of the Institute, spoke about the ideas and the most recent history of the Institute, this all in the imposing presence of Bert Röling to whom the first copy of the jubilee edited volume would be presented. The title was: 'Limits and possibilities',[69] expressing that the concept of juridification is not necessarily unlimited. Röling spoke a few short words of thanks and said that he was 'happy and proud', noticing that the Institute was still flowering through the times. This was his last presentation before his death some months later. On the occasion of this celebration the criminologist Cyrille Fijnaut wrote a praising editorial in the journal *Delikt en Delinkwent* ('Crime and Delinquent') about the Institute and its creative evolution that would continue for the time to come, so he said was his expectation.[70]

In the 1980s the Utrecht thoughts and concepts were put to the test because of the unfavourable developments in criminality and the reactions of the policy of criminal justice. The turn towards a starkly instrumental view of the criminal law within governmental circles dovetailed with a number of developments in Dutch society: the increasingly large-scale structuring of organizations and business corporations, the advances of new technologies, computerization and commercialization, economic regression and the accompanying increase in unemployment rates in the 1980s, and the appearance of the first cracks in the construction of the welfare state.[71] As a result of these developments, intersubjective relations have been largely put on a business footing. Planted

68 Swart, 1978 (Dutch: *De toelating en uitzetting van vreemdelingen*).
69 Kelk, Moedikdo, Moerings & Swart, 1984 (Dutch: *Grenzen en mogelijkheden*).
70 Fijnaut, 1985.
71 See Kelk, 1994, p. 45.

in the soil of the highly liberalist cultural climate of the 1960s and 1970s and the resulting increase in the citizen's political and social independence, the mentioned developments have led to a (further) erosion of social bonds between individuals. This has also been considered as part of the explanation for the strong growth of (very) serious criminality. Organized crime was increasing very quickly, mainly in the field of the trafficking of hard drugs that expanded on a large scale.

Government policy aimed at addressing the problems caused by the increase in serious crime culminated in an important policy document that appeared in 1985 under the title 'Society and crime'.[72] In this document of the Minister of Justice a principal distinction was made between serious and the minor kinds of criminality. The leading idea was that especially acts of serious crime should be criminally prosecuted and brought to justice far more often and effectively than had been the case thus far, opposite to which were the less severe forms of criminality which were thought to be best dealt with by way of administrative prevention methods and other social control mechanisms (like supervision in recreation areas and bikesheds, more conductors on public transport, et cetera). The introduction of this distinction has in fact not only given a considerable impetus to the further development of what is nowadays familiarly designated as 'punitive administrative law', but also given a boost to the belief in the problem-solving qualities of criminal law. However, this belief, which has since grown into unprecedented proportions, is one-sided in the sense that it reduces the criminal law to its instrumental dimension: criminal law was expected to merely offer a powerful repressive instrument to combat crime.

Thus there was a growing need for inventive criminological theories and scientific research into its effectiveness. In any case the extended activity of criminal justice regarding serious crimes (in much more cases the accused were taken into preventive custody) caused a shortage of prison cells, which led to the building of new prisons and the rebuilding of old prisons. Meanwhile the number of mentally disturbed prisoners who needed psychiatric provisions was growing and these provisions had to be facilitated as well.

Detention and compulsory detention for treatment (*terbeschikkingstelling*) were more and more subjected to juridification, not only with regard to the internal legal position of the inmates (the right of complaint), but also with regard to their external legal position (such as in relation to prolonging and terminating the sanction as such). The interest in penitentiary law and penology and also in forensic psychiatry and psychology was growing, with serious consequences for the professors and university lecturers in these areas.

At the same time the punitive climate in society as a whole was getting harsher: local authorities, businesses, and many other societal institutions proceeded towards punitive practices, such as imposing fines. But the sentences

72 Proceedings of the Lower House of the Dutch Parliament (*Tweede Kamer der Staten-Generaal*): *Kamerstukken II* 1984/85, 18 995, no. 2 (Dutch: *Samenleving en criminaliteit*).

of the judiciary also kept up with this general toughening climate and, in its turn, influenced this process. So an amplifying movement was ongoing. More often long prison terms were imposed and the long terms were becoming longer than before. The Willem Pompe Institute was seriously worried about this development.

Extensions of penal provisions and of penal practices occurred in the same way in the areas of special criminal law, like economic and environmental criminal law, in which there was much interest in the Institute. Already in the 1950s economic criminal law was the object of Röling's study, and he created the term 'functional perpetrator' and analysed and profiled the question of the corporation as a perpetrator.[73] In 1986 a special (part-time) chair in economic criminal law was established in Utrecht, for the first ten years occupied by Mischa Wladimiroff, an advocate. In 1996 he was succeeded by John Vervaele, whose chair at present is in European and economic criminal law.

The very rapid increase in organized crime was an enormous challenge for the capacities of the police. It came to light that the police in the 1990s had employed very unusual and daring, if not illegal, investigative methods without supervision or control in many serious cases. This was revealed through the so-called IRT scandal.[74] A parliamentary committee started an inquiry in 1994 with many hearings on these hidden police practices and reported its findings and conclusions to Parliament in 1996. All this resulted in a Bill for Special Investigative Methods, implying that a great number of articles were added to the Code of Criminal Procedure.[75]

On the occasion of the sixtieth anniversary of the Institute in 1994 the title of the edited volume of articles was not without reason: 'How punitive is the Netherlands?'.[76] Meanwhile a *multicultural society* was developing, which had consequences not only for the nature, size and differentiation within the world of crime, but also for the (re)action patterns of the administration of justice. These developments offered fertile ground for cooperative projects among lawyers, criminologists, behavioural experts and other social science experts, in line with the good Utrecht tradition. So the professor of criminology who was appointed in 1988 at the Institute, Frank Bovenkerk, initiated a great deal of research in the field of multicultural community and criminality, emphasizing the interest of the empirical components of criminology.

Another development which was characteristic of that period was the *increasing internationalization* of criminal law. The voice of Brussels influenced national criminal law to a great degree, whereas due to growing mobility across borders many questions arose pertaining to international criminal law. Bert Swart certainly founded a school in international criminal law within the

73 Röling, 1957.
74 IRT: Interregional Investigation Team, in this case in North Holland and Utrecht.
75 *Wet Bijzondere Opsporingsbevoegdheden* (*Staatsblad* 1999, 245).
76 Moerings et al., 1994 (Dutch: *Hoe punitief is Nederland?*).

Institute in Utrecht: he was an expert in all parts of international criminal law and at the highest level.[77] He was the supervisor of many PhD theses and, moreover, he frequently provided very thorough and elaborate advice in urgent cases to advocates. In doing this he has contributed enormously to the legal developments in this extended and difficult era. He also wrote many magazine articles on the development of human rights in relation to criminal law and criminal procedure.

Meaningful was the theme of the edited volume of articles written when the Institute celebrated its sixty-fifth anniversary in 1999: 'Moral questions in criminal law'.[78] This theme was an excellent choice, considering the fact that we had landed in a pluralistic and postmodern society, where the liberty of the autonomous individual is the main starting point. This implies that criminal law has to steer clear of determining the contents of morality, contrary to the expectations generally held in society that criminal law will teach morality to the citizens. The enormously extended punitivity has already made clear how great the belief of the community is in a serious and firm criminal law.

This phenomenon is strengthened under the influence of the anxious safety ideology that arose worldwide after the attacks on the eleventh of September 2001, through which we are now living in a 'safety' society. The strong emphasis on safety and security engendered the monomaniac tendency to permanently stimulate the growth of punitivity. The belief in criminal law is so strong that one has the illusion by that means to be able to avert all kinds of insecurity. A new act on terrorist offences (based on a European Union framework decision) showing such pretensions was established in 2004.[79]

The academic research group tasked by the Minister of Justice to develop ideas and suggestions about how to revise certain parts of the criminal procedure that caused frictions in practice worked for several years around the year 2000 on this project: 'Criminal Procedure 2001'.[80] A number of professors of criminal law, among others Chrisje Brants (Utrecht), were of the opinion that the official research group was thinking too much from a pragmatic instead of from a principal and fundamental point of view. Hence the 'alternative' group published an edited volume of contributions, in which the *basic values* of some subjects were more underlined and analysed.[81]

77 See Groenhuijsen, 2008, p. 1097.
78 Moerings, Pelser & Brants, 1999 (Dutch: *Morele kwesties in het strafrecht*).
79 *Wet Terroristische Misdrijven* (*Staatsblad* 2004, 290); *Framework Decision of the European Council of 13 June 2002 on combating terrorism*, 2002/475/JBZ.
80 The leaders of this project were M.S. Groenhuijsen and G. Knigge.
81 Brants, Mevis, Prakken & Reijntjes, 2003.

3 Thematic characterization: three constants in criminal law scholarship in Utrecht

3.1 Three constant streams within a shifting epistemological bedding

In the previous section we provided, from a predominantly chronological perspective, a characterization of the Willem Pompe Institute's history, starting from its foundation in 1934. In the present section we want to describe, from a more thematic and diachronic point of view, a few central features of the scientific investigations that have been carried out at the Institute in the course of the last eighty years. We are convinced that – despite the enormous diversity of topics that have been subjected to the discipline of various scientific methodologies – at least three constant traits can be discerned within the Institute's rich research tradition. Those three constants each deserve a separate, 'overarching' elucidation. Again, and for reasons accounted for in the introduction to this chapter, the focus will be on criminal law scholarship. The later contributions in this volume will show the extent to which these three threads remain typical of the research projects that are currently being conducted at the Institute, or will be in the (near) future.

The three constants are referred to with the catchwords: 'overarching (bodies of) thought', 'critique', and 'humanity and solidarity'. They will be reviewed separately below. For each of the three constants we examine the more specific meanings which have contributed to these constants and the associated notions in different periods of the Institute's existence. In this connection, we will, where relevant, also address the principal underlying epistemological currents or 'trends' that have influenced or inspired the research activities at the Institute in the respective periods. Even though each of the three constants is distinctly discernible in all three phases, a subtle division of emphasis can already be indicated here: in the days of the old Utrecht School the notion of 'overarching thought' stood in the foreground, in the days of the new Utrecht School it was the notion of 'critique', and during the most recent period the notions of 'humanity and solidarity' have been more prominent.

3.2 Overarching (bodies of) thought

The old Utrecht School: an integrative view of the delinquent person

One catchword that characterizes a notable dimension of the Institute's research tradition is taken directly from the inaugural public lecture delivered by one of the three leading figures in the old Utrecht School: Pieter Baan. In 1947, shortly after his appointment as an honorary private tutor in forensic psychiatry at the faculty of law in Utrecht, Baan delivered his public lecture, entitled: 'Overarching thought in the borderland of psychiatry and law'.[82] He elaborated

82 Baan, 1947 (Dutch: *Het overkoepelend denken in het grensgebied van psychiatrie en recht*).

on the ideas contained in this lecture in his second inaugural lecture, entitled 'The psychiatrist *in foro*',[83] held in 1951 on the occasion of his appointment as an endowed Professor of forensic psychiatry at the same university. Baan's concept of 'overarching thought' indicates, to a considerable degree, the scientific agenda he pursued: an integration of juridical, psychiatric and criminological perspectives on the phenomenon of crime and on the delinquent individual. The members of the old School were united in their view that only an integrated, multilevel theory of delinquency, which does justice to as many facets of the individual delinquents' life histories as possible, could produce truly valuable insights into the causes of delinquency and into the nature of interventions with which the delinquent individuals could be guided back to the straight and narrow path with the highest chance of success.

The construction of overarching theories within the old Utrecht School was predominantly motivated by a communal endeavour to develop an integrative scientific view of the delinquent person. The focus of attention was put on the delinquent precisely *as* a person, that is to say: as an equal fellow man who can and needs to be *assisted* so as to become aware of his responsibility towards society.[84] The optimistic assumption was that the delinquent could also in fact be made to feel and assume this responsibility. Criminal law scholarship and criminal law practice therefore needed to take due notice of insights stemming from adjacent practical fields such as forensic psychiatry and the after-care and resettlement of offenders; it is only on this condition that a proportionate and 'customized' sentencing was expected to optimally invite the delinquent to fully *redeem* his fault, with the result that he, afterwards, would be enabled to responsibly participate in social life again, on an equal footing with all other citizens.

> This image of the delinquent individual – portrayed as an equal member of the citizenry, who needed to be approached with confidence and help – contrasted sharply with a number of competing theories, which reduced the offender to a sum of dispositional and environmental factors. Different members of the old Utrecht School, most notably Kempe and Baan, vehemently opposed these deterministic views that glued the offender indissolubly together with his crime; we will come back to this in subsection 3.3.

Meanwhile, the 'overarching' character of the ideas developed by the members of the old Utrecht School manifested itself in multifarious ways. For instance, the aforementioned integrative view of the delinquent person was the result of a *theoretical* endeavour, which was clearly inspired by a number of anthropological, phenomenological, and existentialist philosophies that gained much attention and popularity at the time (i.e. roughly between 1945 and

83 Baan, 1951 (Dutch: *De psychiater in foro. Het overkoepelend denken II*).
84 See Nagel, 1963; Moedikdo, 1976; Goudsmit, 1987.

1960), also in the Netherlands. Several adepts of the old School incorporated, implicitly or explicitly, some central philosophical insights of such thinkers as Edmund Husserl, Martin Heidegger, Karl Jaspers, Jean-Paul Sartre, Maurice Merleau-Ponty, and Helmuth Plessner in their theoretical constructions. In this connection, it should be noted that the impetus to the reception of these philosophical insights had already been provided to a considerable degree by the different scholars associated with the Utrecht School 'in the broader sense' (see subsection 1.1), most notably among them Buytendijk, Langeveld, Van den Berg, and Van Lennep; Buytendijk, for example, maintained close relations with Merleau-Ponty, and Van Lennep had been in contact with Sartre.[85]

Although Willem Pompe epitomized the old Utrecht School ('in the more narrow sense'), he proved to be less manifestly influenced by the different anthropological, phenomenological, and existentialist philosophies that were *en vogue* at the time; at any rate, he did not directly refer to them in his writings. This can probably be explained by the fact that Pompe was, first and foremost, a classical, highly authoritative legal scholar who devoted most of his writings to the big, central doctrinal concepts of the substantive criminal law, and who only very rarely hazarded any philosophical excursions.[86]

This does not alter the fact that Pompe is believed to have been influenced in his thinking by extra-juridical theories (particularly by those of Max Scheler and Gabriel Marcel).[87] Furthermore, it is obvious that he contributed – to a degree that can hardly be underestimated – to the development of a unique type of interdisciplinary, delinquent-centred research that rose to great heights within the ranks of the old Utrecht School.[88] And to conclude, during the thick of the rivalry between the adherents of the so-called Classical School, grafted onto the works of Cesare Beccaria (1738-1794), whom Pompe admired, on the one hand, and the adherents of the positivist New or Modern School, inspired by the works of Cesare Lombroso (1835-1909) and Enrico Ferri (1856-1929), on the other, Pompe repeatedly declared himself openly in favour of an *integrative* view of the delinquent individual, that is to say: a view that does justice to both the highly abstract qualities that were ascribed to the delinquent as a supposedly autonomous, calculating individual by the Classical School, and the different concrete empirical properties of individual delinquents that were brought to light by the representatives of the Modern School (see subsection 1.2). Pompe sought to acquaint himself with the essential features of 'the' delinquent person, both on the level of his abstract, universal-human qualities and on the level of his concrete, individual qualities.[89]

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85 See Abma, Bos, Koops & Van Rinsum, 2009; Weijers, 1991.

86 Cf. *supra*, subsection 2.3, *sub voce* 'Pompe's views'; see also Fijnaut, 1986, p. 4-5.

87 See Abma, Bos, Koops & Van Rinsum, 2009.

88 See Moedikdo, 1976, p. 93.

89 Very distinctly in his inaugural lecture: Pompe (1928) 2008a and in his valedictory address: Pompe, (1963) 2008b.

Very markedly, by contrast, the criminologist Ger Kempe proved to be an ardent adherent and advocate of the existentialist ideas of philosophers such as Sartre, Heidegger, Binswanger, and Jaspers. Kempe was vehemently opposed to the, in his view, starkly individualistic mentality that was characteristic of the interbellum period; he advocated a form of criminology that was philosophically informed, and that exhibited the traits of the phenomenological and existentialist theories of his liking, in which man was conceptualized not as an atomized individual, but as a being whose humanity makes him radically dependent on other people and thus on social bonds. The following two quotations – the first of which is taken from Kempe's inaugural lecture, entitled 'Guilty Being' (*Schuldig Zijn*) – serve to testify to his preference for phenomenological and existentialist expressions:

> 'To summarize, I would therefore like to submit that criminal Being is a guilty, *viz.* paradoxical mode of being-in-the-world, directed towards the destruction of its coexistence with the other; that it represents an impossible manner of World projection; and that the act, in and through the way in which it is thrown into the world, so to speak, encapsulates this entire guilty Being; that the act, therefore, is not – as it was assumed to be in the older criminological theories – a *symptom*, revealing that something is not in good order, nor is it a *symbol* of the split between man and world, but it is the *Gestalt*, the totalizing concept (*Inbegrip*) of the guilty manner of being in the world.'[90]

> '[One could] imagine that a blow like the one inflicted on us during the German occupation has been necessary to be able to understand that the criminal act is *not* merely an act that deviates in a socially unacceptable way from the sociological standard, but that this act has a substance *of its own* and that it is unfolded as the expression, indeed as the totalizing concept of a certain way of being in the world and of relating to the world. (...) [A criminal act is something more than] an act that only happens to acquire its criminal status if and because society considers it to be harmful, unseemly, intolerable. (...) [We must accept the criminal act] as an *in se* meaningful utterance, as an attempt to, as I phrased it in my inaugural address, "accomplish, out of a mode of *Dasein,* that is, to our taste, perhaps deficient or even defective, a nonetheless transcending creation".'[91]

Whereas Kempe primarily addressed criminological theories that were grounded on phenomenological and existentialist philosophies, there was another notable member of the old Utrecht School who devoted himself to the cause of revitalizing a profoundly *sociological* impetus behind the development of 'overarching thought' concerning offenders and their criminality. Rijk Rijksen forcefully advanced the idea that sociological theories are necessary to develop

90 Kempe, 1950, p. 19 (our translation, FJ/CK).
91 Kempe, 1952, p. 176 and 180-181 (our translation, FJ/CK).

a meaningful integrative view of delinquency and the delinquent individual. As we will see in subsection 3.3, Rijksen's primarily sociologically-oriented concern for the 'societal structures' in which delinquents participate can in retrospect be viewed as having served as a catalyst in the process of unlocking a form of critique of the prevailing establishment. On the occasion of his public lecture whereby he assumed his position as an honorary private tutor at the faculty of law of Utrecht University, Rijksen spoke the following words:

> 'Criminal conduct clashes with the normative framework [*normatiek*] applied in society at large. This simple formulation alludes to a highly complicated problem, which is connected with differences in the normative frameworks adhered to by differing groups in society as a whole. This problem can only be properly dealt with if we depart from the available knowledge of the societal structure, which belongs to the field of sociology. (...) In order to understand the individual criminal human being, it is necessary for us to consider him within the framework of the societal structures in which he participates. (...) This sociological knowledge can only be productive in our effort to attain the desired understanding if the sociologist passes on his insights to a team that aims at getting to know the whole individual in his multidimensionality.'[92]

As important as the theoretical *tours de force* in the scientific works produced within the framework of the old Utrecht School was, in addition there was the fact that the members of the old School were united in their view that the anthropological, phenomenological, existentialist, and sociological theories that fuelled their integrative approach would ultimately remain worthless unless this integrative approach was applied *in practice*. And also here, within the context of practical contributions to the administration of justice, the 'overarching' concerns were present. These concerns found a marked expression in the then widely used phenomenological term 'encounter' (*ontmoeting*). In his aforementioned public lecture, Baan argued that lawyers and psychiatrists needed to meet with a shared anthropological interest in the person of the delinquent.[93] In addition to this, these encounters should also take place between the various criminal law officials, on the one hand, and the delinquent individual on the other. And yet, the image that in this regard eventually thrusts itself on us is that of several experts gathered around an operating table, bent over the delinquent on the table, united in their 'overarching' attention for

92 Rijksen, 1955, p. 6-7 (our translation, FJ/CK).

93 Baan, 1947. Also in this connection, it is to be maintained that the old Utrecht School 'in the more narrow sense' was a tributary of the Utrecht School 'in the broader sense'; cf. the titles of the following works: Langeveld, 1957 (*Rencontre, encounter, Begegnung*); Van Lennep, 1949 ('Weighed-examined-encountered in psychological research', Dutch: *Gewogen-bekeken-ontmoet in het psychologisch onderzoek*). See also Moedikdo, 1976, p. 121-122; Brants, 1999, p. 13-14.

his interesting peculiarities, and in their shared aim of determining the most promising remedy for the delinquent's condition.[94]

This rather paternalistic thrust should, however, be seen against the background of the then prevailing climate of thought: in one of Kempe's quotes the relevant issue was already mentioned: the Second World War and its far-reaching impact on the general mental climate during the post-war reconstruction of the country. In the aftermath of the War there was a widely felt need in society, including in academic fields, to actively contribute to the consolidation of a new and just societal order.[95] The cooperation between theoreticians and practitioners from different arenas of criminal justice originated from a communal, intrinsically endorsed belief that criminal law cannot be understood in isolation and has an important social function to fulfil with respect to the reconstructive aims referred to. Contrary to the years of the interbellum, when individualism was rampant, there was a general urge after the Second World War to conceptualize man – in accordance with philosophical theories that, as we saw before, were in vogue at the time – as someone who inescapably finds himself placed 'together-with-the-others-in-the-world'.[96]

All of this was expressed by the fact that members of the old Utrecht School became deeply involved in multifarious pressing practical matters, such as penitentiary care, care for mentally disturbed offenders, rehabilitative care, and different forms of education and counselling.[97] The cooperative mind-set was also manifest in the ideological enthusiasm of people like Baan, who devoted himself to contributing in practice to the project of reshaping forensic-psychiatric practice according to his firm belief that delinquents need and deserve to be seen as, in principle, treatable psychiatric patients who happen to have committed a crime, and not as incorrigible criminals who happen to have some mental disorder.[98] It has been widely acknowledged that the various efforts dedicated to the implementation of scientific insights in practice have had, on the whole, a profound humanizing effect on the administration of criminal justice in the Netherlands (we will come back to this in subsection 3.4).[99]

> The overarching view of the delinquent person was also discernible in a more practical sense, in the gradually established custom at the faculty of law in Utrecht to set up a number of academic courses that were taught jointly by

94 Kempe, for example, once spoke of the delinquent as an 'ailing younger brother' (referring, though, to the representation of the delinquent during the interbellum period); Kempe, 1974, p. 10. Cf. Baauw, 1976.

95 See particularly Pompe, 1945, containing multifarious ideas about the community spirit among the working class after the Second World War.

96 Kempe, 1957, p. 25-26, and 1992.

97 See Kempe, 1957, p. 27, 1963a, 1968b, 1968c; Janse de Jonge & Kelk, 1992.

98 Fijnaut, 2014, p. 463-464; Abma, 2013; Baan, 1952; and Frans Koenraadt in this volume.

99 See Franke, 1990, p. 793.

lawyers and criminologists.[100] To complete the picture painted so far, we want to mention too that during the heyday of the old Utrecht School also the sub-discipline of 'criminography' (in which the criminologist displays himself as the cartographer of crime in a certain region) kept attracting attention.[101] Furthermore, it deserves to be mentioned that the discipline of forensic psychiatry, partly due to the reception of the psychoanalytic theories of Sigmund Freud, flourished during this period. [102]

The new Utrecht School: liaisons with critical social theory

We will keep things considerably briefer here. The type of 'overarching thought' that was characteristic of the new Utrecht School was – as was the case with regard to the old Utrecht School – both theoretical and practical in its orientation and was supported by strong ideological enthusiasm. Regarding its substance, however, the multidisciplinary approach practised by the members of the new Utrecht School differed fundamentally from the one practised by the old *Utrechters*. The existentialist, phenomenologist, and philosophical-anthropological frames of reference were replaced by a strongly critical-sociological approach towards various questions concerning criminal law. In this respect, the new Utrecht School was as much a child of its own time as the old School. As is commonly known, the various democratization movements of the 1960s unleashed a number of critical and anti-authoritarian movements, and far-reaching processes of individualization and informalisation. And – also common knowledge – these developments had some important drawbacks.

Antonie Peters, who was the main source of inspiration for the new Utrecht School and its most prominent representative, had a distinct interest in sociology. From Max Weber and Émile Durkheim he derived a number of basic ideas concerning the 'primitive', original social function of the criminal process. These founding fathers of sociology saw the criminal process as an in origin purely repressive and excluding instrument with which a given community reacts to the damage caused by a criminal act violating the moral consensus or the collective moral conscience of the group. By implication, the criminal process principally serves as a means to regenerate society as a moral community, at the cost of degenerating the criminal individual.[103] In due time, the criminal law systems in Western societies gradually developed into more rational and humane forms of state-governed administration of criminal justice. In the modern era, the 'primitive' function of public chastisement therefore

100 This happened only after 1946; see Fijnaut, 2014, p. 465. See also *supra*, subsection 2.5; and see Kempe, 1963b, p. 290.

101 See Frank Bovenkerk's contribution in the present volume. Also outside of Utrecht there was much interest in 'criminography'; see for example the doctoral dissertation of W.H. Nagel (Nagel, 1949).

102 See Weijers & Koenraadt, 2007; Koenraadt, 2012.

103 See Peters, 1993c, p. 97-98; Durkheim, 1967, p. 70-71; Weber, 1967, p. 117-140.

faded to the background, became 'residual', and has been partly taken over by the media.[104]

Yet, it never disappeared entirely. The 'natural' inclination to outcast delinquents, to consider them as non-humans without any entitlement to humane treatment, must be combated continuously. The adherents of the new Utrecht School were united in their belief that construing a legally secured artificial space within which suspects are protected by powerful procedural safeguards was the best and most efficient means to combat this always lurking 'natural' tendency. Their idea that adequate legal safeguards for the benefit of suspects – who, by definition, find themselves in a far weaker position than the state that turns against them with all sorts of legal powers – are extremely important, or even that these safeguards lie at the very heart of criminal law's true *juridical* nature, was further substantiated by Peters and others with the help of insights that were derived from critical theories designed by members of the *Frankfurter Schule* (particularly Jürgen Habermas) and by Michel Foucault. We will discuss this at length in subsection 3.3.[105] In addition, much inspiration was drawn from the sociological works of Niklas Luhmann (*Legitimation durch Verfahren*), Philippe Nonet and Philip Selznick ('responsive law').[106]

The period from the 1980s onwards: the end of 'grand narratives'

Also here we can be brief: from the beginning of the 1980s, one grand, overarching theory that inspired the scientific research that was carried out in all sections of the Institute was no longer available. Since then the Institute has not collectively manifested itself to the outside world as a 'school'.[107] This change fits the general cultural and intellectual trend: the era of 'grand narratives' or 'ideologies' was considered to have come to an end, which engendered a withdrawal from the pretensions of a grand theory.[108] This may not be altogether surprising, considering the fact that grand, overarching theories could only be conceived at the price of a tremendously high level of abstraction: the increased complexity of the world (or rather: the commonplace experience of this increased complexity and of the interrelatedness of global structures and processes) resisted the formulation of universal theoretical

104 Peters, 1993c, p. 98; Kempe, 1974.

105 All in all, Peters' 'overarching', multidisciplinary approach could sometimes be somewhat eclectic: he saw no difficulty in combining some of Weber's views (who advocated value neutrality) with those of the *Frankfurters* Adorno and Horkheimer (who emphasized the inherently normative character of sociological theory); he combined Durkheim's ideas (who reified the object of sociology) with a critique of reification; and ideas derived from neo-Marxist dialectics were combined with insights drawn from the works of Habermas and Luhmann (who have advocated pronouncedly anti-dialectical views).

106 Luhmann, 1978; Nonet & Selznick, 2001.

107 See Brants, 1999, p. 21-25.

108 Lyotard, 1984; Lacey, 1998, p. 39.

models of society that separate academic disciplines could subsequently make operational and expand for their own respective domains.

There was and is, however, one grand theory – one that was designed to be generally applicable to Western societies in late modernity – which has indeed influenced criminal law (and criminological) scholarship in Utrecht: Ulrich Beck's theory of the *Risikogesellschaft*.[109] This theory proved to resonate well with several developments within Dutch and international criminal law, aimed at counteracting risks and enhancing public security by means of criminal law. However, this theory has not become a *generally* guiding, overarching approach in Utrecht. This is not surprising given the fact that the processes of increasing scale and increasing complexity already referred to, had a marked influence on criminal law: it has expanded enormously in a relatively short time, partly due to the growth of various specialized areas of economic, financial and corporate criminal law, and to the increasing role and influence of international criminal law and the human rights discourse. These shifts have impelled the development of various scholarly specialities, as a consequence of which a certain academic differentiation or even fragmentation has occurred.[110]

The types of overarching thought that *did* develop in Utrecht since roughly 1980 almost always concerned collaborations that were organized occasionally on a more or less *ad hoc* basis. These collaborations were devoted to specific subjects, most often connected to some topical, socially relevant question that deserved to be subjected to an interdisciplinary and multidisciplinary research approach. Examples of such topics are: the concept of criminal responsibility or imputability, morality, punitivity, and multiculturality.[111] Antoine Mooij has always taken an exceptional position. From a truly overarching viewpoint, he has combined fundamental insights from philosophical anthropology, modern hermeneutics and phenomenology, and psychoanalysis, and produced a profound body of thought that connects the cores of the disciplines of criminal law, psychiatry, and forensic psychiatry (see also the conclusions of subsections 3.3 and 3.4).[112]

3.3 Critique

The old Utrecht School: a critical view of scientific method

The old Utrecht School experienced its heyday between 1948 and 1963. Its members entertained marked opinions on the function of criminal law and the

109 Beck, 1986.

110 See also Brants, 1999, p. 22. Not entirely unrelated to this is Fijnaut's submission that the idea of an 'integrative criminal law scholarship' – the programmatic view initially propagated by Franz von Liszt according to which scholarly insights from criminology and criminal law scholarship need to be integrated – has fallen into a decline in the Netherlands since the 1960s; see Fijnaut 1986, p. 5-9.

111 See the volumes: Mooij & Koenraadt, 1990; Moerings, Pelser & Brants, 1999; Moerings et al., 1994; Bovenkerk, Komen & Yeşilgöz, 2003.

112 See Mooij, 2010, 2012.

administration of criminal justice, which were clearly related to the general aim in post-war society to reconstruct the social order in the Netherlands. Contrary to the later period of the new Utrecht School – when, as we will see, a 'conflict model' prevailed – the intellectual climate at the time of the old Utrecht School was dominated by a widely felt need for harmonious cooperation, aimed at realizing a communally endorsed vision regarding the desired organization of society.[113] We also already mentioned that the old *Utrechters*' theoretical views and practical initiatives also incorporated paternalism to a certain degree. These facts later enticed some to the allegation that, while it may be true that the old Utrecht School has considerably enhanced the criminal law's humanity (see subsection 3.4), it was hardly – or far too little – involved in any form of critique of society or of power relations.[114]

This accusation is rather anachronistic, at least to the extent that the predominantly paternalistic post-war period, as opposed to the 1970s, simply was not yet ready for structural criticism. Yet, the accusation is not without *any* foundation: apart from a few exceptions that will be addressed later on, there is hardly any form of critique of society or of power relations to be found in the writings of the members of the old Utrecht School. This does not mean that the notion of critique was entirely unfamiliar to them. On the contrary: specific forms of critique were clearly important ingredients of several of their writings. These specific forms of critique were, however, not directed at social arrangements or power relations but involved mainly views of the *epistemological* or methodological basic assumptions with respect to research on delinquency.

In order to put this epistemological critique in the right perspective, we will again digress for a brief moment to the Utrecht School 'in the broader sense' that, as has been noted before (see subsection 1.1), was strongly influenced by the anthropological, phenomenological, and existentialist philosophies which were extant at the start of the twentieth century. Precisely with regard to their epistemological views a strong affinity existed between Kempe, Baan, and – albeit to a lesser degree – Pompe, on the one hand, and the members of the broader Utrecht School, on the other. These views had been coloured by philosophical discussions *en vogue* in academic circles during the first decades of the twentieth century about the question whether, and if so, to what extent the new different 'sciences of man' (particularly psychology and psychiatry, but also criminology) would have to conform to the epistemological principles of the natural sciences. Those principles were highly materialistic: all phenomena

113 See Weijers, 1991, p. 13-31.

114 On this, see the discussion between H. Bianchi, who accused the *Utrechters* of having ignored (macro-)social structures, as a result of which they did not develop any form of social-critical thinking (Bianchi, 1974) and G.P. Hoefnagels (Hoefnagels, 1975).

in the world, including mental phenomena such as intentionality, were assumed to be inescapably subjected to the invariable causal laws of nature.[115]

The *Utrechters* rejected this reductionist way of thinking, and emphasized that man and his behaviour were to be understood in the light of the individual person's radical 'situatedness' or 'rootedness' within a context of intersubjective bonds. Influenced primarily by the then popular phenomenological views of Husserl and Scheler, they argued in this connection that man is more than some piece of nature governed wholly by the causal laws of nature, and is also essentially different from it. Along the same lines, the epistemological criticism exercised by the members of the old Utrecht School also addressed some of the strongly positivistic and materialistic views held by the leading lights of the New or Modern School in criminology, principally Lombroso, Ferri, and Rafaelle Garofalo.[116] These views were targeted mainly because they were not, according to the old *Utrechters*, embedded in a convincing philosophical body of thought. In 1959, in a small volume dedicated to the work of the different members of the (old) Utrecht School, Jacques Léauté summarized their communal anti-materialistic and anti-positivistic views as follows:

> 'Cette position la conduit à critiquer les positivistes de la fin du XIX^{e} siècle, qui ont donné une expression scientifique à la vieille croyance en la disparité de nature des criminels et des non criminels. Elle l'amène à ne pas épargner non plus leurs disciples contemporains dans la mesure où ceux-ci persistent à voir dans l'*Uomo delinquente* une entité à part, poussée au crime par certains caractères physiques ou psychiques dominants. (...) Les invalidités psychiques et sociales mises en évidence sont peut-être moins la caractéristique des criminels en général qu'une particularité des maladroits découverts. Les non-délinquants ont aussi leur lot de pervers, de fous, d'anormaux, d'inadaptés.'[117]

It is important, however, to note that the old *Utrechters*' epistemological critique was certainly not directed at the Modern School *tout court* (see subsection 1.2), but was addressed only at what they considered to be its harmful excrescences, namely: views, disguised as scientific facts, according to which a delinquent is essentially different from, and hence inferior to, the law-abiding citizen. Although Lombroso, Ferri, and their successive followers such as Von Liszt and Garofalo portrayed and analysed the delinquent individual as a concrete, empirical 'reality' (as opposed to the unworldly abstract view of the delinquent held by the Classical School), they did so in a way that attached this concrete individual firmly to his capacity as a criminal, and hence to him 'being

115 The roots of the broader Utrecht movement lie in Amsterdam, in the group connected to the Valerius clinic where several doctors and psychiatrists discussed various psychiatric issues; see Abma, Bos, Koops & Van Rinsum, 2009, p. 142.

116 See on these scholars of the 'Italian School': Fijnaut, 2014, p. 225-275.

117 Léauté, 1959b, p. 11-12. Cf. also Wichmann, 1923, p. 247-269.

different' from other people.[118] The members of the old Utrecht School argued that the delinquent individual in principle needs and deserves to be treated as an equal *fellow* man who in fact – apart from certain social and/or psychological peculiarities, the importance of which was not in any way denied – also shares a large number of characteristics with the non-criminal portion of the citizenry. Especially Kempe frequently inveighed strongly against the dehumanizing and reductionist tendencies that he uncovered in the works of some of the Modern School adherents, as is testified by the following ornate words:

> '[T]his aggregate of criminological digressions concretized into the motto, under the pretext of which Ferri hoisted the flag of his bio-sociological school on the deserted ruins of Lombroso's once proud castle of so-called criminal anthropology: the criminal individual is a product of dispositional and environmental factors – an assertion that hardly appeals to us anymore (...).'[119]

But as said before, the sometimes severe criticism of the unwarrantedly dehumanizing tendencies found in the works of adherents to the Modern School, does not alter the fact that the old *Utrechters* were in fact sympathetic towards a considerable number of other innovative aspects that were introduced by the Modern School. The fact, most remarkably, that the old Utrecht School focussed its attention so strongly on the *person* of the offender instead of on the criminal act, already clearly testifies to this. On balance, therefore, they maintained a rather nuanced relationship with the New or Modern School in criminology. Pompe in particular fully acknowledged that the image of man prevailing within the tradition of the Classical School and strongly influenced by Beccaria's views had become too abstract and too maladjusted to the concrete, individual characteristics of delinquents brought to light by the investigations of the Modern School. Therefore, the Modern School's concrete scientific attention for the delinquent person was welcomed as a necessary and fruitful *supplement* to the abstract-philosophical assumptions of the Classical School.[120]

The foregoing indicates that the type of critique that was exercised by the members of the old Utrecht School was predominantly of an epistemological nature. They engaged to a far lesser extent in any form of critique of society or of power relations.[121] This is, however, not to say that these sorts of critique

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118 See Kempe, 1952, 1968a.

119 Kempe, 1950, p. 7 (our translation, FJ/CK). See also Kempe, 1952, p. 179: 'Man [can and should] never be degraded to an objectively calculable and measurable quantity in a criminological practice that haughtily ignores his typical humanity.' Cf. also Pompe's criticism of Lombroso and Ferri: Pompe, 1962, 1957a; and see Röling's criticism of Ferri's lombrosian etiology, voiced in his book on 'the criminological significance of Shakespeare's Macbeth' (Röling, 1943, p. 18-20; cf. Gaakeer, 2005, p. 2358).

120 See in particular Pompe, (1928) 2008a. Cf. Brants, 1999, p. 10.

121 See for example Moedikdo, 1976, p. 124.

were completely absent in the writings of the old *Utrechters*. In the first place it needs to be memorized that primarily Pompe, in spite of his on balance charitable view of the just mentioned tenets in the Modern School's research approach, repeatedly and wholeheartedly sung the praises of the principles of culpability and legality that are highly characteristic of the Classical School's thinking. Pompe considered these principles to be of paramount importance, primarily because they offered *protection* to (potential) suspects and delinquents.[122] A similar concern for the classical principles fuelled the criticism voiced by Röling in his dissertation of 1933 regarding the then proposed measure of sustained custodial remand for habitual delinquents. The legislative proposal – that never came into force – was targeted mainly at delinquents who repeatedly committed relatively minor property offences and was a typical product of the so-called Authoritarian Current in criminal law in Europe (see also subsection 2.1).[123] Pompe's and Röling's strong emphasis on the protective value of classical (mainly substantive) criminal law principles can be understood as a form of inherent critique of those penal practices and despotic authority structures, to which the Classical School had already addressed humanizing reforms.[124]

Secondly, we should mention that various members of the old Utrecht School were involved in many scholarly and practical activities with the aim of improving the fate of the lower and more vulnerable social classes.[125] Rijksen was most pronouncedly engaged in this form of critique. In 1958 he published a book with a title that perfectly reflects its contents: 'Opinions of detainees on the administration of criminal justice'.[126] The book clearly showed how sensitive detainees are to the way in which they are treated by the police and prosecuting officers, psychiatrists, probation officers, and prison warders. Their treatment correlates directly to the degree to which the detainees experience either respect for or a denial of their human dignity.[127] In retrospect this book can be said to have marked the transition from the rather paternalistic tone of the earlier writings of the members of the old Utrecht School towards the distinctly socio-critical approach that became prevalent within the new Utrecht School – which we will now discuss.

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122 See for example his authoritative 'Textbook on Dutch criminal law' (*Handboek van het Nederlandse strafrecht*), last published in 1959; Pompe, 1959a.

123 Röling, 1933; Kelk, 2010b.

124 Another notable form of critique of power relations – albeit one that was not explicitly expressed in their scholarly works – is represented by the resistance activities of some members of the old Utrecht School against the German occupation during the Second World War.

125 Pompe, for example, was a convinced socialist and was heavily involved with the Catholic labour movement; Kempe was strongly engaged, both practically and in writing, with the different probation and aftercare services; and Baan implemented his ideological enthusiasm with his activities within forensic-psychiatric practice. See also Kelk, 1994, p. 35.

126 Rijksen, 1958 (Dutch: *Meningen van gedetineerden over de strafrechtspleging*).

127 See Bronkhorst, 1964, p. 16.

The new Utrecht School: critique of society and ideology

As we mentioned before, the new Utrecht School headed by Antonie Peters was operating in a very different political and societal set-up. The fact that the notion of critique came to occupy a prominent place on the research agenda of the new Utrecht School has much to do with a number of juridical, political, and societal developments. Some of these developments already started during the heyday of the old Utrecht School, but their enduring and far-reaching meaning was only registered after some time. In the first place, the Dutch government assumed an increasingly active role in the regulation of the economy and society after the Second World War. This resulted in an enormous increase in instrumental, regulatory law.[128] Secondly, judges and courts emancipated with regard to their adjudicative tasks: the stringent legalism that prevailed in the nineteenth century was substituted – also in criminal law – by a more lenient form of legal adjudication in which considerably more weight was assigned to general legal principles.[129] And thirdly, the various democratization movements that started in the 1960s led to important new opportunities for involvement in the development of law and in public administration.[130]

Partly under the influence of the civil rights movement – that came to the Netherlands primarily from across the Atlantic – the new Utrecht School developed an influential type of critical criminal law scholarship aimed at emancipating the weaker party in criminal proceedings: the suspect. In stark contrast to the old Utrecht School days – when the intellectual climate was dominated by what we referred to as a widely felt need for harmonious cooperation – the views of law and society held by the 'new' *Utrechters* were strongly defined by the then prevailing *conflict model*: in modern social reality, all subjects and questions are, as a matter of principle, controversial and stamped by conflicting material and ideological interests. What is more: controversies concerning the form and substance of legal provisions constitute an integral part of the law. Whosoever enters, voluntarily or involuntarily, legal proceedings, according to Peters:

> 'submits his private interests to general and public consideration, offers his alleged right or privilege to the test of fundamental principles, and exposes himself thereby to fundamental critique.'[131]

This antagonistic model partly explains the clearly dialectic traits of Peters' thinking: he continuously developed and formulated his views of the function and organization of criminal law on the basis of pairs of oppositional terms and

128 See Peters, 1993b, p. 48; Koopmans, 1970. Already in the 1950s, Bert Röling (then a member of the old Utrecht School) had occupied himself with the criminal law aspects of regulatory law; see *supra*, subsection 2.3, *sub voce* 'Research and publications' and subsection 2.6.

129 Peters, 1993b, p. 36. See with reference to civil law: Pitlo, 1972; Wiarda, 1972.

130 Peters, 1993b, p. 50; Spierenburg, 2013.

131 Peters, 1993b, p. 41. See also Norrie, 1998, p. 120 and 141-148.

concepts ('process' versus 'procedure', 'law' versus 'order', 'instrumentality' versus 'legal protection', the 'official' versus the 'critical' model of law, 'reification' versus 'de-reification'). One feature that these pairs of concepts (some of which will be clarified later on) have in common is that their internal relation is a 'precarious' one.[132] The continuous efforts at equilibrating the oppositional notions were thought to contribute to a favourable development of the criminal law. This establishes that although the critical views of the members of the new Utrecht School were rooted in a societal model of conflict, they were equally motivated by a rather optimistic trait of modernity: the belief that desirable social changes can be effected by legal arrangements or government policies.[133] Considering that law is a 'project-like' human endeavour, adequate opportunities for all parties involved to actively participate in (criminal) proceedings are crucial for the positive contribution of the (criminal) law to a favourable development of society.

But from this it follows that the criminal law must be organized in a way that guarantees each of the parties directly involved the ability to effectively participate in the criminal proceedings. Here the need for a profoundly *socio- and authority-critical* criminal-law theory comes into play. Critique of society and of authority has both a 'negative' and a 'positive' dimension: it is directed against existing authority structures that are perceived as oppressive, but with the emancipating aim of contributing to a more just society. In order to clarify the content of the critical theory developed by the new Utrecht School, it is helpful to start from Peters' important conceptual distinction between two contrasting views of the criminal law: the official and the critical view.[134]

In the *official* view criminal law is associated with order, unambiguity, control, and the enforcement of norms. According to Peters, this positivistic view constitutes a closed discourse, in which the emphasis lies on imperative declarations from official public bodies, on the unequivocal, 'ruling' interpretations of doctrinal concepts, and on the preservation of the existing arrangements of power and interest relations. Naturally, the official view recognizes the self-evident fact that various individuals and social groups can and often do have differing views of law and justice. However, to the extent that these views do not fit the prevailing discursive categories of the existing legal system – and hence do not fit the 'ideology' of the official perspective – the law grants them no noteworthy status. Such a view of criminal law easily tends to develop a high degree of rigidity, causing certain abstract, doctrinal concepts to become reified. In other words: these concepts are considered as 'natural' reproductions of empirical, social states of affairs. In this way, the existing

132 The term 'precarious' was often used by Peters, and appears in the title of the *liber amicorum* that was presented to him: 'Precarious values' (Dutch: *Precaire waarden*); J.F. Bruinsma et al., 1994.

133 See for example Peters, 1993e, p. 224, and 1993g, p. 265-288.

134 See Peters, 1993e, p. 209-211.

social order is protected by the law, but what is more: it is also portrayed as the only possible, the only conceivable social order.[135]

Meanwhile, however, social reality of course goes its own sweet way, and numerous incongruities might start to proliferate behind the doctrinal façades of juridical concepts, which remain unnoticed within the rather 'closed' official perspective. For example, Peters refers to the equal measure of freedom for every legal subject formally presupposed within the tradition of the Classical School. Although this counterfactual presupposition initially served an emancipatory function *vis-à-vis* the feudal balance of power of the *ancien régime*, it afterwards started to be used as a cover-up for the actually existing material lack of freedom.[136] When the discrepancy between the concepts of law, on the one hand, and the factual social relations to which they are supposed to apply, on the other, becomes too large, it will inevitably lead to a 'revolt of the facts against the law'.[137] According to Peters, the awareness of this mechanism already existed – albeit latently – in the old Utrecht School, which is why he granted the old *Utrechters* the merit of having given the initial impetus to the dismantlement of the hegemony of the official perspective on the function and nature of the criminal law.[138]

The *critical* view of criminal law – the view endorsed by the members of the new Utrecht School – by contrast constitutes an open discourse in which criminal law is associated with liberation from constraints, emancipation, ambiguity, and the criticisable nature of law. Seen from the critical perspective, all order is in principle considered to be 'provisional' and 'problematic' because every single order is built on a structure of both communally shared and private interests, and is inevitably partly characterized by forms of inequality, by the suppression of certain interests, and by the denial of potential alternatives to the order in question.[139] By implication, critique of society formed a major part of the critical model developed by the new Utrecht School. This form of critique is not confined to the 'technical' inquiry into the degree to which the existing law manages to achieve the aims that are attributed to it, but is far more radical in the sense that it also encompasses the law itself, its institutions, and its functions.[140]

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135 See Peters, 1993e, p. 228-231; 1993f, p. 262-263. On this, see also: Foqué & 't Hart, 1990b, p. 60-64.

136 Peters, 1993c, p. 86. We have seen before that Pompe in fact also already acknowledged this; see *supra*.

137 Foqué & 't Hart, 1990b, p. 203-211.

138 Peters refers in this connection to Rijksen's 'Opinions of detainees on the administration of criminal justice' (Rijksen, 1958); see Peters, 1993d, p. 132-133.

139 Peters, 1993e, p. 210; Lacey, 1998, p. 18; Norrie, 1998, p. 118.

140 Peters, 1993e, p. 223. Similar to some members of the old Utrecht School who did engage in some form of critique of society, the new Utrecht School has not been totally void of the epistemological type of critique that the elder *Utrechters* exercised. In this connection, we want to refer to Peters' doctoral dissertation (defended at Leiden University; Peters, 1966) that was influenced not only by a sociological slant, but also by Buytendijk's epistemological views.

Critique of society is, of course, a rather weighty, *viz.* historical-philosophically heavily charged notion. We will, therefore – following on from our discussion in subsection 3.2 – briefly examine a number of the philosophical and sociological views that have inspired the new Utrecht School. A first source of inspiration are the works of Michel Foucault. Along his lines of thought, the *Utrechters* maintained that the law institutes a specific discursive order, which confines our ways of thinking, speaking, and acting to a closed circuit of shared assumptions that together express the prevailing ideology.[141] Behind the manifest objectives of criminal law (social control, deterrence, the correction of offenders), according to Foucault, a number of latent but more essential functions lie hidden, which are concealed by the prevailing juridical discourse and the connected ideology, namely: disciplining bodies and controlling the proletariat.[142] Critique of society aims precisely at punching holes in the closed juridical discourse and offering resistance to the 'discursive police force'.

Secondly, the new Utrecht School's critical approach to the criminal law has also been clearly inspired by the neo-Marxist views stemming from the *Frankfurter Schule* (affiliates were Theodor Adorno, Max Horkheimer, Walter Benjamin, Herbert Marcuse, and Jürgen Habermas). Critical theory is clearly characterized by an explicit conceptual connection with the practice of intersubjective life, and hence with a sociological approach. The *Frankfurters* developed their critical theories with the aim of uncovering the masked discrepancies between, on the one hand, the concepts, values, and ideals that are enunciated by existing social institutions – including law – and that are alleged to be embodied by these institutions, and, on the other hand, the actual operations of the social institutions.[143] In a fiery essay, explicitly based upon the *Frankfurter Schule*'s 'method', Peters wrote:

> 'In an unjust class society, the law, in terms of the very principles of liberty, equality, and fraternity that it itself proclaims, is false. To the degree that it is effective, it necessarily constitutes, in these circumstances, a false consciousness, because it needs to portray injustice as justice, inequality as equality, thraldom as freedom, exploitation as reasonable. In such circumstances also, a true legal consciousness is necessarily subversive.'[144]

In its negative dimension, critique of society is thus focussed on the unveiling of injustices that are masked – consciously but more often unconsciously – by official ideologies. But as was stated earlier, the socio-critical theory developed by Peters also has a positive dimension: critique is exercised with the ultimate aim of contributing to the rectification of unveiled injustices.

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141 Peters, 1993e, p. 220-221; Foucault, 1971.

142 Peters, 1993f, p. 257, and 1993d, p. 115; Foucault, 2007, p. 41-67; Foucault, 1975.

143 See Leezenberg & De Vries, 2001, p. 180-181; Raes, 1988, p. 288-290; Horkheimer & Marcuse, 1981.

144 Peters, 1993f, p. 240 (our translation, FJ/CK).

The theory's positive dimension is expressed in a concept that Peters named 'juridification'.[145] This term refers to the process whereby certain phenomena from the social realm are cast in juridical moulds. In this way, these pre-juridical phenomena are lifted from their original social contexts, to be adorned with specific juridical meanings on a 'higher' level of objectivity. Juridification also involves decisions, and hence the need for legitimating: legal reconstructions of social affairs will almost automatically raise controversies and criticism, and thus demand justification. Justifying efforts are therefore necessary in order to generate intersubjective acceptance of the choices made, and in order to establish a new, communal consciousness of the normative ordering of social reality.

Juridification thus adds a critical-reflexive dimension to empirical social life. The efforts aimed at legitimating controversial legal decisions can only be effective on condition that the law provides ample room for what Peters termed 'critical discussion'. This term refers to a juridically safeguarded space of free communication between equal citizens,[146] within which the political dimension of social life can take shape. With reference to Habermas' counterfactual concept of a *herrschaftsfreie Diskurs*,[147] Peters argued that law must be a forum where both legal and political issues can be discussed freely and openly, by rational individuals who are equally well informed and are considered to be equally competent, and where no other type of coercion is exerted than that of the better argument. Only when these conditions are fulfilled, can a genuine and 'deep' form of legitimacy be attained. 'Legitimacy in depth' (a term coined by Selznick) requires that the pre-juridical phenomena that, in processes of juridification, are lifted from their original social contexts, are bestowed with specific juridical meanings that form the results of critical discussion; the juridical meanings then bear the mark of a more wide-ranging set of values and interests, and can subsequently be placed back in the social context with a greater chance of intersubjective acceptance.[148]

Peters specified these rather abstract and general thoughts for the domain of criminal law with the help of a further conceptual distinction, namely the distinction between 'process' and 'procedure'.[149] With the notion of 'process' Peters referred to what he viewed to be a *natural* given in the criminal law. The criminal process is the totality of acts and occurrences in which the suspect is subordinated to the authority of the state or of the collectivity in whose name

145 Peters, 1993e, p. 211-214.

146 In this connection, Peters refers to the concepts of the 'original position' and the 'veil of ignorance' from John Rawls' theory of justice; see Peters, 1993e, p. 235.

147 Peters, 1993e, p. 234-235; Habermas, 1973.

148 Peters, 1993e, p. 236; 1993g, p. 269-270; Selznick, 1969.

149 Peters, 1993c, p. 88-95; 1993e, p. 214-217. Peters modelled his distinction partly on the distinction introduced by Hannah Arendt between the 'private realm' (the sphere of the uncontested rule of the *pater familias*, of necessity, and of a lack of freedom) and the 'public realm' (the public sphere of political deliberation, of equality, and of liberty).

the criminal law's punitive powers are exercised. Within the structures defined by the process, the possibilities for the suspect to defend himself against the powers exercised are kept as limited as possible. With the notion of 'procedure', by contrast, Peters referred to the artificial and *unnatural*, and therefore not self-evident totality of juridical arrangements tailored to the aim of protecting and realizing the individual rights and freedoms of the suspect within the given context of a criminal process. For this it is essential:

> '(1) that the key moments of the process that are decisive of its further course, obtain procedural weight; (2) that the suspected individual and the institution that represents the ordering function in society are counter-posited as "parties"; (3) that the individual is granted facilities to adopt an autonomous position and to help decide the course and outcome of the process.'[150]

According to Peters, the criminal law's truly *juridical* nature is a function of the degree to which it is able to secure – against the coercive forces inherent in processes – an effective procedural space for communicative interaction. In his inaugural lecture 'The juridical nature of criminal law', delivered in 1972,[151] Peters argued that the criminal procedure harbours the legal potential to liberate the individual suspect from his weaker position, to transform him into an independent individual and thereby enable him to participate in the workings of law, legal principles and important legal values. Although it may be true that the combating of crime is the *primary (instrumental) task* of criminal law, this task is not the most interesting from a juridical point of view. Seen from a juridical perspective, the pre-eminently juridical values of criminal law are constituted by the *limitations* of the state's competences:

> 'Specific to criminal law – and to all of law – is neither its functions in the spheres of ordering, control, or problem solving, nor its functions in the sphere of combating crime. These functions are so to speak "natural" and relatively unproblematic, in the sense that no society is conceivable without them; they are situated in what one could call the profane sphere. The specifically juridical function lies in *secondary* control: in the regulation of the forms of social control as they grow more or less spontaneously or are exercised by the state and other authorities. The juridical task of the criminal law is not "policing society" but "policing the police". It is from this regulation of primary control functions that the law derives its socio-critical potential, its own moral dimension.'[152]

The most important prerequisite for a vital, socially adequate and just criminal law system lies in the structure of the criminal trial: the trial has to be a forum

150 Peters, 1993c, p. 94 (our translation, FJ/CK).
151 Peters, 1993a. On this inaugural lecture, see: Kelk, 2010a; Ten Voorde, 2012; Nagel, 1981; and the contribution by Stijn Franken and Petra van Kampen in this volume.
152 Peters, 1993a, p. 19-20 (our translation, FJ/CK).

where the opposing parties have equal opportunities to air their views and to challenge the other's conflicting views (in French this is commonly referred to as: *le principe de respect du contradictoire*). A trial thus provides the possibility for a critical evaluation of the facts, allows the citizen to have a protected position in his conflict with the powerful state, and opens up possibilities for active participation in the development of the law. The legal protection is granted to the individual suspect not only by statutory provisions, but also by recognized multi-interpretable legal principles.

Peters considered the profession of the legal counsel to be of exceptionally great importance, because this notable representative of the constitutional state is in the exquisite position to bring and mediate the law to the citizen and to his or her situation. This explains why in the research conducted by the various members of the new Utrecht School – contrary to the research conducted within the old School, which was often more oriented towards substantive criminal law – there was a strong emphasis on the legal position of the defence and on other procedural topics.[153] The strong focus on defence rights and the many pleas for a more *contradictoire* type of criminal procedure must be interpreted against the background of the predominantly inquisitorial traits that have traditionally dominated the Dutch criminal law system; on the whole there has been little attention for the legal position of the suspect.[154]

The period from 1980 onwards: a continuation of the juridification movement

In a sense, the new Utrecht School sailed on the wind of the generally critical intellectual climate of the 1970s. These years bore the marks of a widely endorsed 'action perspective' and of the strong popularity of neo-Marxist critique in the academia.[155] That situation changed dramatically from 1980 onwards. During the more recent period from 1980 onwards, the pronouncedly critical approach of the new Utrecht School was gradually 'tamed'. In 1990 a book was published by René Foqué and Joest 't Hart (affiliated with the universities of Rotterdam and Leiden), under the *epochemachende* title: 'Instrumentality and legal protection'.[156] This seminal work (in fact still the only one of its kind in the Dutch-speaking regions) analyses criminal law on the level of its theoretical foundations in terms of an everlasting and ever-changing dialectical relation between the two poles of, on the one hand, instrumentality (referring to the policy-related aims of criminal law, such as the enforcement of

153 With reference to Peters' inaugural lecture, A.L. Melai spoke of 'A pull towards the procedural side of criminal law' (Melai, 1972).

154 The same can be said for the legal position of victims; but contrary to our present days, the members of both the old and the new Utrecht School were not particularly concerned with the position of the victim; one could even say that the victim for a long time has been somewhat neglected. On this, see the contribution by Chrisje Brants to this volume.

155 This does not alter the fact that a few critics, at times, also considered the criminal law institute at Utrecht University to be a dangerous, radically left-wing bastion.

156 Foqué & 't Hart, 1990b (Dutch: *Instrumentaliteit en rechtsbescherming*).

substantive criminal law norms and the fight against crime) and, on the other, legal protection (referring to procedural and other legal safeguards against the arbitrary use of state powers).

Of course, the balance between these poles can and does vary over time, but the character or 'identity' of any criminal law system at any given time is by definition a mixed product of both instrumental reasoning in policy-making, and protective safeguards for the benefit of the individual delinquent. Instrumentality and legal protection are two sides of the same coin. By implication, any theory that denies the instrumental dimension of criminal law or maintains that the instrumental dimension forms no part of criminal law's truly juridical nature, runs the risk of resulting in a view of the nature of criminal law that is no less 'totalitarian' than those theories which perceive criminal law as nothing more or other than an instrument for the realization of political ends.[157] Therefore, according to the theory put forward by Foqué and 't Hart, neither dimension can or ought to be made absolute. Their theory has achieved a rather wide acceptance within Dutch criminal law scholarship, also in Utrecht.

Although the sharp edges of the socio-critical approach that prevailed during the days of the new Utrecht School were ground down later, the emphasis put on the criminal law's protective dimension has remained ever since. And with good reason: in the wake of various societal developments, criminal law had become increasingly businesslike and bureaucratic; partly in reaction to the increase in serious crime, criminal law also expanded enormously and became subjected to a strong ideology of safety and control.[158] The *Utrechters* continued to criticize the dehumanizing effects of these and other developments in criminal law.[159] The Institute's members can be said, on the whole, to have continued the 'juridification movement' that was initiated by Antonie Peters in the 1970s.[160] This continuation can be seen, for example, in the strong recommendations for sufficiently protective procedural safeguards for the benefit of detainees in prisons and other 'total institutions'.[161]

And finally: the years from 1980 onwards also witnessed a continuation of the epistemological type of critique as had been exercised in the days of

157 It can harly escape one's attention that this critique is targeted at the view defended by Peters. See in this connection also Foqué & 't Hart, 1990a, and Peters, 1990.

158 See with reference to the international context Garland, 2001.

159 See Kelk, 1994, 1993. The continuation of the juridification movement was at the same time a partial critique of the abolitionist theories that argued that the functions of criminal law (and the criminal law as such) should be taken over completely by 'intermediary institutions'; see for example Kelk, 1986b.

160 Arguing along the same lines: Ten Voorde, 2012; Brants, 1999, p. 24-25.

161 A term coined by Erving Goffman; see Kelk, 1983; Janse de Jonge, Moerings & Van Vliet, 1993. We want to mention also the criticisms voiced by Chrisje Brants together with several colleagues from other universities, levelled against the academic research project 'Criminal proceedings 2001' (Dutch: *Strafvordering 2001*); see Brants, Mevis, Prakken & Reijntjes, 2003; Brants, Mevis & Prakken, 2001, and see *supra*, the conclusion of subsection 2.6.

the old Utrecht School. Whereas Kempe, in his previously cited remarks from 1950, maintained that the older 'criminal anthropological' view, according to which the delinquent individual is a product of dispositional and environmental factors, 'hardly appeals to us anymore', the recent renaissance of materialistic and scientistic views in, for instance, neuroscience and biological psychiatry have lent new popularity to determinism, as a consequence of which the notions of freedom and human responsibility have again come under fire. Alongside his thorough epistemological critique of contemporary versions of hard, deterministic 'naturalism', Antoine Mooij has vigorously defended the concepts of freedom and responsibility, which are of such essential importance to both criminal law and (forensic) psychiatry.[162]

3.4 Humanity and solidarity

The old Utrecht School: an ethical-paternalistic view of humanity

A last important catchword that characterizes a notable dimension of the Institute's research tradition is humanity, or solidarity with vulnerable fellow citizens. As we have seen in subsection 3.2, the members of the old Utrecht School argued that the delinquent individual is, in principle, an equal fellow citizen who deserves to be treated with respect and courtesy, and to whom one therefore needs to show solidarity. We have already mentioned that the old *Utrechters* have contributed considerably to the humanization of criminal law, partly as a result of their efforts to get rid of what they viewed to be the excrescences of the New or Modern School and their efforts to reconcile the attainments of the Classical School with those achievements of the New School they could and did endorse.

The old Utrecht School's view of humanity and solidarity can be described as ethical and paternalistic. It was an *ethical* view in the sense that the notion of human responsibility lay at the heart of their theories concerning the nature and functions of criminal law. This is particularly clear in Pompe's case.[163] Against some of the strongly reductionist and fatalistic views of Lombroso and others, he raised two important objections. In the first place, Pompe maintained that the offender must be addressed and held accountable as a responsible individual whose criminal acts are not, at least not entirely, reducible to external causes or to the dominion of external laws of nature. Pompe's view of the individual in criminal law was characterized, moreover, by a strong emphasis placed on his *confidence* in the capabilities of the delinquent to – with the assistance offered by various criminal law officials – become aware of his responsibility towards society and to act accordingly.[164]

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162 See for example Mooij, 2012 and the contribution by Antoine Mooij to the present volume; see also De Jong, 2012.

163 Moedikdo, 1976, p. 98.

164 See Pompe, (1928) 2008a, 1957a, 1962, (1963) 2008b and 1959c.

This confidence matched the *personalistic* and existentialist theories that inspired the members of the old Utrecht School (narrow and broad). 'Personalism' starts from the idea that it is the 'higher', spiritual dimension of humanity that needs to guide the various efforts aimed at the (re)construction of society. The individual – also the delinquent individual – is not an indifferent puppet of deterministic laws, but is capable of choosing to be or to become a 'different' person than he is; and exactly this individual development of selfhood stood at the centre of attention.[165] In spite of the strong emphasis Pompe and others put on the individual responsibility of the delinquent person and on the classical, protective legal principles, the *Verstehende* approach of the members of the old Utrecht School was not void of a certain *paternalism*. The old *Utrechters*' integrative view of man portrayed the delinquent individual as an equal fellow citizen, but the widely advocated 'encounter' between, on the one hand, criminal law officials and forensic experts and, on the other, this fellow citizen often amounted to an examination of the delinquent's individual traits and symptoms, whereas the personalities of the sublime experts were kept out of range. The expert may claim to be 'on your side as a fellow human being', but meanwhile 'his stethoscope functions as a periscope for the judicial authorities'.[166]

The new Utrecht School: a formal, democratic-participative view of humanity

The paternalistic thrust disappeared in the days of the new Utrecht School. The ethical-paternalistic view of humanity was substituted for a more *formal* or procedural, and *democratic-participative* view. We will keep our exposition brief, because the neo-*Utrechters*' views of humanity and solidarity have already, albeit implicitly, been addressed in subsection 3.3. To start with, it should be noted that Antonie Peters and his 'disciples', on balance, proved to pursue many ideas developed by the members of the old Utrecht School.[167] In particular, they endorsed and carried further the idea that criminal law is to be viewed as a potentially inclusive social apparatus, that is to say: a system aimed at the re-socialization and rehabilitation of offenders. In addition, they shared the old *Utrechters*' confidence in the criminal law's capacity to contribute to a just ordering of society by regulating and delimiting the powers of the state and by advancing the autonomy of the citizen. And finally, just as the members of the old School, the neo-*Utrechters* emphasized the importance of general legal principles and of solidarity between people and between the individual and society at large.[168]

These ideas were, however, radically changed. Compared to the old *Utrechters*' version thereof, the notion of humanity as it was conceptualized

165 Abma, Bos, Koops & Van Rinsum, 2009, p. 145. See also Peters 1993d, p. 130-132.
166 Anonymous quote, recorded by Peter Baauw; Baauw, 1976, p. 387-388.
167 Brants, 1999, p. 15.
168 Ibid., p. 25.

by the members of the new Utrecht School was of a far more formal nature: the humane qualities of the criminal law were primarily sought in *procedural arrangements*. As may be recalled from our discussion in subsection 3.3, the new Utrecht School, contrary to the old one, actively engaged in forms of critique levelled at the normative contents of criminal law and insisted on structural changes in criminal procedure. Accordingly, the members of the new Utrecht School projected their emancipatory aims primarily onto the juridical, protective safeguards surrounding the procedural position of the defendant and his/her counsel. The general idea was that a strongly secured and protected legal position is an indispensible condition for the defendant's ability to truly and meaningfully participate in the proceedings, and is thus a prerequisite for the emancipation and empowerment of the delinquent.

The period from 1980 onwards: a composite view of humanity in a diversified setting

We shall dwell somewhat longer on how the notions of humanity and solidarity were given shape at the Institute in the 1980s and onwards. In the course of these more recent years, a composite view of humanity and solidarity was developed that includes both formal or procedural and philosophically-informed ethical dimensions. As was noted in subsection 3.2, the research devoted to criminal law that was conducted at the Institute since roughly 1980, was no longer supported by a dominant integral, overarching theoretical or methodological approach. The days of the 'grand narratives' were over; and those of the development of scholarly specialities dawned. Nonetheless, the notions of humanity and solidarity have remained to constitute important and clearly distinguishable constants in the various specialized research areas throughout the years and until this day. We will discuss four of these areas: domestic criminal law, including detention law; the human rights discourse and its influence on domestic criminal procedure; the meaning of general legal principles within international and European criminal law and regulatory criminal law; and finally the domain covered by philosophical-anthropological theories on human responsibility within the context of forensic psychiatry. We start, however, with a brief sketch of the most notable changes within the social and legal climate that have occurred since the 1980s.

From the 1980s onwards, the administration of criminal justice in the Netherlands has been subjected very quickly to bureaucratic accountancy models, to output demands and demands of efficiency and cost-reduction. The developments that were already mentioned in subsection 2.6 resulted in an enormous expansion of the criminal law. A large number of new penal provisions appeared; the competences of criminal law officials were broadened; and, in addition, a number of new doctrines that broadened the scope of criminal liability were introduced into the general part of substantive criminal law (the criminal liability of corporate entities in 1976, the penalization of preparatory activities in 1994). In addition, the different areas of regulatory criminal law

expanded tremendously. Also, as is well known, international criminal law became increasingly important and sizeable. All in all, criminal law has become increasingly harsh and punitive.[169] This development is closely connected to a notable shift in the social and juridical perception of the status of the offender and of the victim that took place in the 1980s.[170] The idea that a criminal act has to be viewed, not as a transgression of certain public interests that are protected by criminal law, but primarily as a violation of certain rights and freedoms of a concrete victim, has gained ground. The criminal law is even assumed to derive its moral legitimization and its *raison d'être* from the suffering inflicted on victims.[171] The legal position of the victim has, unsurprisingly, also gained much prominence in criminal law policy and criminal law scholarship.

Due to the scholarly differentiation in research in criminal law – a rather inescapable process, considering the various developments just discussed – the notion of critique has become more diffuse and less prominent, and the research methodologies have become more varied. What remained was the focus on communal concerns for the preservation of a sufficiently humane quality of the criminal law in its differing manifestations.[172] The notions of humanity and solidarity have, in the first place, always formed a fixed part of the research in *domestic* criminal law, including detention law.

Notwithstanding strong instrumental tendencies that have resulted in the withering of several protective attainments within substantive and procedural criminal law and detention law, Constantijn Kelk and others have continuously contested the image of the delinquent as an 'enemy' of society.[173] With respect to the substantive criminal law, there has been continuous concern for the important protective values embodied by the classical principles of legality and culpability, and for the dangers connected with highly objective 'impersonal' interpretations of *mens rea* elements and of excusatory defences such as duress.[174] With respect to procedural criminal law and detention law, there has remained – in line with the juridification movement initially developed by

169 It should be noted, however, that the development of international, European and different branches of regulatory criminal law was not motivated solely by a general trend of increased punitivity; their development was of course to a notable extent also driven by an aim to protect so-called 'new legal interests' of a collective or systemic nature, such as ones concerning the environment and financial markets. The academic debate on the role of the criminal law with regard to the protection of these interests in relation to civil law and administrative law started abroad in the 1970s. See for example Faure, Vervaele & Weale, 1994; Vervaele, 1999.

170 Spierenburg, 2013. See also the contribution of Chrisje Brants in the present volume.

171 Cf. Boutellier, 1993. With reference to Richard Rorty's ideas, it is argued in this book that a communally shared feeling of abhorrence concerning the suffering of victims of acts violence and other crimes, constitutes the single remaining source of ethical consensus in our strongly multiform society.

172 See Peters, 1986, p. 34; see also Brants, 1999, p. 21-25.

173 See for example Kelk, 1994, p. 11-21.

174 See for example: Kelk, 2008, 2015 and 2006; De Jong, 2009.

Peters (see subsection 3.3) – a strong emphasis on the importance of protective legal safeguards and a sufficiently firm legal position for delinquents.[175]

Kelk and others have not only expanded the idea of juridification and transposed it to the field of detention law; they also remained true to some of the main views developed by the old Utrecht School. With Pompe, for example, they considered the notion of human responsibility to be of paramount importance to criminal law. On balance, therefore, the contributions by Kelk and others to criminal law scholarship in Utrecht have amounted to a synthesis of the principal ideas brought forth by the old and the new Utrecht School.[176] Appealing to the individual responsibility of the delinquent *vis-à-vis* society can only have the desired effect if the criminal law meets certain conditions of decency, both socially and juridically. Because the individual is confronted with the overwhelming powers of a bureaucratically organized repressive state apparatus, the notions of humanity and solidarity deserve to be promoted to the ranks of nothing less than legal *principles*:[177]

> 'But what is specific to the criminal law – in comparison with other fields – is the a priori vulnerable position of the suspect in criminal proceedings and the circumstances of strong dependence in which convicts are situated. With regard to these individuals, enhanced prominence accrues to constitutional values, to which, in a democratic society like ours, the value of solidarity is closely allied. (...) Ideals prove to be too feeble to be able to actually counter [the inevitable lack of liberty, equality and fraternity suffered by detainees], but they can contribute to the mitigation of this lack, which could secure the upholding of some tangible proportions of humanity. Time and again, it proves to be a distinguishing characteristic of systems, that this humanity is in a constant need of being protected.'[178]

A second area in which the notions of humanity and solidarity have clearly played important roles concerns the *discourse on human rights* and the influence of the Strasbourg Court on domestic criminal procedural law. The relevance of this Court's rulings with regard to particularly article 6 of the European Convention has gradually – after an initial period that was still characterized by a certain uneasiness or even timorousness – become firmly engraved in the consciousness of criminal law scholars and practitioners.[179] Much research has been devoted to different notions connected with the concept of a fair trial, including the right for the defence to be given an adequate and proper opportunity to question witnesses, and rules concerning the use in evidence

175 Kelk, 2015; 1994, p. 52-54.
176 Notwithstanding, of course, various individual accents; Chrisje Brants, for example, has portrayed Kelk as an 'Utrechter *sui generis*'; Brants, 2008.
177 Kelk, 2002.
178 Kelk, 1994, p. 269-270 (our translation, FJ/CK).
179 See Myjer, 2000; Franken, 2004.

of anonymous testimonies.[180] Whereas the attention initially focussed mainly on the legal position of the defence, later also the legal position of the victim gained more scholarly attention, partly due to developments in human rights law, such as the introduction of the doctrine of positive obligations.[181] Although the focus on the Strasbourg Court's case law and its implications for domestic law neatly fitted the new Utrecht School's concept of juridification, it was of course by no means typical only for criminal law scholarship in Utrecht.[182]

In the third place, emphasis on humanity and solidarity is clearly distinguishable in research dedicated to *international and European criminal law* and the different subfields of *regulatory criminal law*. Regarding the international and European criminal law, in particular the pioneer role of Bert Swart should be mentioned. He was one of the first scholars who conducted profound research into various aspects of the internationalization of criminal law, such as the law concerning extradition, international legal cooperation, the law of tribunals, and the developing European criminal law.[183] He has continuously emphasized the importance of securing fair procedures and providing sufficient legal safeguards for delinquent individuals.[184] Moreover, his pioneering activities in the fields of international and European criminal law have inspired many younger scholars.[185] Chrisje Brants typified his views as follows:

> '[I]n the criminal law, it is not law-bound policy that is put first, but the quality of the administration of justice, which is intrinsically connected with the integrity of the procedure, the centre of which is occupied by the human individual; also, it is not the outcome of policy that is decisive for its legitimacy, but the way in which the outcome is reached.'[186]

Over the past decades, research into the European criminal law has developed into a true speciality at the Institute in Utrecht.[187] The same holds true for research devoted to various fields of regulatory criminal law (including socio-

180 See for example Beijer, 1997.

181 In Utrecht, the legal position of the victim has been studied primarily by Renée Kool; see also her contribution and Chrisje Brants' contribution to the present volume.

182 One topic that has become rather characteristic for the research done in Utrecht is that of (internal and external) publicity in criminal proceedings. This theme has been dealt with primarily by Chrisje Brants. Already in her inaugural lecture, this was a focus of her attention; see Brants, 1999, p. 32-37. See also especially: Van Lent, 2008.

183 See Swart, 1983; 1994; 1986; 1996. See also the edited volume: C.H. Brants, C. Kelk & M. Moerings, 1996.

184 See Groenhuijsen, 2008, p. 1097.

185 See Klip, 1994; Sluiter, 2002. Some time after his departure from Utrecht in 1996, Swart was appointed as an endowed professor at the University of Amsterdam.

186 Brants, 1999, p. 23-24 (our translation, FJ/CK).

187 Not exclusively in Utrecht: also at the University of Maastricht, an important expertise centre in the field of European criminal law has come into being, under the guidance of André Klip (one of Bert Swart's *promoti*).

economic criminal law, fiscal criminal law, environmental criminal law). Within regulatory criminal law, criminal provisions tend to be formulated more broadly than is the case in 'civil' criminal law, and they more often include duties of care. Regulatory criminal law often differs also on the procedural level: criminal investigations are frequently preceded by administrative acts of surveillance, and procedural competences are often formulated more broadly than normally in other instances.[188] Although the attention paid to the development of European and regulatory criminal law has been quite limited in Utrecht in the past,[189] nowadays rather the opposite holds true. These areas have been thoroughly dealt with by Mischa Wladimiroff and Peter Baauw, and today they form the primal focus of attention of, particularly, John Vervaele and Michiel Luchtman.[190] The notion of humanity is manifested, *inter alia*, in their concern for the value of classical principles and notions such as legality, legal certainty, *ultima ratio*, and *ne bis in idem*.

Fourth and last, considerable attention has been paid to the notion of humanity also from a philosophical and anthropological perspective in the research dedicated to foundations of human responsibility within the field of *forensic psychiatry*. Antoine Mooij, in particular, has written extensively on the concepts of subjectivity and human responsibility. Connecting central insights taken from philosophical anthropology, hermeneutics, phenomenology, psychoanalysis, and linguistics, he has produced a highly original and ingenious body of thought that encompasses virtually all human aspects which are relevant to criminal law and psychiatry.[191] In his work, Mooij has not only forcefully criticized the prevailing reductionist tendencies within naturalistic branches of psychiatry and other human sciences (see the conclusion of subsection 3.3); he has also firmly placed the notion of 'the mental reality' (*psychische realiteit*) at the heart of the criminal law, of psychiatry, and consequently of the domain where both disciplines intersect: forensic psychiatry. These disciplines are founded on a series of mutually related concepts that refer to essential dimensions of humanity: responsibility, culpability, intentionality, action, and freedom. Mooij has elaborated these concepts both philosophically and in terms of the central criminal law doctrines.[192]

Finally, we want to add that the notions of humanity and solidarity have also occupied prominent positions within *criminological* research as it has been carried out at the Institute since roughly 1980. In this connection, one can think

188 See Baauw, 1999, p. 15; Wladimiroff, 1989.

189 With the exception of Bert Röling and Bé Buiting, two *Utrechters* who dealt with economic crime and environmental crime already at an early date.

190 See Vervaele, 1994 on European criminal law; and see the textbook: Kristen, Lamp, Lindeman & Luchtman, 2011 on regulatory criminal law.

191 See Mooij, 2010, 2012 and 2015.

192 On responsibility, culpability, and free will, see for example Mooij, 1997, 2004 and 1998. See also Koenraadt, 2008.

of investigations dedicated to the application of insights taken from the labelling-theory, which has its origins in American criminology (Howard Becker, Edwin Lemert), to national issues;[193] criminological studies on various issues relating to the multicultural identity of contemporary society;[194] criminological research into discrimination issues;[195] and research on the social construction of crime and the cultural factors which help explain differences between legal systems.[196]

4 Concluding observations

4.1 Lessons from the past

We will now briefly deal with the question of what lessons can be learned – to our mind – from our exposition of the history of the Willem Pompe Institute. First of all and rather self-evidently, any academic institute must always consider it its task to continuously be engaged in some form of *critical* enquiry. In her inaugural lecture, Chrisje Brants has phrased this task as follows: 'Essential to all forms of scholarship is the positing of question marks next to what is considered – in daily political reality – to be self-evident.'[197] A fundamental prerequisite for the fulfilment of this critical task is a securely autonomous and independent position for academic research. The Willem Pompe Institute – like many other academic institutes in the Netherlands and elsewhere as well – has always had the advantage of being able to maintain such a position; and luckily, this is still the case today, although it deserves to be noted that academic freedom and independence seem to have come under an increasing threat of a pronouncedly bureaucratic form of academic governance (we will come back to this briefly in subsection 4.2, *infra*).[198]

In the criminal law, *state powers* constitute a 'given', and the proper exercise of the different competences that are connected with these powers need to be subjected to firm and unremitting critical scrutiny. This is so, obviously, because the criminal law authorizes the state to employ a large number of extremely drastic measures with which it interferes directly with differing rights and freedoms that accrue to citizens. Criminal law scholarship ought to apply itself to this critical scrutiny, irrespective of how one thinks about the rather bold theory advocated by Antonie Peters, according to whom this critical scrutiny ('policing the police') constitutes the criminal law's *true juridical nature*. Academic critique is not levelled at the existence of state power as such; what is essential, after all, is that the exercise of state powers in the field of criminal law

193 Moerings, 1978; Moerings & Van den Bunt, 1976.
194 Bovenkerk, Komen & Yeşilgöz, 2003.
195 Brants, Kool & Ringnalda, 2007.
196 Brants & Kool, 2009; Brants & Brants, 1991; Brants, 2013.
197 Brants, 1999, p. 26 (our translation, FJ/CK).
198 Cf. Kelk, 1983, p. 32.

should be justified or legitimized by means of juridical regulations. Pompe and the other members of the old Utrecht School were already well aware of this.

In addition, the history of criminal law scholarship in Utrecht teaches us how important it is that, within the administration of criminal justice, a sufficient measure of attention is continuously being paid to the *individual delinquent*, and that this individual is treated, if and where possible, with sufficient sympathy for the difficult situation he is in. The same holds true for investigations of the mental capacities of the individual delinquent and of the background conditions of his criminal act. This form of *solidarity*, which amounts to something entirely different from any sort of 'pampering' that public opinion often associates with it, not only serves the purpose of enhancing the criminal law's humanity, but also stimulates the meticulousness of criminal law practice. Already long ago, the old Utrecht School bequeathed us this still important insight.

Particularly the new Utrecht School has emphasized the importance of *protective safeguards* that the criminal law (potentially) affords to the citizen. An optimal exploitation of this potential within criminal proceedings – by way of appealing to human rights and fundamental legal principles – presupposes a communal belief and confidence in the autonomy of the criminal law. This 'dynamic' conceptualization of the notion of legal protection or legal safeguards will have a positive influence on the overall fairness of criminal proceedings. In this connection, it is striking that, since the formation of the Institute and until today, many staff members of the Institute have had additional functions at the Bar or within the judiciary.

Lastly, the legacy of the old and the new Utrecht School demonstrates the importance of *multidisciplinary research* into the differing aspects of delinquency and criminal law. This type of research, in which the Institute at times has excelled, deserves to be continued, because it contributes to both a deepening and a broadening of our understanding of many important issues. Nowadays, an integrative, multidisciplinary approach is called for more than ever before, considering the fact that new scholarly branches have been growing out of the old existing multidisciplinary tree of criminal law, criminology, forensic psychiatry and psychology, and juvenile criminal law, such as: the internationalization of criminal law, European criminal law, comparative criminal law, regulatory criminal law, and the law concerning victims' rights.

4.2 Contemporary questions and future challenges

The notable increase of punitivity within the Dutch criminal law system during the previous decades has lowered this system's level of humanity and has consequently also somewhat dulled its once firm international reputation of being a humane system. This development is presumably partly induced by the increased tendency of policy makers to propose and implement reforms that are modelled after situations in a few other European countries where the

standards of humanity in criminal law have traditionally been lower. In the first place, the once so highly esteemed *ultima ratio* principle has in the meantime thinned into barren theory. Although both practitioners and scholars in the field of criminal law may by now have become accustomed to this trend – one gets used to anything, even to price increases, in this case the price of crime – the widespread naive belief in the useful effects of punishment and of the criminal law nevertheless deserves continuous scepticism.

In the second place, the legal position of the suspect in criminal proceedings and of detainees has withered to some extent, partly as a result of the advent of a sometimes very harsh or even cynical discourse in politics and the media surrounding the legal status of suspects and detainees.[199] In many important respects, contemporary Western society is very different from societal conditions in the 1950s or 1970s. To be sure, not all social developments have been for the worse; the increased solidarity with victims of (violent) crimes, for example, has rightfully stimulated the enhancement of victims' rights within criminal proceedings. However, the recent advent of the 'victim paradigm' of which Chrisje Brants speaks in her contribution to the present volume, should not entice us to succumb to the popular and, at times, demagogic rhetoric that creates a false opposition between the actual or assumed needs of victims, on the one hand, and the different legal safeguards that protect the delinquent individual, on the other.[200]

A critical concern for the legal position of delinquents is therefore still highly necessary, probably even more so than was the case during the heyday of the new Utrecht School in the 1970s.[201] As we have seen in subsection 3.3, the socio-critical approach that prevailed within the new Utrecht School was characterized by both a negative and a positive dimension: in its negative dimension, critique of society is focussed on the unveiling of injustices that are masked – consciously but more often unconsciously – by the official ideologies; and in its positive dimension, critique is exercised with the ultimate aim of contributing to the rectification of the unveiled injustices. By this route, the individual delinquent could be empowered and liberated from his strongly dependent position. The 'juridification movement', which can be seen as a long-lasting heritage of the new Utrecht School, continued to contribute to this positive dimension by emphasizing the importance of sufficiently stable protective legal safeguards for the benefit of delinquents.

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199 Cf. De Jong, 2014.

200 See also Groenhuijsen, 2013.

201 In 2014, the Dutch Minister of Security and Justice announced a big legislative project aimed at a thorough modernization of the total Dutch Code of Criminal Procedure (that entered into force in 1926). This enormous legislative enterprise (*Modernisering Wetboek van Strafvordering*) calls for a continuous critical eye, not in the least with respect to several aspects of the legal position of the defence in criminal proceedings. See Mevis, 2014; Franken, 2014; Van Kampen, 2014.

New times ask for new forms of scholarly critique. Perhaps simplifying matters a little bit too much, we could say that the 'classical' notions of protective legal safeguards which the old Utrecht School valued so highly, were strongly resemblant of the so-called 'negative freedoms' protected by the classical human rights (securing the citizen's freedom *from* interferences by the state), although the old *Utrechters* also strongly emphasized any individual's dependence on other people for the development of a (positively) free existence; in comparison to this, the later emancipatory ideals of the new Utrecht School were more directly resemblant of the 'positive freedoms' of the modern, empowering human rights (enhancing the citizen's freedom *to* lead an independent life).[202] In addition, in our contemporary 'liquid society' power relations and questions related to human rights and fundamental freedoms have become more horizontalized (the advent of the so-called 'victim paradigm' in criminal law also attests to this).[203] However, we can by now ask ourselves whether, or to what extent, the emancipatory ideals that were propagated by the new Utrecht School were not still, in the end, too 'formal', and in a way too 'negative'. The rather optimistic view that prevailed in the 1970s was that removing existing impediments for the defence to actively participate in the criminal procedure would more or less automatically empower the delinquent to contribute meaningfully to the development of law and enable him 'to vindicate his citizenship'.[204] With the benefit of hindsight, we can now conclude that this expectation was rather too optimistic.

Unlike the old *Utrechters* (despite their paternalism), the members of the new Utrecht School have not really aimed at developing a more *substantiated* 'positive' conceptualization of individual freedom in terms of the individual's role in society and in terms of the importance of intersubjective bonds within social communities. This brings us to our last observation, which concerns the academic community. Years of neo-liberalist government policy have had a tremendous influence on governance structures within the academic context. The strong focus on output and targets and the different forms of prioritizing quantity over quality have put the old academic values of contributing to intellectual growth and to critical citizenship under very strong pressure.[205] The value of independent, original and fundamental research has become somewhat overshadowed by the increased and still increasing necessity for academic scholars to engage in fundraising activities and in contract-based, short-term research projects. However, the fact that the mentioned old academic values are still widely considered to be anything but outdated, is attested to by the different

202 Cf. Berlin, 2002.

203 See Bauman, 2000, p. 85, who maintains that instead of Foucault's *panopticon* what we have come to inhabit is what he terms a *synopticon*, that is: a system without a centre, wherein powers that used to belong to the state have been privatized and commercialized.

204 Peters, 1993e, p. 217-220; cf. Franken, 2004.

205 Cf. with reference to the international context: Stolker, 2014.

recent upheavals within several academic communities in the Netherlands and abroad.[206]

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