Symbolic and diabolic forces in criminal law

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by

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‘The symbol gives rise to thought.’
Paul Ricoeur[1]

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Introduction and the central question

Highly esteemed listeners,

'At the very core of things, (...) the person who engages in criminal activity gives up on the community; he does something, therefore, which in light of this demand he cannot do, and hence becomes someone who he cannot become; he projects a World, which cannot exist, in short: he lives, due to his very continued existence, within guilt.' These somewhat ominous words were pronounced sixty-six years ago, in 1950, by Ger Kempe, on the occasion of his official acceptance of the office of Professor of Criminology at this university. Kempe adorned his beautiful, albeit at times somewhat overblown inaugural lecture with the title *Guilty Being*. Invoking eminences of the likes of Martin Heidegger, Karl Jaspers and Ludwig Binswanger, he painted a rather diabolic image of the person who lapses into criminality and thereby assumes an existence within guilt. Diabolic, because being delinquent, according to Kempe – and I cite his words for a last time – equals 'a guilty, *viz.* paradoxical, mode of being-in-the-world, oriented towards the destruction of communal bonds with the other.'[2]

What do these solemn words – so clearly formed pursuant to the lingual demands of the anthropological and existentialist philosophies of the first half of the past century – still mean to us today? Do they still speak to us at all? At first glance, they appear to mean rather little to us. The words are too 'symbolic' in our highly visual culture. Within our current administration of criminal justice, with its tit-for-tat policy and its focus on making individuals toe the line, Kempe's words feel rather counterintuitive. To this can be added that our criminal justice system is no longer very keenly sensible of high-flown principles, and instead relies heavily on pragmatism. Meanwhile, therefore, the traditional justifications and accounts of the overall design of our criminal justice system seem to have become quite hackneyed. The old, classical principles regarding, for example, culpability and legality, but also the presumption of innocence and other procedural principles, to which jurists commonly and consistently defer in order to rationalize the existing

institutional design of the criminal law, and to criticize infringements of this design, enjoy a decreasing appeal outside legal circles.

Undoubtedly, this is partly due to the high level of abstraction that pertains to the fundamental principles of criminal law, which is why critical stances that are based on them are rather easily countered with an appeal to 'changed times'. Even the renowned Dutch juridical commentator Folkert Jensma has stated, in one of his usually very spot-on columns in the newspaper *NRC Handelsblad*, that he tends to feel a bit annoyed by the reflex with which legal academics often portray novel legislative initiatives as direct threats to the rule of law.[3] On the one hand, I find this lamentation somewhat bothersome: if even legal scholars cannot voice these sorts of complaints without grating on the nerves of journalists, then who can? On the other hand, however, Jensma does have a point, insofar as the traditional discourses on the rule of law and on the normative meaning of legal principles indeed appear to have dulled to a certain degree. Could it be that, whilst the jurist imperturbably keeps on harping upon the same string, the principles that she invokes have in the meantime for others transformed into simulacra that have ceased to provide any genuinely guiding meaning?[4]

This question leads me to the core of the issue that I want to address in this lecture. I will not solve the issue, but I do want to map out its contours and point to a number of directions for future research that, in my estimation, could prove to fruitfully contribute to the effort of solving the issue. The principal question that I want to address is: what are the contours of a critical groundwork of a theory of criminal law that we need in 2016, that is, in a time of diabolic forces that disrupt symbolic ties? In the remainder I will call those phenomena 'symbolic' that bind a society or a part thereof, in other words: phenomena that create or uphold a community. I will call 'diabolic' those phenomena that split, disrupt, threaten or undermine communal ties.[5] Part I of this lecture discusses a number of philosophical-anthropological and post-Kantian[6] insights into the symbolic foundations upon which our criminal law is assumed to rest since the Enlightenment; referring to the concept of anxiety, Part II will discuss the way in which the relevant symbolic foundations have withered in late modernity; Part III will pave the way for a critical theory of the groundwork of contemporary criminal law that could effectively offer resistance to the different diabolic forces within contemporary society, politics, and the administration of criminal justice.

Part I

Post-Kantian foundations of public criminal law

When we unwrap Kempe's aforementioned statements from their existentialist and phenomenological articulation, we lay bare a substance that incontestably conforms in considerable measure to some of the most notable ideas that have traditionally grounded, and still continue to ground, our criminal law. In order to elucidate this, the first Part of this lecture pays attention to some of the most important philosophical foundations of criminal law as it has taken shape since the time of the Enlightenment. I start with a discussion of a number of insights stemming from philosophical anthropology that concern the mysterious concept of a symbolic order. In this connection, I will contend that the public institution of a criminal law system is essentially a manifestation of a symbolic order. Subsequently I will discuss the solid conceptual connection between the notions of authority and human freedom, and I will argue that the exercise of public authority to which the criminal law authorizes its officials is ultimately oriented towards the purpose of optimally safeguarding human freedom. In conclusion, I will return to the previously cited words of Kempe.

Language, culture, and the concept of a symbolic order

Philosophical anthropology and also, for that matter, recent neuroscience confront us with the somewhat teasing insight that, considered from the perspective of the degree of dependence on congeners, human beings are worse off than most of the other animals that inhabit our Earth.[7] A human being comes into the world as a relatively helpless creature, relatively poor in instincts and with limited senses. Compared with other young animals, the human child is dependent on the care provided by others, usually the parents, for a long time. During this time, the human child acquires and develops skills and capabilities that enable her to independently participate in and contribute to social life. The learning processes, in other words, contribute to a thorough socialization of the human individual.

Processes of socialization assimilate a human being into a culture. In a very fundamental sense, the phenomenon we call 'culture' forms the effect

of the exercise of a deeply human capability, which is commonly referred to in philosophical anthropology as the capability of 'symbolization'.[8] In and through the exercise of this capability of symbolization man has access to reality in a specifically human fashion. Different forms in which the cultural life of humans manifests itself – such as language, art, science, religion, law – are symbolic systems in terms of which certain sections of reality are denoted and fixated in certain meanings. Every symbolic order is constitutive of a specific intersubjective, hence public space: communicative agreement between people presupposes a shared 'background knowledge', which can only be the result of the *interposing* of a 'ground' in between man and immediate reality.[9]

In this connection, language enjoys paradigmatic importance. Language interposes a system of meanings between man and reality. It filters absolute and undifferentiated reality; it makes reality relative to human concepts, and thereby renders reality amenable to human interpretation and intersubjective communication. This is to say: language *transforms* reality into a 'world' that comprises collections of distinct and hence apprehensible objects and subjects. Language transforms reality into a world *filled* with meanings.[10] Absolute, undifferentiated reality is infinite, but meanings are more or less finite.[11] Filling reality with meanings therefore presupposes that reality, in one way or another, is limited or condensed, is made finite. This is exactly what language does: language functions as a system of terms that do not in the first instance refer directly to the world, but that first and foremost refer to one another, and only by that route to the world. In this way, language *dimensions* reality into humanly manageable proportions, both spatially and temporally.[12]

Now of course, language is a very basal form of a symbolic order.[13] But a highly important one nonetheless, viewed from the perspective of philosophical anthropology: by means of language, a human being is drawn out of the seclusion of her subjective interiority, and transferred into a symbolically structured public space. Our experience of the symbolically 'pregnant' world depends on the distance that language interposes between the surrounding environment and us.[14] This distance has multiple shapes. Objects in the world can be perceived and discerned on account of the fact that they appear to us, not within an endless, physical space, but within a socially dimensioned and therefore *lived* space that conforms to human proportions.[15] Moreover, they announce themselves to our consciousness, not within a cosmological and purely linear elapse of time, but within a temporal world that is marked by the perspectival dimensions of a past, a present, and a future.

Language *engenders* a public space, the existence of which forms a constitutive precondition for intersubjective communication. By implication,

language is a representative structure – not in the sense that it depicts reality one on one with its terms, but in the sense that it puts reality at a distance and at once presents it anew in the guise of an intersubjective life-world. That life-world is a cultural and hence historical phenomenon. Consciousness always implies being conscious *of something*, being directed *towards something*.[16] Martin Heidegger strongly emphasized that any consciousness of something is in turn embedded in an anticipatory comprehension of this something *as something*. This 'as' presupposes that the object of which one is conscious is, on a more fundamental level, already available '*als Aussprechbares*'.[17] Understanding our position within the life-world that was not created as a result of our own individual efforts, therefore, is dependent on a structure of culturally transmitted preconceptions (*Vor-urteile*) that are rooted in traditions and forestall the interpretation of objects and perceptions inside the life-world. This structure has a *lingual* or *dialogical* character. Or in the words of Paul Ricoeur: the transmitted preconceptions inscribe us into an already running dialogue within which we try to orient ourselves.[18]

The price that a human being pays for the distance from immediate reality that is put in place by language, is that this immediate, absolute reality – at least insofar as it is symbolically mediated – becomes inaccessible to her. The proceeds yielded by the separation between man and reality, however, are larger than the costs involved herein. In the absence of any such distance or separation, subjective perceptions and utterances would remain enclosed within a chaotic, unintelligible reality.[19] The human being would be left to the mercy of an unstructured reality of brute natural forces, within which she would, like the other animals, only be able to orient herself led by innate instincts and other motivational thrusts that she cannot control. On account of the fact that language subjects immediate reality to the discipline of a symbolic order, a human being is enabled to distance herself in a certain measure from her surroundings, and to reflect on the situation in which she finds herself.

The objects, the other subjects, and even one's own self are no longer immediately present to the self. Between the self and the other a symbolic interval is in place that allows us to interpret the utterances of the other. The symbolic order of language also enables us to distance ourselves from ourselves, that is, to temporarily see ourselves as 'another' whose identity and whose utterances can then become the objects of our reflection and interpretation. This specific capability of distancing and reflecting harbours the very characteristic that has of old been considered to be a pre-eminently human one: freedom. Owing to our capability of reflection and of assuming a second person's perspective, we do not completely coincide with ourselves. According to the line of reasoning that I am following, freedom can be defined as the human condition on the basis of which, given certain concrete

circumstances, different courses of action can be taken into consideration, and responsibility can be assumed for the course of action that one has actually followed.[20]

Earlier on I submitted that symbolization renders possible a specifically human access to and interaction with reality. Symbolization discloses a multitude of different perspectives on reality. For example, in juxtaposition there exist a scientific perspective, a moral perspective, a juridical perspective, an ethical perspective on reality – perspectives that each have their own regional validity, so that no single perspective can legitimately be made absolute to the detriment of the other perspectives. The different perspectives that are opened up in processes of symbolization have at least one important feature in common: they are all essentially cultural through and through. Symbolic orders that are unadulteratedly private are by definition impossible.[21]

Also the law forms an important example of a representative structure that is constitutive of a specific cultural, human world, and hence of a specific perspective on reality. Law provides for a symbolic ordering of reality that is placed under the sign of justice.[22] Just as language puts absolute and immediate reality at a distance, in order that a symbolically construed intersubjective life-world is created and made accessible, so too the law, in its turn, puts that intersubjective life-world at a distance, in order that an again symbolically organized, but this time specifically *juridical* world emerges. Law is a symbolic system that is comprised of concepts in terms of which the intersubjective life-world is denoted juridically. Law mediates between social facts and juridical meanings by interposing between the world of social facts and the world of juridical meanings a system of concepts and norms with the help of which it is principally possible to view any social fact through a juridical lens.

In this way, law engenders a further objectification of cultural life: it elevates the human subject above the socially dimensioned world and places her within a new objective dimension. By means of shaping a juridical order, an artificial normative space is carved out, separated from the moral demands – and the different controversies surrounding them – that in a more direct sense govern an entire political community or a section of a political community. Thus, the law subjects the plurality of individual interests in a community to the authority of a collective and formal normative order.[23]

Authority, freedom, and the function of criminal law

The criminal law, like law generally, submits social life to the authority of a normative order that prescribes how to act and how not to act in certain circumstances. Law, in other words, forms a manifestation of *practical*

authority: it purports to *direct* human activity in a binding manner.[24] Criminal law is positioned at the far end of the juridical symbolic order, as its aggressive tailpiece: if less radical interventions appear insufficient to have someone toe the line, she can be called to account criminally. After all, it is an empirical fact that people sometimes have to be compelled, the hard way if need be, to act in accordance with the legally prescribed courses of action.[25] The hard way *if need be* – not as a rule. The principle of subsidiarity implies that the intrusive State interventions authorized by the criminal law can only take place with regard to actions that transgress a certain threshold of severity, of social unworthiness, or in a term coined by Maarten Pleun Vrij: of 'sub-sociality'.[26]

So what is the main aim pursued by criminal law? The different prescriptions of criminal law fence off the repertoire of actions that people can legitimately perform, and hence curtail human freedom. As a result, human freedom is even less unbridled, even less absolute, than it would have already been in the absence of valid prescriptions of criminal law. This further curtailment, however, is firmly inscribed into a more fundamental and long-term finality of our modern criminal law that bears the marks of Enlightenment values, namely: the aim of securing that the individuals who together make up a political community are and continue to be able to live together in peace and with a sufficient measure of mutual trust, so as to ensure that they can optimally and autonomously develop their own life-projects within the scope of legally permitted actions.[27]

Criminal law embodies a form of practical authority with the help of which – however paradoxical this may sound – human freedom is being protected by way of its very restriction. This rather rough outline of the function of criminal law is of course hardly sensational; it does, however, clearly show that there is a firm conceptual connection between the notions of freedom and authority. What is more: human freedom is impossible in the absence of any form of authority. Freedom presupposes a limitation – a limitation that is introduced by authority. By implication, freedom can be circumscribed as the subjective capability of conforming of one's own accord to the directives stemming from a certain (official or unofficial) authority. In what follows, I discuss the conceptual tie between freedom and authority more in detail.

To have practical authority is to have a *normative say* over someone: for someone to be a practical authority it is required that she is actually capable of unilaterally making alterations in the normative situation (for example the totality of rights and obligations) of a person.[28] Decisions or directives of practical authorities influence processes of normative *reasoning*. What is more: they curb these processes – or at least they do so according to the dominant view in the extensive analytical-philosophical literature devoted

to the relation between authority and legitimacy. Joseph Raz has pithily captured this view in his so-called *Pre-emption Thesis*: 'The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.'[29]

The directive issued by an authority constitutes a reason of a mixed type. It is a *positive* reason to perform the required action, and simultaneously it is a *negative* reason not to act on the basis of reasons that are incompatible with the contents of the directive. A person thus has practical authority if she has the ability to obligate someone by issuing a directive that, at least partly, constitutes the *reason* for the subordinate person to observe and not frustrate the directive. To the extent that a subject complies with the obligation on the ground *that* the obligation stems from an authority, the reason to comply with the obligation is termed a 'content-independent reason'.[30] For example, if I, after having inquired into the reasons for some disagreeable directive, ultimately content myself with an answer that runs: 'Because I say so!', and I subsequently do as the authority requires, then I act on the basis of a content-independent reason.[31]

In many cases, practical authority is exercised by another person than the one who is subjected to this authority. The authority normally derives her normative say from a set of conventions and norms that are rooted in a stable social practice or 'institution'.[32] The normative say exerted by practical authorities is – at least in the typical cases and in most cases – a strongly regulated and rule-bound power, and thus not a kind of authority that is seized, so to speak, 'ad hoc'. Evidently, this holds true particularly for the exercise of legal authority. However, it is all but always the case that the authority that is exercised over us directly stems from other persons. According to an old philosophical tradition that can be traced back to the views of Immanuel Kant, human beings also exert authority on *themselves*.

Earlier on I maintained that freedom consists of the ability of a human subject to distance herself from her immediate perceptions, impulses, inclinations, and desires, and to submit these to the scrutiny of a certain authority. In many instances, this authority is embodied by no other than the distancing and reflecting human subject in question. The acting self, then, does not act in a direct response to some experienced impulse or wish, but suspends this impulse or wish in order to, upon reflection, either endorse or reject the impulse or wish. Christine Korsgaard has termed the part of ourselves that is responsible for this endorsement or rejection the 'reflecting self'; it is to *her* authority that we subject our acting selves.[33] In this way, one can ask oneself: could I live with myself if I were to perform this action? Or, less dramatically: do I really want to yield to this impulse, wish or desire that I perceive?[34]

In case of a positive answer to such a question, the initially pre-reflective impulse is being endorsed and thereby transformed into a *reason* to perform the action to which the impulse had already predisposed us; in case of a negative answer, the impulse is being rejected and thereby transformed into an obligation not to act on the impulse.[35] In this connection it is important to take notice of the fact that the form of authority that the reflecting self exercises over the acting self cannot, by definition, causally influence or completely determine what the acting self does or does not do. Freedom is conceptually meaningless when separated from the notion of authority; inversely, however, authority cannot be separated from the notion of freedom, because authority conceptually presupposes subjective acknowledgement or voluntary acceptance.[36] This acceptance cannot be exacted without compromising the very meaning of the concept of authority, that is: without perverting authority into a blunt exertion of power. The reflecting self's authority can be challenged and defied and does not annul freedom.[37] Later on, we will re-encounter this view in Kant's statement that a 'demonic dimension' characterizes human freedom.

The reflecting self to whom the acting self submits is not, of course, a natural given. It is a part of our identity, which is construed and continuously developed further under the influence of multifarious environmental learning processes. This identity is strongly variegated: every individual has different 'practical identities'. Within different practical contexts we assume different practical roles. We identify with these roles: we *are* a lecturer, a mother or father, an artist, friend, globetrotter. A practice is a symbolically ordered intersubjective sphere that is invested with an ethical structure of relations of responsibility;[38] as such, they authoritatively foster the attainment of human responsibility and freedom.[39] The different learning processes that I mentioned before initiate young human beings into differing symbolic systems: language, social conventions, morality, and conceptions of one's own identity. The environmental and cultural influences exerted on human beings are hence very diverse, but what they all have in common is their essentially symbolic nature.

At the same time, we share – in our capacity of a citizen, legal subject, and moral subject – in the more encompassing practical contexts of (Dutch) citizenship, of the law, and of the universalist practice of morality.[40] Also the criminal law, the aggressive tailpiece of the entire juridical order, is therefore to be viewed as one of the more encompassing practical contexts in which we are, by default, engaged. Seen from this perspective, the cultural practice we call the criminal law is nothing but a strongly formalized specification of the types of practices that we are engaged in on a daily basis. In addition to our differing, and sometimes conflicting, practical identities, we have *learned* to view ourselves as legal subjects,

that is to say: as persons whose actions are amenable to juridical evaluation and whose freedom is juridically presupposed. This holds true, not only for the law-abiding citizen, but also for those who flout the regulations of (criminal) law: also the 'bad man' can 'talk the talk of law'.[41]

Seen in this way, criminal law contributes to the shaping of the reflecting self. It nourishes the reflecting self with its norms, its obligations and prohibitions, with an eye to encouraging the acting self to 'domesticate' or inhibit her most detrimental or diabolic impulses. In other words, criminal law seeks to influence a legal subject's normative reasoning in such a way that her reflecting self will be inclined as much as possible to exercise a 'legitimate' form of practical authority over her acting self. And this, as was already stated earlier on, is done with the aim of securing an optimal scope of human freedom within an intersubjective context: by means of the enforcement of certain prohibitions and obligations a sufficient level of communal trust in the fellow citizens is preserved, so that people may develop their own existence in relative freedom.

The public nature of criminal law and the diabolic nature of crime

Our rather long sojourn at the different insights stemming from philosophical anthropology served the purpose of clarifying two matters: first, the substance of the cultural conditions for the existence of criminal law; and second, the meaning of the criminal law's symbolic function of founding and preserving communal bonds within a political community. At the beginning of this first Part of my lecture, I mentioned that Kempe's statements about the 'core' meaning of delinquent existence, which were quoted in the introduction, appear – once unwrapped from their existentialist and phenomenological articulation – to conform in considerable measure to some of the most notable ideas that have traditionally grounded our criminal law. To complete the traditional narrative concerning the most notable philosophical foundations underlying our criminal law, we need to still briefly pay attention to the diabolic character of crime and the public nature of the criminal law.

As we saw before, the human being is worse off than the other animals to the extent that she is radically dependent on social learning processes that initiate her into different symbolic orders and that help her to acquire the skills she needs to navigate independently through the world. However, when considered from another perspective, this same human being is a highly privileged creature: during the relatively long period of socialization, the human being learns to avail herself of the gift of reason.[42] The French philosopher Paul Ricoeur therefore submitted that man is characterized by an essential disunity. The human being is a *homo duplex* on account of the

fact that she is marked by a fundamental 'disproportion' between finitude and infinitude, that is to say: she occupies a fragile position between, on the one hand, the finitude of her *bios* or situated existence, and, on the other hand, the infinitude of *logos* or reason that gives her a glimpse of the universal.[43] Exactly due to the disproportional relation between these two dimensions that are both germane to the human condition, the human being is essentially fragile and, as a result of this fragility, capable of evil. The *locus* of evil, or the passage along which evil enters the world through the human being, lies, according to Ricoeur, in this very notion of man's fragility.[44]

Between both poles of the finite and the infinite, the human being needs to try to find her way. Hence, the human being is fundamentally dependent on forms of *mediation* – mediation between her experiences, perceptions, and impulses in the here and now, on the one hand, and a transcendental viewpoint, on the other. This mediation is procured culturally, *viz.* by means of the processes of 'symbolization' that were discussed earlier. However, no single process of cultural symbolization can effectively prevent diabolic forces from threatening, undermining or attacking the communal symbolic order: the human being is and will always remain 'fragile' and thus cursed with an indissoluble feature that Immanuel Kant has termed man's '*Hang zum Bösen*'.[45]

Within Kant's theory of criminal law, crime is essentially a manifestation of a wilfully or inadvertently caused infringement of the public freedom of one or more citizens. Criminal offences, therefore, are breaches of the categorical imperative: the victim is being treated solely as an instrument, not as an end in itself. Therefore, the victim is not respected by the offender in relation to the very thing that makes her a human being.[46] This is exactly why, according to Kempe, being delinquent equals 'a paradoxical' mode of 'being-in-the-world, oriented towards the destruction of communal bonds with the other.' A reaction in the form of punishment, however, can only be justified on condition that the offence can be morally imputed to the offender, that is to say: on condition that the offender has freely chosen to perform the criminal act. Only a free human being can possibly *choose* to do evil. This is what Kant has termed the 'demonic side' of freedom: the *Hang zum Bösen* springs from human freedom itself.[47]

Given that the State, on account of the social contract, has a duty to preserve its citizens' freedom, crime is a public matter (*crimen publicum*). Public criminal law formulates the most basal conditions that need to be met for citizens to be able to live their lives in peace and relative freedom; in addition, it formulates what consequences the State is authorized to attach to the contravention of these conditions. And it is precisely in this

sense that crime can be viewed as a diabolic force, an evil that threatens or even erodes the communal order, that is, the order of the symbolic.

In principle, only those types of actions become the objects of the criminal law's attention, which constitute a threat to the continued existence of peaceful conditions within society and to the possibility for citizens to freely develop their lives.[48] For this reason, society at large has an interest in this type of evil.[49] The public reaction to the diabolic forces of criminality is outsourced to the State. The reverse side of this transaction that goes by the name of the social contract is the transferral of small portions of individual freedom by every citizen to the State, the sum of which suffices to enable the State to effectively protect its citizens. On account of this, the State possesses the monopoly of violence.[50]

This rounds up the old and traditional account of the fundaments and function of criminal law. A very reasonable account, a very familiar one too – and to that extent I have not said anything particularly revolutionary. But at the same time, perhaps, the account is also somewhat too abstract and too clinical for our days. In these times, which are pregnant with seemingly irrational views and sentiments, abstract concepts are often considered as outdated expressions of an elitist otherworldliness. And here my central issue again comes to the fore. In the introduction I asked whether and, if at all, to what extent the principles of criminal law to which the legal academic is in the habit of referring, have in the meantime for others transformed into simulacra that have ceased to provide any genuine feeling and guiding meaning. In order to bring the contours of a critical groundwork theory for our present-day criminal law within our sight, it is now necessary to focus our attention on the most important diabolic forces that disrupt the symbolic ties that also the criminal law is in the business of maintaining.

Part II

Anxiety and crime within a pluralistic visual culture

If we understand the criminal law and law as such, as I try to do, as a thoroughly *cultural* and hence human phenomenon, in the sense that the substance of the norms and the concepts of criminal law, as well as the institutional design of the administration of criminal justice are products of the culture in which this criminal law performs its operations, but also in the sense that the criminal law, in its turn, exerts influence on and partly shapes the culture in which it is operative, well then it is imperative that we also take this culture into consideration. However perilous this may be: talking of something so indeterminate as culture, a culture, *nota bene*, to which the speaker himself belongs, is like staring into a mirror in the expectation of getting to see a reflection of the whole of humanity.

I will nevertheless make an attempt. The principal aim that will guide this attempt is to gain some insight into the, after all, strongly changed cultural bedding of our criminal law, especially where the increased significance of the notions of anxiety and security is concerned. The meanings of these notions and their reception within the administration of criminal justice have – or so I will argue – notable implications for the traditional narrative concerning the social or symbolic function of criminal law and for the theoretical groundwork of criminal law. First, I discuss the conceptual difference between the notions of anxiety and fear in relation to the symbolic *conditio humana*; subsequently I address some forms of philosophical critique levelled at the types of authority to which human beings are subjected within certain symbolic orders, and the reception of these forms of critique within criminal law scholarship; in conclusion, I discuss, with reference to the concepts of anxiety and identity, a number of diabolic effects that reveal themselves in our late-modern visual culture.

Anxiety, fear, and 'das nichtende Nichts'

Whosoever is obsessed with security, is obsessed with anxiety. We live in a time, therefore, which is pregnant with anxiety. The question now is: what is the nature of this anxiety and what influence does it have on and within

society? A big question, I know, and hence a question that we should put to a big thinker. I propose therefore to consult Søren Kierkegaard, the famous Danish philosopher who lived between 1813 and 1855 and who, in his short life, developed many insightful thoughts on the concept of anxiety that are also very useful at present. Under the pseudonym Vigilius Haufniensis, the guardian of Copenhagen – one of his numerous pseudonyms – Kierkegaard published an extremely complex book on the concept of anxiety in 1844 (*Begrebet Angest*).[51] In this book he introduced an important conceptual distinction between two modes of being frightened. The most illustrative modus is that of fear. Fear has a clear object; one fears *something* or *someone*. Anxiety, by contrast, lacks a concrete object; one is anxious without being able to specify what, exactly, one is anxious of.[52]

Fear can be objectified. One can denote fear, give it a name, and thereby put the fear at a certain distance. One could say: well then, I am afraid of flying, or of large – or small – dogs, or of men with long beards. Thereupon, if one finds the experienced fear to be too cumbersome, one could go on to actually deal with this fear, or one could choose not to do this, of course. But in both cases one is at least able to *relate* to one's fear and to its object. And the last-mentioned capacity is exactly what is utterly lacking when one is in the grasp of anxiety, angst, *Unheimlichkeit*. Anxiety inundates a human being, absorbs a human being. For this very reason, this indefinable, seemingly objectless sentiment has traditionally been considered to be irrational and as something that is in need of being allayed, for example by way of a therapeutic treatment. In this perspective, anxiety is viewed as a form of fear that has not identified its actual object. With the help of some sort of critical (for instance psychoanalytical) therapy the victim of anxiety then has to be aided in the process of becoming conscious of the object of anxiety that had hitherto been lurking in the realms of the subconscious.[53]

Considered from this perspective, anxiety is a privation of fear: anxiety is characterized by the absence of a known object. This absence then needs to be converted into a presence, so that the anxious person can learn to meaningfully relate to her emotion. However, this perspective can, and perhaps should, be reversed. Instead of trying to understand anxiety as a special and still to be clarified manifestation of fear, one could also attempt to understand fear as a special manifestation of the more general phenomenon of anxiety. This strategy is the one followed by Kierkegaard. And it is in this reversal that one can acknowledge Kierkegaard's important contribution to philosophical anthropology, a contribution that should prove to be of great value especially for our turbulent and anxiety-ridden times. According to Kierkegaard, the indefinable anxiety or restlessness is intrinsic to the human mode of existing, intrinsic to the *conditio humana*.[54]

Anxiety springs from the pre-reflective realization that we, human individuals, ultimately have nothing to hold on to. And precisely this feeling, Kierkegaard argues, is what we should learn to welcome as a friend, instead of trying to eliminate it as if it were our enemy. This is so, because anxiety has a therapeutic, liberating efficacy. When anxiety is experienced consciously, one discovers and passes through a certain feeling of desperation. This awareness is the result of the by then reflective insight that, in the face of the horrors that life has in store, a human being is ultimately thrown upon her own resources, and is unable to rely on the help of anything or anyone when it comes to the decisions to be taken in the event of some horrific tragedy. For Kierkegaard, this insight of being ultimately 'naked' and helpless not only engenders a feeling of anxiety, but it eventually also produces a feeling of comfort or consolation. We simply *are* without any hold; and the only thing that can save us from eternal despair, according to Kierkegaard, is an unconditional faith in a higher power.[55]

Kierkegaard's line of thought concerning the concept of anxiety – with the exception of its quite Christian undertone – is also alluded to by Martin Heidegger in his famous, or perhaps rather infamous expression: '*Das Nichts selber nichtet.*' This sentence features in Heidegger's inaugural lecture in 1929 entitled: *Was ist Metaphysik?*[56] In this lecture, Heidegger addresses the question: what is the object of philosophy? His answer to this question is that the object of philosophy is 'nothing'. What did he mean by this, and what did he mean by this mysterious image – if one could call it that – of a 'nothing that nihilates'?

The meanings of these phrases have already been announced in an earlier part of my lecture, where I discussed the symbolic function of language and the symbolic function of criminal law. I maintained that language puts absolute and immediate reality at a distance, thus creating and unlocking a symbolically construed intersubjective life-world. I also maintained that the law, in its turn, puts that intersubjective life-world at a distance, as a result of which an again symbolically organized, but this time specifically *juridical* world emerges, and that the criminal law should be viewed as the aggressive tailpiece of the way in which a society subjects itself to the authority of an entire juridical symbolic order.

Symbolization, therefore, involves the putting in place of an interval or distance between a symbolic and a pre-symbolic reality. That interval forms an indispensable condition for the human capability of forming interpretations of that reality and of reaching an intersubjective agreement of opinions about that reality. The term nothing precisely denotes this interval. Objects must first be at a certain remove from one another before they can not only be perceived but also be *apperceived*, that is: be apprehended in a certain, intersubjectively available meaning. The nothing of which

Heidegger speaks, therefore, is not an absence *of* something that might as well have been present, but is an absence that is installed by means of symbolization *between* objects; in other words, an absence that 'nihilates', that permits a presence to appear and to be experienced.[57]

The question, of course, is now: what does this symbolic nothing have to do with anxiety? Anxiety – and again I refer to the idea of *Unheimlichkeit* without a concrete object – 'reveals the nothing', according to Heidegger in a passage that is heavily influenced by Kierkegaard.[58] And like Kierkegaard, Heidegger associates anxiety with a purifying function. Anxiety reminds the human being of the fact that she is a profoundly cultural being, and thus a product of the different symbolic strings in which she finds herself to be 'thrown' – that she is, essentially, a delegate of the nothing. This realization provides the human being – or at least, it provides the human being who shows to be receptive to this – with an insight into the contingent nature of the totality of cultural-symbolic interventions of which her identity forms the result. In this sense, anxiety is instructive: only he who admits and welcomes anxiety can truly become able to raise himself above his condition of 'thrownness' (*Geworfenheit*) and to develop an individual existence that is at least to a certain degree authentic.

The former possibility is reserved only for the brave, certainly not for every human being. And neither, for that matter, was it reserved for Heidegger himself who, as is well known, willingly/naively allowed himself to be encapsulated by the Nazi regime's wicked *Blut und Boden* romanticism in the years following his inaugural lecture.[59] Whereas the indeterminable oppression of anxiety confronts us with the nothing, fear is accompanied with a direct orientation towards something, towards a concrete object. Now of course, fear can often be a very adequate and useful emotion. However, fear can also be a more spurious kind of flight, a flight away from the indefinability of anxiety. The despair of anxiety is then being evaded by means of putting a determinate something in the place of nothing. In these cases, according to Heidegger, fear equals a cowardly avoidance manoeuvre. The fear absorbs us into an obsession with or fascination for a concrete object and is meant to serve our ultimately futile effort to retain our footing in this world.[60]

Anxiety, inversely, individualizes and distances us from our ontological condition of 'being-in-the-world'. The human subject's, or *Dasein*'s, anxiety originates, not from the realization that one is born into a *specific* and possibly contingent symbolically structured world, but from the realization that, when it comes to the crunch, the subject's existence is ultimately without any hold. The realization, in other words, that one, in a deep sense, is never entirely at home in the world one inhabits – hence Heidegger's frequent use of the word '*un-heimlich*'. Anxiety, one could therefore say,

is *diabolic*: the human being who, in accordance with Heidegger's edict, greets and welcomes anxiety as a friend, realizes that she needs to follow her route to authenticity all by herself, apart from the others, and to this extent she turns her back on public society.[61] She turns her back on society, and hence on the overarching symbolic structures that are constitutive of any society.

We should wonder, therefore, whether Heidegger's conception and welcoming appreciation of the phenomenon of anxiety can be considered to be fruitful also for our times. Following the Flemish philosopher Rudi Visker, I think they cannot. If there is one catchword which is most commonly used to characterize our late-modern times, it must be the term: pluralism. The *conditio humana* of late modernity is marked by direct and continuous confrontations with difference, with a multiformity of values and outlooks on the good life.[62] I call to mind that Heidegger's nothing points to the principle that underlies every symbolic order: the nothing is an absence that makes the presence of perceivable and interpretable objects possible. On account of the empty spaces or intervals between things also a phenomenon known as subjectivity is made possible: a subject is a creature who perceives an object but who is not absorbed by this object. An object does not force itself upon us, but remains at a certain distance.[63] The nothing or the emptiness, therefore, makes sure that we are able to relate to the objects, and to the other subjects, and to ourselves, and it prevents us from being inundated by impressions or objects.

Now according to Visker, the indefinable anxiety that haunts our late-modern Western societies is essentially the opposite of its Heideggerian conception: anxiety is precisely the feeling of despair that germinates from the realization that our distance to the objects, to the others, and to ourselves is dissolving, disappearing – that '*das Nichts*' ceases to '*nichten*'. Visker draws up and tries the hypothesis that in anxiety man does not glimpse into the ontological abyss out of which the mysterious 'nihilating nothing' gazes at him, but that the anxious individual is rather confronted with a surplus of *present*, far too present and obtrusive images.[64]

This hypothesis, I think, is a very promising one for our present times. But what exactly is meant by it? I am not saying anything particularly novel when I state that Western society has been enthralled by a marked individualistic and consumerist ideology already for quite some decades. The more pessimistic cultural theoreticians even do not shy away from designating our contemporary society as 'valueless'.[65] But maybe – and again I am following Visker here – it is more correct to say that we live, not in a valueless society, but rather in a society that is characterized by a surplus of mutually irreconcilable values.

Be this as it may, it should strike us as conspicuous, and actually also somewhat amusing, that Heidegger himself, of all people, gradually became ever more pessimistic with regard to the possibility of Western man to raise himself above his condition of being-in-the-world, to release himself from the suffocating twaddle of the others, and to develop a genuinely authentic existence. Although Heidegger initially – unlike Kierkegaard, whom he considered to be too 'Christian' (which may be why he only sporadically referred to him explicitly) – thought of anxiety in ethically neutral terms as an important entranceway to authenticity and true subjectivity, he denied every possibility thereof in the later stages of his philosophical career. The disciplinary and technological powers of what Heidegger eventually called the 'enframing' (*das Gestell*) had grown into such all-encompassing proportions so as to leave us with no other option than to surrender to indifferent resignation (*Gelassenheit*), whilst placing all our hope in the coming of a saving deity.[66]

Critique, emancipation, and the criminal law

A deity – or a devil? Please enter: Michel Foucault, the philosopher who has once been characterized, and not entirely without justification, as a 'diabolic orator'.[67] As is well known, Foucault is one of the most notable spiritual fathers of the idea that no or hardly any truly authentic qualities can be descried in relation to the human subject. The human individual does not originate from herself, but is essentially an effect of power, a product of multifarious disciplinary techniques.[68] The human, in other words, resembles something like a barrel filled up with rules. According to Foucault, the modern era is characterized by a steadily increasing quantity of alliances between forms of the exercise of power and forms of knowledge accumulation. As a result, an increasing number of institutions, procedures, and techniques are established that aim to 'normalize' people, that is to say: to press them into a mould out of which they are supposed to reappear as socially useful and docile subjects.[69] Foucault has coined the term '*gouvernementalité*' to designate the ideology of control that hides behind the differing disciplinary techniques.[70]

In his later work, however, Foucault emphatically argued that we need not, or rather even must not capitulate to the disciplinary powers that have us firmly in their grasp. Contrary to what Heidegger proclaimed, we are not condemned to resort to the adoption of a nihilistic, self-renouncing attitude of resignation or to await the arrival of a pardoning deity. The human being never *completely* coincides with the ways in which and the degrees to which he is being governed by power mechanisms; there always remains a 'rest' out of which a critical attitude can germinate. According to Foucault,

therefore, critique is a 'virtue', and hence an exercise situated inside the domain of practical reason rather than that of theoretical reason.[71] Critique, for Foucault, is an attitude of resistance: resistance against the ways in which and the degree to which the mechanisms of the ideology of control have forced one to be the subject one has become.

In a lecture in which he fitted his own philosophical project in the tracks of Immanuel Kant's famous answer to the question *Was ist Aufklärung?*, Foucault argued that critique is concerned with the enquiry into the boundaries of our epistemological certainties, that is, the enquiry of what Theodor Adorno has termed 'ideology'.[72] Critique actively questions the different connections between knowledge and power, because these connections produce epistemological certainties that sustain a particular social order, whereas they suppress, and declare inconceivable, alternative ways of structuring the social world. The spirit of critique has also deeply influenced criminal law scholarship; in the Netherlands this influence has probably been strongest here in Utrecht. I am alluding here to Antonie Peters who epitomized what has come to be known as the new or second Utrecht School, a scholarly movement that had its heyday in the 1970s.[73]

In the 1950s, Kempe, whose words I cited at the beginning of my lecture, was rather vehemently opposed to the strongly individualistic social climate that characterized the Interbellum period; he advocated a form of criminology that was philosophically informed by phenomenological and existentialist theories in which man was conceptualized, not as an atomized individual, but as a human being whose humanity makes him radically dependent on other people and thus on social bonds. These theories found fertile soil in the post-war years in which Kempe wrote his inaugural lecture, a period that clearly bore the marks of communal efforts to reconstruct society.[74] In other words: a period of symbolic forces. Kempe's views pertaining to the function of criminal law, and certainly also the views of the other prominent members of the old or first Utrecht School from the 1950s – Willem Pompe, Pieter Baan, Rijk Rijksen, Bert Röling – were clearly influenced by a 'social harmony model'.

But this changed rather drastically: from the 1960s onwards, criminal law scholarship came under the increasing influence of a 'social conflict model'. This holds true particularly for the so-called new or second Utrecht School that was developed under the inspiring leadership of Antonie Peters and that, as mentioned before, had its heyday in the 1970s. According to the antagonistic model of late-modern social reality, each and every issue is fundamentally controversial and stamped by conflicting material and ideal interests. The old Utrecht School's philosophical-anthropological and existentialist frames of reference were replaced by a strongly critical-sociological approach towards various questions concerning criminal law.

In this respect, the second Utrecht School was as much a child of its own time as was the first School.

In different publications, Peters explicitly referred to the views of Foucault. Along his lines of thought, Peters maintained, for example, 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.[75] In what Peters termed the 'official perspective' on law, certain abstract, doctrinal concepts are being reified, that is to say: they are considered as 'natural' depictions and reproductions of empirical, social states of affairs. In this way, the existing social order is protected by the law, but what is more: it is also portrayed as the only possible, the only conceivable form of social order. 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.

According to Foucault, a number of latent but more essential functions lie hidden behind the manifest objectives of criminal law (social control, deterrence, the correction of offenders), which are concealed by the prevailing juridical discourse and the connected ideology: the disciplining of bodies and controlling of the proletariat. The second Utrecht School's critique of society was precisely aimed at punching holes in the closed juridical discourse and offering resistance to the 'discursive police force'. This critical orientation implied, moreover, that the different controversies regarding the law's form and substance were thought to form an integral part of law itself. And in order to give these controversies their due place within criminal law, 'a pull towards the procedural side of the criminal law', as it was phrased by Cyrille Fijnaut, was necessary.[76] The main idea was that the degree to which the criminal law is capable of contributing to a favourable development of society is a direct function of the contributions and active participation of all involved parties.

But then the administration of criminal justice needs to be structured in a way that effectively allows each of the involved parties to meaningfully contribute to and participate in the development of law. On this very account, Peters submitted that law must be a forum where both juridical and political issues can be discussed openly and freely, by rational individuals who are equally well informed and who are considered to be equally competent, that is: a forum where no other type of coercion is exerted than that of the better argument. By means of active civil participation in the development of law, the individual vindicates her citizenship and establishes herself as a legal subject.[77] Only when these conditions are fulfilled can a genuine and 'deep' form of legitimacy be attained. The criminal law's truly juridical nature, according to Peters, is therefore a function of the degree to which it

is able to secure an artificial procedural space for effective communicative interaction that is based on equality and that suppresses the coercive forces naturally inherent in processes.[78]

Anxiety and identity in a 'liquid' visual culture

Why has Foucault been characterized as a 'diabolic orator'? What made his speaking diabolic? Well: for the established authorities, his pleas for the virtue of critique constitute a gift out of hell. Especially in his later works he emphasized what he took to be an ethical task of rejection: to rebel against different authority structures and to design new, 'authentic' forms of subjectivity ('life as a work of art'). In most Western societies, the results of this rebellious attitude are quite familiar. The far-reaching anti-authoritarian developments and processes of individualization of the 1960s and 1970s need not to be recounted here.[79] One of the important drawbacks to these developments has been the strongly increasing confrontation with difference and fragmentation in society.

Due to this confrontation we start to suspect that the values that we initially thought we 'owned' or 'possessed' rather have us in their grasp, possess *us*. We cannot renounce these values, since we have grown up with them or have even grown together with them; but in the face of the countless differences that surround us we are also no longer able to be completely absorbed in these values. Something particular and contingent keeps sticking to the values we purport to endorse. This 'something' does not, to be sure, preclude our ability to defend our values vis-à-vis people with other opinions, but it does render it impossible for us to defend these values with the comfortable certainty that we will be able to convince the others of the superiority of the values that hold us in their grasp. This insight oppresses.[80] Our anxiety, then, is the effect of our distressing realization that we have to do without the comfort of 'the absolute'.[81]

In the meantime, however, people tend to entrench themselves in the bastions of their own normative views. Fundamentalism, in whatever guise, seems to me to be a strongly magnified manifestation of this form of flight; a flight away from the public realm. Visker mentions the now highly topical example of the terrorist who sets herself up as our *political* opponent, thereby refusing to conform to the vocabulary in which she is portrayed as a diabolic monster, barbarian, frustrated loser.[82] With regard to these sorts of irreconcilabilities between different symbolic circuits, Jean-François Lyotard has coined his famous term '*différend*'.[83] The postmodern condition is characterized, among other things, by a strong heterogeneity of discourses. Because of this heterogeneity, according to Lyotard, it becomes increasingly difficult to sustain or attain social consensus or a *tragende*

Einverständnis (a central concept within the hermeneutical philosophy of Hans-Georg Gadamer). What is more: in their continuous confrontation, the differences are being only magnified, as a result of which an initially still anticipated consensus turns into an almost complete *dissensus*.[84] Think, for example, of the image of the naive, left-wing *Gutmensch* in opposition to that of the mud-slinging right-wing demagogue in discussions pertaining to what has come to be referred to as the refugee crisis; nobody wants to know of any form of rapprochement.

What is happening on a deeper level, in the unfortunate experience of the apparently only regional, and hence not universal validity of the values that possess us? One takes to flight. One tries to find ways to tame the existential anxiety that germinates from the experienced lack of the comfort of the absolute. A particularly popular method, then, is the avoidance strategy of fear, the strategy that, as we saw, was heavily denounced by Heidegger. The despair of anxiety is evaded by means of putting something specific in the place of the 'nothing': the image of the refugee or, more generally, the foreigner, the image of the paedophile or, more generally, the criminal, the image of the apparatchik in Brussels, et cetera, all of them figures that are considered as threats to our own way of life.

On purpose I just spoke of fear that nowadays predominantly expresses itself in *images*. When the 'nothing' ceases to 'nihilate', when the order of the symbolic draws back, that is to say: when the authority of and respect for the symbols that sustain communal bonds wither, well, then images assume the vacant positions on the pedestals of which the symbols have toppled off. We are living, it is said, in a visual culture, a culture, that is, in which the swift, always substitutable and immediately consumable image has come to prevail.[85] This development puts communal bonds between members of society under strong pressure; these bonds are thinning and easily snap at the occasion of the earliest normative crisis.

The crisis of the symbolic is therefore simultaneously a crisis of identity. In this connection, Zygmunt Bauman uses the evocative expression of a 'liquid' modernity that indeed harbours many, though increasingly *thin* intersubjective ties.[86] Whereas the public realm was still a strongly symbolically structured space during the period of so-called solid modernity, this realm has become much more sparsely populated ever since the era of liquid modernity has started. Individuals have transformed into a kind of nomads with – again in a term coined by Bauman – 'cloakroom identities'. Already in the second half of the nineteenth century, the famous Norwegian playwright Henrik Ibsen thematized the central idea contained in the notion of liquid identity in his, in hindsight, prophetic play *Peer Gynt*, which was published in 1867 and performed for the first time in 1876.[87] The titular hero of this play, which is partly based on an ancient Norwegian folk tale,

personifies, one could say, the obsession with the quest for an authentic identity. Peer Gynt, therefore, exactly personifies the diabolic substance of the type of anxiety that Heidegger initially endorsed: the task of pursuing authenticity all by oneself, apart from the others. In a key passage in the second act, Peer Gynt encounters Dovre-master, the troll king, who poses the following question to Peer: what is the difference between a human being and a troll? He gives the answer himself: 'Out there, under the radiant sky, they say: "Man, be yourself!" But here, in the world of trolls, we say: "Troll, be yourself – enough!"'[88] 'Enough', in other words: to hell with the rest!

Contemporary society has thus become the plaything of centrifugal and hence diabolic motions. On account of this, not very much may by now be left of the symbolic public realm, the importance of which was so vehemently emphasized by Hannah Arendt.[89] The public realm has been transformed into an immense quantity of semi-public spaces with varying and sometimes mutually incompatible symbolic structures. The languishing existence of the public realm is also exemplarily testified by the diminished expressiveness of a notion like 'the public interest'. As a result of the emancipation of the individual in relation to public authorities, a certain measure of independence has been gained, and personal identity has ceased to be a given and has become the object of a task, but something has also been clearly lost: the experience of a *communal* and shared identity, of belonging to a bond that transcends our status as individuals. And as a logical consequence of this, we are almost obsessively occupied with the thorny question of our shared identity: what still binds us together?

Part III

Towards a novel critical theory of the groundwork of criminal law

By now you may think, and perhaps rightfully think: besides a symbolic and a diabolic dimension, this exposition also seems to be invested with a hyperbolic dimension. Are things not being exaggerated? Is it all as bad, as torn, as I have suggested in this lecture hitherto? Not exactly, of course: in many respects our society runs like clockwork. And yet I suspect that a diabolic disunity indeed exists on a deep social level, a disunity that has important implications also for the groundwork of our criminal law.

In this third Part of my lecture I shall attempt to elucidate this suspicion. It is high time, therefore, to turn back to the criminal law and to my principal question: what are the contours of a critical groundwork of a theory of criminal law that we need in 2016? To begin with, I will sketch the current state of the groundwork theory of Dutch criminal law. I will subsequently associate my previous reflections on late-modern Western culture with states of affairs in present-day criminal law. In conclusion, I will briefly chalk out the contours of a novel critical groundwork theory of an integrated form of criminal law scholarship.

State of the current groundwork theory of Dutch criminal law

Although the emancipatory, critical type of criminal law scholarship that was advocated by Antonie Peters and the other members of the second Utrecht School was grounded in a 'social conflict model', it was simultaneously still strongly characterized by a rather optimistic trait of modernity: a firm belief in the possibility of effecting favourable social change by means of government policies, and the belief that a sufficient degree of unanimity can be attained with regard to the answer to the question of what sort of change could count as a favourable form of progress in law and in society.[90] The both critical and optimistic enthusiasm has inspired many generations of Dutch students and scholars of criminal law, both inside and outside of Utrecht. However, the mentioned optimism seems by now far away.[91] An important part, I think, of the explanation for the loss of that optimistic trust I have tried to trace in the previous Part of my lecture, in an effort to map

out a number of general cultural developments that, taken together, lead to a thinning of symbolic ordering structures that have of old upheld communal bonds within society.

As we have seen, Peters still contended that the criminal law's true juridical nature is to be found exclusively in the totality of protective safeguards for suspects and defendants within an adversarial procedure. From the 1980s onwards, however, this idea found decreasing support. An alternative view rapidly gained ground, *viz.* the idea that the legitimacy of criminal justice equally depends on its instrumentality, that is: the measure in which the criminal law effectively and visibly contributes to the prevention and combating of crime. I am alluding here to the book *Instrumentaliteit en rechtsbescherming* (Instrumentality and legal protection) by René Foqué and Joest 't Hart.[92] It has now been over twenty-five years since this book that has proved to be of immense importance for criminal law theory made its entry on the Dutch market of legal ideas. The book has gathered a large following.[93]

As appears from the book's subtitle, the authors attempted to formulate a groundwork theory of criminal law. They summarized the different foundations of the values that are protected in and by the criminal law in the twin concepts that make up the main title of their book: instrumentality and legal protection. Both finalities are entangled in a perpetual contest with one another, a contest that, to be sure, shows different temporary outcomes in different periods and in the different subfields of criminal law. But this does not alter the fact that criminal law essentially and unavoidably always serves both an instrumental and a protective purpose; neither of both polar finalities can be made absolute.

Against the background of this view of the function of criminal law, the authors developed a theory of criminal law, which they call 'relational', and within which the concepts of counterfactuality and narrativity are of pivotal importance. As a matter of course, I cannot here do justice to the theory's very complex, detailed and richly nuanced characteristics. But the main idea is briefly this: the criminal law's doctrinal concepts are counterfactual in the sense that they are not direct depictions of states of affairs within social reality. They never completely coincide with, but are always on a semantic remove from their terminological equivalents in colloquial language.[94] However, when the criminal law withdraws too far into its own doctrinal world of meanings, it runs the risk of placing itself at too large a distance from society, thereby becoming unworldly and dysfunctional. In order to avert the permanent risk of the fossilization of doctrinal constructs, Foqué and 't Hart introduce the notion of narrativity; this is a form of openness that the administration of criminal justice must provide through which potentially subversive narratives could enter into the doctrinal world

of criminal law concepts and in confrontation with which these doctrinal concepts could be critically tested.[95]

I will briefly come back to these abstract notions of counterfactuality and narrativity in a moment. First let me mention three reasons why I think it is useful to ask ourselves whether we presently, in 2016, are in need of a new conceptual underpinning of the groundwork of our criminal law. In the first place, it needs to be noticed that it has proved to be possible to hitch both the concept of instrumentality and that of legal protection to carriages that move in different directions. What, for example, is the principal meaning of the concept of legal protection? Who is to be protected from what, or what is to be protected from whom? Until not too long ago, one could confidently and unhesitatingly answer this question as follows: the suspect or the potential suspect must be protected vis-à-vis the much more powerful State. The by definition weaker party in criminal proceedings deserves to be furnished with a sufficiently safeguarded legal position within which she is protected against possible arbitrary or otherwise unjustified forms of state intervention.[96] However, the strongly increased attention for victimhood and the meanwhile improved legal status of the victim within criminal proceedings have evoked the question of whether and to what extent the different safeguards for the suspect or defendant throw a spanner in the works of the legitimate needs for legal protection to be provided for victims.[97]

Equally ambiguous, furthermore, is the concept of instrumentality. The term instrumentality in itself does not tell us more than that the criminal law – or more narrowly, the inflicted punishment – is considered to be a means that is used in the pursuit of a certain end. That end can consist of a manifold of things.[98] What is more: just like the term legal protection *could* also be taken to refer to the (instrumental) aim of protecting the different legal interests implicitly referred to in statutory definitions of offences, so too the term instrumentality could be taken to pertain to the (protective) function of offering safeguards vis-à-vis the exercise of intrusive State powers. In other words, also legal protection against the exercise of the powers of the State serves as a *function* of the criminal law, that is, as an aim for the realization of which the criminal law is put to use as a means or an instrument.[99]

A second reason why we should wonder whether our present times are in need of a new conceptual underpinning of the groundwork of our criminal law ensues from the foregoing. Foqué and ’t Hart argue that criminal law is fundamentally characterized by both its instrumental orientation towards the realization of the aims that are drawn up by politics and in policies, and its protective directedness towards the prevention of arbitrary or otherwise improper exercises of State powers. They submit, furthermore, that neither

of both finalities can be made absolute to the detriment of the other. However, as Marc Groenhuijsen already argued in his inaugural lecture of 1987, devoted to the substantive criminal law's principle of legality, to portray the instrumental and the protective finalities of criminal law as communicating vessels is not without peril, for as soon as developments within legislation, case law or policy have us realize that we are located on a slippery slope, we lack a clear criterion with the help of which we could determine whether or not a certain development is too instrumental or possibly too protective.[100]

In the meantime – and here I arrive at the third reason for my contention that a novel conceptual approach of the criminal law's groundwork is no redundant form of academic *luxuria* – the traditional justification for or elucidation of the institutional design of our criminal law has dulled to a certain extent, as I have maintained in the introduction to this lecture. What is manifested here is the apparent fact that the existing groundwork theory of criminal law is still too system-immanent for us to be enabled to convincingly shout: we have reached the limit, *non plus ultra!* What we need therefore is a more system-transcendent principle, or set of principles, that allows us to level effective and convincing forms of critique at developments within criminal law.[101]

The changed cultural bedding of criminal law

The three aforementioned reasons impel, I think, a renovation of our groundwork theory of criminal law. In the remainder of this Part of my lecture I will venture to provide not more than a first onset for this redevelopment. To this end, I will first have to succinctly connect my earlier reflections on Western culture in late modernity with contemporary issues in criminal law. After all, I set out from the supposition that criminal law is a thoroughly *cultural* and hence human phenomenon, in the sense that the substance of the norms and the concepts of criminal law, as well as the institutional design of the administration of criminal justice are products of the culture in which this criminal law performs its operations, but also in the sense that the criminal law, in its turn, exerts an influence on and partly shapes the culture in which it is operative.

A first thing we may recognize by now is that – viewed against the background of my earlier reflections – it is actually not a very remarkable fact that the administration of criminal justice has already been influenced so strongly for some decades by thinking in terms of security and instrumentality. This influence should be seen in connection with the ways in which the inherently human condition of anxiety in late-modern times manifests itself in forms of fear that have different concrete objects. Take, for example, the so-called 'security paradox', which, on further

consideration is less mysterious, and certainly less paradoxical than its name suggests. The term security paradox refers to the idea that, although Western societies have by and large become safer than ever before, strong feelings of anxiety and uneasiness are nonetheless very prevalent. This anxiety and this uneasiness are therefore seemingly irrational.

However, on further reflection they may appear to be far less peculiar than they seem to be. After all, if we start from the idea that anxiety is an existential emotion that is deeply entrenched in the human condition, and that it, so to speak, is always 'already there', then we must acknowledge that within an increasingly secure environment anxiety finds fewer places where it can, let me say: legitimately, be released. That is to say: anxiety has fewer places where it finds objects with regard to which it can be transformed into fear on reasonable grounds.[102] Hence, the always slumbering anxiety is expressed in relation to images that, rationally speaking, are not very obvious. One of these images is crime. In the Netherlands the level of crime is consistently decreasing, as is evidenced by official statistics year after year.[103] Our *fascination* with crime, however, remains constant. In spite of the sober finding that crime – *grosso modo*, and leaving aside exceptional instances – forms a relatively controllable and controlled social issue in our country, the multifarious reports, opinions and interpretations of different manifestations of crime in our newspapers and on our screens are simply unavoidable.

Within a visual culture, the appeal of uniting symbolic structures diminishes. The authority attached to symbols fades, whereas the authority ascribed to fast and transient images grows.[104] The existential feeling of anxiety that seeks ways of release in our late-modern and pluralist times finds its origin – as was mentioned before – in our silent awareness of the fact that a discomforting measure of contingency is germane to the very values that keep us in their grasp and that we cannot relinquish. The awareness, that is, that we lack the comfort of the 'absolute' to the degree that the contingency of our values prevents us from being able to justify in absolute terms our values against alternative views. And it is precisely this awareness that finds a marked expression within the existing theory of the groundwork of criminal law, the theory of Foqué and 't Hart, *viz.* in their important concept of counterfactuality, on which I have already made a few remarks previously.[105]

This notion of counterfactuality instills in us the awareness of the fact that any given criminal legal order is precisely that: an artificial social arrangement that forms the result of human interventions in the world, interventions that could equally well have turned out differently. In other words: the counterfactual nature of the doctrinal concepts of criminal law confronts us with the unavoidably partly contingent status of the criminal

legal order, and thereby with the fundamental impossibility of exhaustively justifying this order, even in the face of the biggest of evils.[106] Hence, different pleas have frequently been voiced for a more adversarial type of criminal proceedings, at least during the trial phase, that will enable the different participants to insert their personal narrations before the court cuts the Gordian knot in its verdict in the name of the legal order at large.

Considering the foregoing, the 'relational' legal theory that was developed by Foqué and 't Hart in their book *Instrumentaliteit en rechtsbescherming* from 1990, still has at least one of its legs in the type of thinking that prevailed in the so-called 'solid' modernity. Characteristic of solid modernity was the existence of more or less stable and fixed symbolic orders. Any symbolic order is of course under a permanent threat of becoming rigid or totalitarian, of imagining itself to be the only true reflection of reality. However, more than twenty-five years after the publication of the groundbreaking book by Foqué and 't Hart it seems somewhat inappropriate to speak of rigid or rusted doctrinal criminal law concepts. Several traits of what Bauman termed the 'liquid modernity' have meanwhile left their marks also within our criminal law. In this connection, one could first of all think of a number of cohering developments that tend towards developing a more relaxed and flexible specification of the different doctrines of the general part of substantive criminal law.[107] The phenomenon of rigidity has therefore become rather seldom in relation to the doctrinal concepts of criminal law.

To this can be added that in contemporary criminal law there is certainly no shortage of 'narrativity'. In an article that was published in 2013, Leonie van Lent and yours truly argued that certain, partially ideologically marked developments could be considered as indications of a decreasingly *public* nature of the criminal law.[108] For example: the increased attention for victims[109] and for mediation instruments seems to allude to a shift towards a more 'local' instead of public bedding of criminal law. The traditional and also somewhat detached narrative surrounding Dutch criminal law, which emphasizes its objective and public character and the importance of ritualized proceedings and legal safeguards, has become more disputed. This traditional image of criminal law attending to intolerable actions on behalf of, and at a certain distance from, the involved parties and the general public, is increasingly repressed by a totality of far more *particularistic* narratives of the directly involved parties.

In my view, this development may be seen as a reflection of a much wider socio-cultural phenomenon that was discussed earlier on: the languishing existence of the public realm and hence the increasingly thin nature of symbolic bonds. As was mentioned before, the crisis of the symbolic is simultaneously a crisis of collective identity. Attempts to retrieve a communally shared identity are often artificial (think, for example, of

discussions concerning the formulation of different 'canons') and, more importantly, they often adopt a negative strategy. It appears – and also Hans Boutellier already maintained this following Richard Rorty – that within our normatively pluralistic society any general consensus can only be attained with regard to issues that we collectively denounce: violence, suffering, victimhood.[110] The strong indication with victims of crime, therefore, fits in well with the pluralistic structure of a visual culture.[111]

A visual culture is furthermore characterized by a strong urge to control; the awareness of the partially intangible and uncontrollable nature of the multiform societal conditions makes way for a nervous need for usually precipitate quick fixes.[112] In this way, the criminal law is more and more frequently being used as a means to mark the different practices and life-styles with which we do *not* wish to identify ourselves. Meanwhile, the level of forbearance with regard to unwelcome actions seems to have become very low. The fact that many widely divergent actions are being experienced as threats to our collective self-image itself already indicates that this self-image no longer amounts to much, and can take shape merely negatively, that is to say: in opposition to everything we denounce.

Under the sign of 'security', meanwhile a rather harsh and authoritarian type of criminal justice has evolved.[113] I point to only a few examples. The judiciary has complied in considerable measure with the public demand (or, at any rate, the demand that is voiced in the media) for more severe penalties: over the past decade or so, the severity of court-imposed penalties has on average increased to up to twenty percent, and also the sentence of life imprisonment is being imposed more often.[114] In addition, we can refer to the excessive austerity within the detention system. The rehabilitation of offenders has become something like a favour, not anymore a responsibility of the State.[115] All in all, one could say that a rather cynical view of the delinquent individual has become prevalent within contemporary criminal law. I suspect that we may even contend that our criminal law, ever since the different instrumental developments started to gain increasing influence in the 1980s, has gradually manoeuvred itself into the firm grasp of a 'neo-Modern' or 'ultra-Modern' school of thought,[116] one-sidedly oriented towards enhancing efficiency and security, and towards the incapacitation of delinquents.

Contours of a novel critical theory of the groundwork of criminal law

I am well aware of the fact that I painted a rather roughshod picture in the foregoing. Evidently, also redeeming features can be descried within the turbulent influences that are currently being exerted on our substantive and procedural criminal law. Contemporary criminal law is affected by

the different, previously described diabolic forces, but it nonetheless still forms a strong symbolic system that, also in comparison with surrounding countries, enjoys a very reasonable measure of public confidence;[117] otherwise, it would hardly have been explicable why people – including politicians – are so persistently projecting their high expectations onto the criminal law. Furthermore, I recently read in a newspaper that, according to a recent survey by the Dutch Social and Cultural Planning Bureau, the level of trust invested by Dutch citizens in (criminal) law has started to slightly increase again. Another notable bright spot can be descried in the developed practice within the criminal division of the Dutch Supreme Court to render clarifying didactic judgments with regard to issues that induce interpretative problems or uncertainty in practice.

Also, I do not mean to underestimate the threatening and potentially disrupting dimensions of certain branches of criminality that we have to contend with in this country. I have no difficulty whatsoever to call certain manifestations of (organized) crime diabolic and to endorse the aim of combating it forcefully. Nevertheless, I do want to stand by my earlier assertion that the changed cultural bedding of our criminal law has implications for the duties that criminal law scholarship needs to discharge. As was mentioned at the beginning of my lecture, I do not purport to be able to unfold a complete and new groundwork theory here. The most that I will be able to offer is a rather brief and rough outline of some contours of the building stones for a yet to be developed critical theory of the groundwork of criminal law. With this sketch I will conclude the substantive part of my lecture.

First, let me briefly return to Ger Kempe's words with which I commenced my lecture: his words on 'the person who engages in criminal activity', the person who 'gives up on the community' and who 'projects a World, which cannot exist', in short: the person who 'lives, due to his very continued existence, within guilt.' As I have mentioned already, released from their existentialist and phenomenological phrasing, Kempe's statements on the very 'essence' of what it means to be delinquent appear to conform to some of the most notable views that have traditionally grounded, and still ground, our criminal law. Crime is essentially an infringement of a citizen's autonomy or freedom, because this citizen is treated, not as an end in itself, but merely as a means. On account of this, Kempe stated that a criminal existence is a 'paradoxical' mode of existence, oriented towards the destruction of communal bonds. And precisely for this reason, crime is to be considered as a diabolic force (a *malus*) which threatens or even attacks the communal order.

But what does this still mean, existing within guilt, existing within evil? Have not all of us in the meantime constructed Worlds of our own that

cannot actually exist – not, to be sure, because they are necessarily directed at the destruction of intersubjective ties, but because they are removed from the public realm, too far removed from 'the other'? Do all of us therefore lead an existence within guilt? A reflection on these questions is useful also within criminal law scholarship, considering that the administration of criminal justice in the Netherlands has meanwhile seemingly been taken hostage by a nervous, authoritarian ideology of security, an ideology that dismisses delinquent individuals. By means of reducing delinquents to enemies who do not belong 'to us', we are primarily charging our collective psychic burden to the account of individuals who make an easy target for this aim. And also victims are frequently being reduced to ideal types. To that extent they are also being sacrificed on the altar of our collective obsession with anxiety and security.

With the foregoing, I have not in any way meant to call into question the different victims' rights with respect to information and participation in criminal proceedings. Neither have I meant to lachrymosely advocate a restoration of the type of criminal justice that prevailed until the 1980s. At that time, criminal law may indeed have been too lenient, and victims of crime were indeed neglected. Still: notwithstanding the lapses they have made, perpetrators remain citizens who deserve to be able to live together with us once again on an equal footing after the execution of the inflicted punishment. They are human beings and hence not merely 'images' in the fear of which our existential anxiety is released. I have contended that anxiety constitutes an affect which is inextricably anchored in the *conditio humana*. In our late-modern time, this anxiety has broken adrift, it has run amuck. One of the most important tasks for criminal law scholarship and its groundwork theory, therefore, is to contribute to the realization of the aim of again 'domesticating' this anxiety that is 'always already there', in other words: to impose a rhythm on our existential anxiety once again.[118]

This, of course, requires work on many fronts. I can here mention only a few of these. According to Zygmunt Bauman, the principal task of critique in our days does not any longer – as it still did for Antonie Peters – amount merely to the protection of the private sphere over and against the colonizing powers of the State, but it also or even primarily amounts to the protection of the public sphere over and against the colonizing powers of 'the private'.[119] In the first place, therefore, criminal law scholarship needs to dedicate itself to the task of rediscovering and re-cultivating the symbolic and hence communally endorsed meanings of the central concepts and principles of criminal law. If we maintain that the criminal law's symbolic function is to secure an optimal freedom for all citizens to 'design' their lives, by way of binding the actions of people to actually directional norms, then we need to be able, or become able if need be, to clarify, not only within but also

outside of our interpretative community, the substance of our concepts in light of this symbolic function of criminal law. That is to say: we must put fresh meat on the bones of our principles!

But to have an eye for the symbolic also implies that we have an eye for the necessarily limited scope of the aims that the criminal law is capable of realizing. In this connection we should first of all concern ourselves with the reasons why it is necessary to limit the powers that the State can exert on individuals. We therefore have to remain observant with regard to the development of different forms of 'function creep' within our criminal law. And, in addition, we have to continue to apply ourselves to the task of convincingly advocating the value and public necessity of procedural legal safeguards.

Peters and the other members of the second Utrecht School were among the first to emphatically draw attention to this necessity. From Max Weber and Émile Durkheim he derived a number of basic ideas concerning the 'primitive', original social function of the criminal process.[120] 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.

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 faded to the background, became 'residual', and has been partly taken over by the media. 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 subdued continuously in an effort to uphold a legally secured artificial space within which suspects or defendants are protected by powerful procedural safeguards.[121]

Besides the public and constitutional necessity of limiting State powers we should persist also in drawing attention to the intrinsic limitations of the vigour of criminal law that is currently strived for to such a high degree. And this means: persist in contributing to a more *sober-minded* style of the administration of criminal justice that is aware of its own limitations and shortcomings and that also welcomingly accepts these limitations and shortcomings instead of losing itself in an unbridled ideology of control in which it is obsessed by images and quick fixes and in which it continuously groans and moans under the yoke of the task of rectifying its own defects.[122]

A last major task I want to mention pertains to the necessity of highlighting not only the limitations of criminal law, but also the potentially devastating effects that it can have on the lives of individuals. Over and against the cynical view of delinquents that has already been weighing down on our criminal law for some time, and that is characteristic of what I earlier referred to as a neo- or ultra-Modern school of thought, a fresh dose of trust will have to be invested in the person of the delinquent. Otherwise, the criminal law would continue to contribute to a further splitting of society. This is also why Kempe – like the other members of the first Utrecht School – so vehemently advocated an integrative view of delinquent man, oriented towards his rehabilitation.[123]

More than virtually anybody else, Willem Pompe endeavoured to advocate and substantiate this indispensable and creative notion of trust. In the striking words of Kees Schuyt, Pompe had a 'big trust in trust', trust in the criminal law official and trust in the delinquent individual.[124] The strengthening of a new and realistic form of trust is not at all an easy task; it requires that we take seriously the delinquent individual as a person and also his or her responsibility in relation to society in both a concrete and an abstract sense. This also implies that we give a new substance to the notions of freedom and subjectivity and protect them against the reductionist tendencies that prevail in science and society.[125] All of this requires what Cyrille Fijnaut has called an 'integrative form of criminal law scholarship', in which contemporary insights from criminal law, forensic psychiatry and psychology, and criminal law are meaningfully reunited.[126] Precisely in this connection, the Willem Pompe Institute faces an important task.

Concluding words and words of thanks

In this lecture I have propagated the view that the criminal law should be considered (or at least *also* be considered) as a thoroughly cultural phenomenon, *viz*. as a manifestation of a symbolic order that spans an entire political community and that seeks to combat diabolic forces in society. To the extent that I have argued for an understanding of criminal law as a cultural phenomenon, I have argued for an understanding of criminal law scholarship as a human science. The criminal law's cultural *raison d'être* simultaneously implies that the symbolic order of criminal law is, and needs to be, a human and a humane order. This impels criminal law scholarship not to desist from reminding criminal law of its function to ultimately serve human freedom within human proportions.[127]

Having almost reached the end-point of this – if I am allowed to employ a pleonastic expression – symbolic ceremony, I would like to address some words of gratitude to a number of individuals and institutions. First of all, I want to thank the board of governors of this University, the board of the Faculty of Law, Economics, and Governance, and the board of the Department of Law, for the trust invested in me.

Highly esteemed Kelk, dear Constantijn, and highly esteemed Mooij, dear Antoine – my two principal scholarly examples from Utrecht. In my lecture I have mentioned many names, including those of predecessors in Utrecht. I did not mention both of your names, however, and with reason: your voices are conveyed in virtually every sentence that I uttered. And I dare to say that in my plea for understanding criminal law as a symbolic, cultural artefact that is bound to human proportions some of your most prominent insights are closely united. Both of you have – in your own individual ways and of course on different scientific domains – contributed in a truly overarching sense to the reinterpretation and continuation of the rich body of thought of different generations of predecessors from Utrecht. I consider it an enormous privilege to have been allowed to 'serve my apprenticeship' with both of you.

Dear colleagues at the Institute of Criminal Law, Forensic Psychiatry and Psychology, and Criminology – dear 'Pompeans'. If there is one thing that

truly deserves to be designated as a powerful symbol, it must be the Willem Pompe Institute, the eightieth anniversary of which we celebrated last year. We are a strong team with a measure of mutual trust and collegiality that other organizations would, rightfully, be jealous of. And may I say that we have everything in store that is needed to resuscitate the idea of developing a truly integrative criminal law scholarship? I consider myself fortunate, and I am extremely proud, to have the privilege of being in your midst.

Dear colleagues of the Utrecht Centre for Accountability and Liability Law. Although the institution UCALL has been established only relatively recently, it is swollen with talented individuals, and has therefore proved itself able to already achieve a great deal. I am looking forward to contributing to this in the years to come, and I am very glad to have found an intellectual accommodation also with you.

Dear students and colleagues at the Utrecht Law College 'Tilia'. This year, the Utrecht Law College celebrates its second lustrum. What started as a daring experiment in 2005, has quickly demonstrated its worth as a very successful institution. I am very proud of the many intellectual and inspiring achievements that have already been attained within the ULC community, and I hope to have the privilege of learning from you for many more years. I thank all of you for the large measure of cordiality with which you have welcomed me in your midst.

I would furthermore like to thank my dear parents and brother. I am well aware that I have somewhat neglected you in the last few months. Fortunately, however, the principal cause of this has ceased to exist today. I am very thankful for your unconditional support and love.

And finally: Christian. You wanted me not to mention you, but as a matter of course: *das kommt überhaupt nicht in Frage!* Never did I meet anyone who is able to face up to existential anxiety as resolutely and as courageously as you – I have never met anyone, therefore, as authentic, in a Heideggerian sense of the word, as you. Now I still have to learn this; but together we will succeed.

I have spoken.

References

1 P. Ricoeur, *The symbolism of evil*, New York/Evanston/London: Harper & Row Publishers 1967, p. 347.

2 G.Th. Kempe, *Schuldig Zijn* (inaugural lecture Utrecht University), Utrecht/Nijmegen: Dekker & Van de Vegt 1950. Both quotations appear on p. 19 (my translation, *FJ*).

3 F. Jensma, 'De rechter verliest terrein op het bestuur', *NRC Handelsblad* 25 January 2014. Also within Dutch academia, debates on whether or not the classical principles of criminal law are out of date sometimes arise. See for example M. Barendrecht, 'Het zwijgrecht van de strafrechtgeleerden', *Nederlands Juristenblad* 2002, p. 1729; K. Rozemond, 'De retorische verleiding van het strafrecht', *Nederlands Juristenblad* 2005, p. 1182-1185; E. Prakken & T. Spronken, 'Terug naar het harde positivisme. Reactie op Klaas Rozemond', *Nederlands Juristenblad* 2005, p. 1451-1454.

4 Cf. A. Norrie, 'Simulacra of morality? Beyond the ideal/actual antinomies of criminal justice', in: R.A. Duff (ed.), *Philosophy and the criminal law. Principle and critique*, Cambridge/New York: Cambridge University Press 1998, p. 101-155.

5 See P. Berghoff, 'The diabolical dimensions in the shapes of political reality', in: B.C. Labuschagne & R.W. Sonnenschmidt (eds.), *Religion, politics and law. Philosophical reflections on the sources of normative order in society*, Leiden/Boston: Brill 2009, p. 205-221, p. 206; R. Foqué, 'Kwetsbaarheid aan het woord brengen. Tegen strafrechtelijk instrumentalisme', in: F. Verbruggen, R. Verstraeten, D. Van Daele & B. Spriet (eds.), *Strafrecht als roeping* (liber amicorum L. Dupont), Leuven: Universitaire Pers Leuven 2005, p. 1123-1142, p. 1130-1131.

6 In this connection I speak of 'post-Kantian', because most of the insights that will be discussed in the first Part of this lecture are more or less directly connected with the Kantian philosophical tradition. See M. Friedman, *A parting of the ways. Carnap, Cassirer, and Heidegger*, Chicago: Open Court 2000, p. 25-37.

7 A.W.M. Mooij, *In de greep van de taal. Symbolisering en betekenisgeving: Lacan en Cassirer*, Amsterdam: Sjibbolet 2015, p. 134; P. Moyaert, *Ethiek en sublimatie. Over de ethiek van de psychoanalyse van Jacques Lacan*, Nijmegen: Sun 1995, p. 29, 92, and 173; T. Pfau, *Minding the modern. Human agency, intellectual traditions, and responsible knowledge*, Notre Dame: University of Notre Dame Press 2013, p. 317-319 and 395-402. For neuroscientific insights into learning processes and representation, see: J.A. den Boer, *Neurofilosofie. Hersenen, bewustzijn, vrije wil*, Amsterdam: Boom 2004, p. 194-195 and 203-215; F. de Jong, 'Wilsvrijheid en strafrechtelijke verantwoordelijkheid. Een rondgang langs fysicalisme, connectionisme en belichaamde cognitie', *Justitiële verkenningen* 39 (2013) 1, p. 10-39.

8 Some parts of this sub-section are based on earlier publications: F. de Jong, *Straf, schuld & vrijheid. Pijlers van ons strafrecht*, Amsterdam: Sjibbolet 2012, p. 62-72; F. de Jong, 'The end of doctrine. On the symbolic function of doctrine in substantive criminal law', *Utrecht law review* 7 (2011) 3, p. 8-45. The concept of symbolization cannot, of

course, be extensively discussed here; I refer to Mooij 2015 (*supra*, note 7); A.W.M. Mooij, *Intentionality, desire, responsibility. A study in phenomenology, psychoanalysis and law*, Leiden/Boston: Brill 2010, p. 221-239.

9 J. Habermas, *Between naturalism and religion. Philosophical essays*, Cambridge: Polity Press 2008, p. 151-180; M. Merleau-Ponty, *Phenomenology of perception*, London: Routledge & Kegan Paul (1945) 1962, p. 121: 'To sum up, it [the capability of symbolization, *FJ*] consists in placing beneath the flow of impressions an explanatory invariant, and in giving a form to the stuff of experience.'

10 E. Cassirer, *An essay on man. An introduction to a philosophy of human culture*, Hamburg: Felix Meiner (1944) 2006, p. 128-139; E. Cassirer, *The philosophy of symbolic forms. Volume III: The phenomenology of knowledge*, New Haven: Yale University Press (1929) 1957, p. 202; Merleau-Ponty 1962 (*supra*, note 9), p. 189.

11 More or less: in stating that meanings are finite I do not mean to imply that terms can always be (or could ever be) lent definite meanings which are immune to any adaptation or interpretative controversy. Meanings are finite in the sense that they – together, as a systematic or functional unity – delimit and domesticate an otherwise unlimited, unmediated reality. Cassirer 1957 (*supra* note 10), p. 286: 'Nowhere (...) do we find anything isolated or detached.'

12 A.W.M. Mooij, *Prudentie en evidentie* (valedictory lecture Utrecht University), The Hague: Boom Juridische uitgevers 2009, p. 15; Cassirer 2006 (*supra* note 10), p. 128-139; Cassirer 1957 (*supra* note 10), p. 202; D.P. Verene, 'Introduction: the development of Cassirer's philosophy', in: T.I. Bayer, *Cassirer's metaphysics of symbolic forms. A philosophical commentary*, New Haven/London: Yale University Press 2001, p. 1-37, p. 16.

13 Not necessarily the *most* basal, however: Maurice Merleau-Ponty (1962; *supra*, note 9) has emphasized that human beings are engaged in a symbolically mediated way with reality also already on a pre-conscious, bodily level; the body receives meaning from its environment and the body lends meaning to its environment. This insight finds support within the relatively recently developed neuroscientific branches of connectionism and embodied mind; see Den Boer 2004 (*supra*, note 7).

14 R. Visker, *The inhuman condition. Looking for difference after Levinas and Heidegger*, Dordrecht/Boston/London: Kluwer Academic Publishers 2004, p. 69; A.W.M. Mooij, *Psychiatry as a human science. Phenomenological, hermeneutical and Lacanian perspectives*, Amsterdam/New York: Rodopi 2012, p. 129-138, 155-157, and 165-171.

15 Merleau-Ponty 1962 (*supra*, note 9), p. 280-298.

16 E. Husserl, *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie. Zweites Buch: Phänomenologische Untersuchungen zur Konstitution*, The Hague: Martinus Nijhoff 1952, p. 105: 'Sofern jedes cogito ein cogitatum fordert, und dieses im Aktvollzug zum reinen Ich in Beziehung steht, finden wir in jedem Akte eine merkwürdige Polarität: auf der einen Seite den Ichpol, auf der anderen das Objekt als Gegenpol.'

17 M. Heidegger, *Sein und Zeit*, Tübingen: Max Niemeyer (1927) 2006, p. 149. See also H.G. Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, Tübingen: J.C.B. Mohr (1960) 1975, p. 261-269; Merleau-Ponty 1962 (*supra*, note 9), p. 4-5. On the 'as-structure', see also: Mooij 2015 (*supra*, note 7), p. 68 and 277-283.

18 P. Ricoeur, *Hermeneutics and the human sciences. Essays on action, language and interpretation*, Cambridge/New York: Cambridge University Press 1989, p. 108.

19 H. Lindahl, 'Democracy and the symbolic constitution of society', *Ratio Juris* 11 (1998) 1, p. 12-37, at p. 20-22. See also R. Visker, *Truth and singularity. Taking Foucault into phenomenology*, Dordrecht/Boston/London: Kluwer Academic Publishers 1999, p. 91-112.

20 The line of thought is derived by me from the works of Antoine Mooij. See Mooij 2010 (*supra*, note 8), p. 10-14 and 58-62; Mooij 2012 (*supra*, note 14), p. 138-148; A.W.M. Mooij, 'On (free) will', in: F. de Jong (ed.), *Overarching views of crime and deviancy. Rethinking the legacy of the Utrecht School*, The Hague: Eleven International Publishing 2015, p. 421-433. See also S. Darwall, *The second-person standpoint. Morality, respect, and accountability*, Cambridge, Mass./London: Harvard University Press 2006; P.W. Kahn, 'Freedom, autonomy, and the cultural study of law', in: A. Sarat & J. Simon (eds.), *Cultural analysis, cultural studies, and the law. Moving beyond legal realism*, Durham: Duke University Press 2003, p. 154-187, p. 180. For a Kantian account of the meaning of reflection for human freedom, see: C.M. Korsgaard, *The sources of normativity*, Cambridge/New York: Cambridge University Press 1996, p. 90-130.

21 As also appears from the famous arguments developed by Ludwig Wittgenstein against the notion of a 'private language'; L. Wittgenstein, *Philosophical investigations*, Oxford: Blackwell (1953) 2001, sections 243 and further. See also Korsgaard 1996 (*supra*, note 20), p. 136-140.

22 Which is to say: law lays *claim* to ultimate and legitimate authority, which in no way necessarily implies that this claim is always morally justified. For an understanding of law as a symbolic order, see: W.S. Hamrick, *An existential phenomenology of law: Maurice Merleau-Ponty*, Dordrecht: Martinus Nijhoff 1987; D. Coskun, *Law as symbolic form. Ernst Cassirer and the anthropocentric view of law* (doctoral dissertation Radboud University Nijmegen), Dordrecht: Springer 2007. See with regard to politics and the views of Claude Lefort on 'the political': U. Hebekus & J. Völker, *Neue Philosophien des Politischen. Zur Einf*ührung, Hamburg: Junius 2012, p. 61-89.

23 R. Foqué, *De ruimte van het recht* (inaugural lecture Erasmus University Rotterdam), Arnhem: Gouda Quint 1992.

24 Theoretical authority refers to the exertion of influence on what a subject believes or takes to be true. Practical authority, conversely, refers to a certain type of normative say on what a subject is under an obligation to do or not do, irrespective of whether or not this subject is convinced of the correctness of the obligation issued by the authority. See S.J. Shapiro, 'Authority', in: J. Coleman & S.J. Shapiro (eds.), *The Oxford handbook of jurisprudence and philosophy of law*, Oxford/New York: Oxford University Press 2002, p. 382-439.

25 G.E. Langemeijer, 'Evolutie, revolutie, demokratie en recht', in: J.A. Ankum, G.C.J.J. van den Bergh & H.C.F. Schoordijk (eds.), *Plus est en vous. Opstellen over recht en cultuur* (liber amicorum A. Pitlo), Haarlem: H.D. Tjeenk Willink 1970, p. 17-29.

26 M.P. Vrij, 'Ter effening. Het subsociale als het derde element van het delict' (valedictory lecture State University of Groningen, 1947), in: E.J. Anneveldt, B.H. Kazemier, G.E. Langemeijer, A. Mulder, W.H. Nagel & Th.W. van Veen (eds.), *Professor mr. M.P. Vrij. Verzameling uit zijn geschriften op het gebied van strafrecht en criminologie*, Zwolle: W.E.J. Tjeenk Willink 1956, p. 285-307. The notion of sub-sociality is not only a manifestation of the *ultima ratio* principle; in Vrij's theory it additionally serves a doctrinal function as an 'element' of the offence, supplementing the *mens rea* and *actus reus* elements.

27 See P. Ricoeur, *The just*, Chicago/London: The University of Chicago Press 2000, p. 127-132. Ricoeur refers to two finalities attached to the act of judging: a short-term finality aimed at putting an end to the legal uncertainty that exists between the disputing parties, and a long-term finality that lies behind the short-term finality and that is aimed at contributing to the maintenance of social peace.

28 J. Raz, *The authority of law. Second edition*, New York/Oxford: Oxford University Press 2009, p. 16-20; A. Marmor, 'An institutional conception of authority', *Philosophy*

& public affairs 39 (2011) 3, p. 238-261, p. 240-241; J.M. Finnis, 'Authority', in: J. Raz (ed.), *Authority*, New York: New York University Press 1990, p. 174-202.

29 J. Raz, *Ethics in the public domain*, New York/Oxford: Oxford University Press 1994, p. 198.

30 Shapiro 2002 (*supra*, note 24), p. 389-390; V. Wellman, 'Authority of law', in: D. Patterson (ed.), *A companion to philosophy of law and legal theory*, Oxford: Blackwell 2010, p. 559-570.

31 A rather obvious question is: why would one do that? Is a voluntary submission to an authority not irrational and incompatible with the concept of moral autonomy? The prevailing answer to this question is that conforming to authority is not in itself at odds with moral autonomy; the arguments for this answer, however, diverge. Whereas Joseph Raz' argumentation, centred around his so-called *Normal Justification Thesis*, is strongly rationalistic (J. Raz, *The morality of freedom*, Oxford/New York: Oxford University Press 1986, p. 53), other authors develop lines of reasoning that explicitly take into account feelings of reciprocity between the authority and its subjects; see for instance S. Darwall, 'Authority, accountability, and preemption', *Jurisprudence* 2 (2011) 1, p. 103-119; A. Marmor, 'The dilemma of authority', *Jurisprudence* 2 (2011) 1, p. 121-141; and P.W. Kahn, *Political theology. Four new chapters on the concept of sovereignty*, New York: Columbia University Press, p. 141-147. See furthermore F. de Jong, 'A reciprocal turn in criminal justice? Shifting conceptions of legitimate authority', *Utrecht law review* 9 (2013) 1, p. 1-23.

32 Marmor 2011 (*supra*, note 28), p. 241-247.

33 Korsgaard 1996 (*supra*, note 20). Essentially, we have here a distinction that is prevalently used in various traditions of (cultural) philosophy, for example by both Immanuel Kant and Sigmund Freud. See B. Longuenesse, 'Kant's "I" in "I ought to" and Freud's Superego', *Proceedings of the Aristotelian Society. Supplementary volume LXXXVI* 2012, p. 19-39; E. Fromm, *Escape from freedom*, New York: Henry Holt (1941) 1969, p. 171-172.

34 All of this of course is not to imply that human beings unremittingly reflect. That would even be impossible. In much, if not most, of what we do, we rely on learned processes that occur automatically and unconsciously; see M. Slors, *Dat had je gedacht! Brein, bewustzijn en vrije wil in filosofisch perspectief*, Amsterdam: Boom 2012, p. 100-141. The statements on reflection, therefore, do not betray an outdated, nineteenth century form of dualism with regard to the concept of action; on this, see M. Loth, 'Zeven stellingen over de gedraging in het strafrecht', in: M.S. Groenhuijsen, G.E. Mulder & J. Remmelink (eds.), *De Schets nader bekeken. Beschouwingen naar aanleiding van de Schets materieel strafrecht van W. Nieboer*, Arnhem: Gouda Quint 1992, p. 21-32.

35 Here again we encounter a conceptual connection between authority and rationality; see J. Raz, *Practical reason and norms*, Oxford/New York: Oxford University Press 1999.

36 H. Arendt, *On violence*, San Diego/New York/London: Harcourt Brace & Jovanovich Publishers (1969) 2009, p. 43-47; R. Visker, *Genealogie als kritiek. Michel Foucault en de menswetenschappen*, Amsterdam: Boom 1990, p. 114-115.

37 Sometimes there can be good 'reason' to be suspicious of the results of our reflection; the philosophical and therapeutic tradition of psychoanalysis is precisely oriented towards the aim of discovering these deeper reasons. The same could be said of other forms of 'critique of ideology' or '*Tiefenhermeneutik*'; see Th. de Boer, 'Hermeneutiek en ideologiekritiek', in: H. Kunneman (ed.), *Wetenschap en ideologiekritiek*, Meppel: Boom 1978, p. 96-134; Ricoeur 1989 (*supra*, note 18), p. 63-100.

38 See A. MacIntyre, *After virtue. A study in moral theory*, London: Duckworth 1985, p. 187 and 204-225.

39 From an entirely different angle, this is supported by relatively recent neurobiological insights concerning the 'embodied mind'. The prevailing view is here that human consciousness does not directly 'depict' a world but instead 'enacts' a world. We derive the skills needed for our orientation within the world primarily from different learning processes. This points to the importance of our ontogenesis and of the role of corporality therein. Already on the pre-reflective level of our bodily interaction with the environment, this environment receives the traits of a symbolically mediated 'world'. See A.R. Damasio, *Self comes to mind. Constructing the conscious brain*, London: William Heineman 2010, p. 89-107 and 327-328; M. Johnson, *The meaning of the body. Aesthetics of human understanding*, Chicago/London: University of Chicago Press 2009; Den Boer 2004 (*supra*, note 7), p. 129, 90-101, 146, and 179-180.

40 The normative significance of our practical identities and of the Kantian notion of a moral identity is emphasized by Christine Korsgaard. See Korsgaard 1996 (*supra*, note 20), p. 90-130; C.M. Korsgaard, *Self-constitution. Agency, identity, and integrity*, Oxford/New York: Oxford University Press 2009, p. 18-26 and 37-41.

41 That is: in most cases, and leaving aside obvious instances of irresponsibility due to a severe mental disorder. See S.J. Shapiro, *Legality*, Cambridge, Mass./London: Belknap Press 2011, p. 112.

42 This view stems from a long philosophical tradition that can be traced back to Aristotle (the human being as *zoön logikon* or *animal rationale*). See Mooij 2015 (*supra*, note 7), p. 16 and 48.

43 P. Ricoeur, *Fallible man*, New York: Fordham University Press (1960) 1986; C.C. Simut, 'Paul Ricoeur's concept of fallibility as fault, myth and symbol', *Perichoresis* 7 (2009) 1, p. 113-126; B.P. Dauenhauer, *Paul Ricoeur. The promise and risk of politics*, Oxford/New York: Rowman & Littlefield Publishers 1998, p. 59-60; J.B. Thompson, *Critical hermeneutics. A study in the thoughts of Paul Ricoeur and Jürgen Habermas*, Cambridge/New York: Cambridge University Press 1981, p. 41-48; A.W.M. Mooij, 'Toerekeningsvatbaarheid en de vraag naar het kwaad', in: B.F. Keulen, G. Knigge & H.D. Wolswijk (eds.), *Pet af* (liber amicorum D.H. de Jong), Nijmegen: Wolf Legal Publishers 2007, p. 333-351.

44 We have to be careful, therefore, not to eulogize mankind to the skies. In her book *The posthuman* (Cambridge: Polity Press 2013) Rosi Braidotti vehemently opposes the tradition of humanism insofar as it has elevated the human being to the rank of the Crown of the Creation, as a result of which (according to Braidotti) a too strongly anthropocentric and individualistic model of subjectivity has come to prevail, that disregards human responsibilities for plants, animals, the natural environment, and future generations.

45 I. Kant, *Die Religion innerhalb der Grenzen der bloßen Vernunft*, in: *Werke. Band 4*, Darmstadt: Wissenschaftliche Buchgesellschaft (1793/1794) 1970, p. 672-677; Ricoeur 1986 (*supra*, note 43) provided an elaboration of Kant's notion of human fragility; see Mooij 2007 (*supra*, note 43), p. 342 and 344-345.

46 I. Kant, *Groundwork of the metaphysics of morals*, New York/London: Harper Perennial 1964, p. 63-64.

47 See Mooij 2007 (*supra*, note 43), p. 343.

48 For the sake of clarity: I am here still dealing with the 'old', traditional account; later on, I will try to provide a partial explanation for the fact that the *ultima ratio* principle has withered rather severely later on.

49 See M.S. Groenhuijsen, 'Het publiekrechtelijke karakter van het materiële strafrecht', in: J.P. Balkema et al. (eds.), *Gedenkboek. Honderd jaar Wetboek van Strafrecht*, Arnhem: Gouda Quint 1986, p. 103-123, p. 121-123.

50 I. Kant, *Die Metaphysik der Sitten*, in: *Werke. Band 4*, Darmstadt: Wissenschaftliche Buchgesellschaft (1797) 1970, p. 307-634; A. Ripstein, *Force and freedom. Kant's legal and political philosophy*, Cambridge, Mass./London: Harvard University Press 2009, p. 232-266 and 300-324. Also with Cesare Beccaria we find a strong emphasis on the public nature of criminal law, with a reference to the social contract; see C. Beccaria, *On crimes and punishments*, New Brunswick/London: Transaction Publishers (1764) 2009, p. 11-13 (chapter 2); and see M. Thorburn, 'Criminal law as public law', in: R.A. Duff & S.P. Green (eds.), *Philosophical foundations of criminal law*, Oxford/New York: Oxford University Press 2011, p. 21-43.

51 S. Kierkegaard, *The concept of anxiety. A simple psychologically orienting deliberation on the dogmatic issue of hereditary sin*, Princeton, NJ: Princeton University Press (1844) 1980.

52 In the Dutch word '*angst*', the indeterminate and undirected quality of this emotion finds a rather inadequate expression; the English term anxiety or the German *Unheimlichkeit* are more apt expressions in this regard.

53 Sigmund Freud, for example, associated indeterminate anxiety with the neurotic disorder along these lines; see Visker 2004 (*supra*, note 14), p. 59-60; G. Glas, *Angst. Beleving, structuur, macht*, Amsterdam: Boom 2001, p. 21-24.

54 Also in other books: S. Kierkegaard, *The sickness unto death*, Princeton, NJ: Princeton University Press (1849) 1983; S. Kierkegaard, *Fear and trembling*, London: Penguin Classics (1843) 2003; see Visker 2004 (*supra*, note 14), p. 62-64 and 235-254.

55 Visker 2004 (*supra*, note 14), p. 62-63.

56 M. Heidegger, *Was ist Metaphysik?*, in: *Gesamtausgabe. Band 9: Wegmarken*, Frankfurt am Main: Vittorio Klostermann (1929) 2004, p. 114; see also Visker 2004 (*supra*, note 14), p. 64-69.

57 Visker 2004 (*supra*, note 14), p. 69.

58 Heidegger 2004 (*supra*, note 56), p. 111.

59 See for example R. Wolin, *Heidegger's children. Hannah Arendt, Karl Löwith, Hans Jonas, and Herbert Marcuse*, Princeton, NJ: Princeton University Press 2001. The recent publication of Heidegger's *Überlegungen* – the first series of his so-called *Schwarze Hefte* – has engendered a new round of heated discussions on the degree to which Heidegger's philosophy is contaminated with antisemitism; see P. Trawny, *Heidegger and the myth of a Jewish world conspiracy*, Chicago: University of Chicago Press 2016; D. de Schutter & H. Arendt, *Martin Heidegger. Een apologie*, Zoetermeer: Klement 2015.

60 And is not the correctness of this negative appreciation of fear at least hinted at by, for example, the panicky hunt for sex offenders and the different protest scenes against planned accommodations for asylum seekers, which we have recently been informed of by the media?

61 Visker 2004 (*supra*, note 14), p. 252-253.

62 See Visker 2004 (*supra*, note 14), p. 73-75. See also J. Waldron, *Law and disagreement*, Oxford/New York: Oxford University Press 1999, p. 149-163.

63 As is well known, Jean-Paul Sartre carried this view further in a rather extreme sense in his conception of '*néantiser*' or 'nihilating'. The subject who perceives something, simultaneously *poses* this something – she so to say throws it outside of herself, realizing: that is not me. See J.P. Sartre, *l'Être et le néant,* Paris: Gallimard 1943; Th. de Boer, *Tamara A., Awater en andere verhalen over subjectiviteit*, Amsterdam: Boom 1993, p. 163-165.

64 Visker 2004 (*supra*, note 14), p. 69, 73 and 251-253.

65 See Visker 2004 (*supra*, note 14), p. 61-63, 73.

66 M. Heidegger, *Gelassenheit. Zum 125. Geburtstag von Martin Heidegger. Heideggers Meßkircher Rede von 1955 mit Interpretationen von Alfred Denker und Holger Zaborowski*, Freiburg/Munich: Verlag Karl Alber (1955) 2014; De Boer 1993 (*supra*, note 63), p. 167-169 and 183-186.

67 De Boer 1993 (*supra*, note 63), p. 25.

68 We therefore have to be careful not to entertain the overconfident idea that we would be indemnified from these massive disciplinary techniques. When I discuss Foucault with Master's degree students, I usually refer to the processes of 'training' that they underwent during several bachelor-level courses in which students are taught to analyze a legal case in precise conformity with the rules of legal interpretation, that is: in the form of a complete argumentation in which the right arguments are used in the right order – all of this with the aim of learning to become a good, well-adjusted, and hence disciplined lawyer!

69 M. Foucault, *Surveillir et punir. Naissance de la prison*, Paris: Gallimard 1975; M. Foucault, 'The subject and power', in: L.H. Dreyfus & R. Rabinow, *Michel Foucault. Beyond structuralism and hermeneutics. With an afterword by Michel Foucault*, Chicago: University of Chicago Press 1983, p. 208-226; M. Schuilenburg, *Orde in veiligheid. Een dynamisch perspectief* (doctoral dissertation Free University Amsterdam), The Hague: Boom Lemma 2012, p. 55-59 and 81-132; Visker 1990 (*supra*, note 36).

70 M. Foucault, 'What is critique?', in: S. Lotringer (ed.), *The politics of truth. Michel Foucault*, Los Angeles: Semiotext(e) 1997, p. 41-67. In his unfortunately posthumously published book *De wet als kunstwerk. Een andere filosofie van het recht* (Amsterdam: Boom 2014, p. 397), Willem Witteveen translated this term as '*beheersbaarheidsmentaliteit*' (controllability mentality). Once subjected to this mentality, individuals are made as transparent and controllable as possible.

71 Foucault 1997 (*supra*, note 70); J. Butler, 'What is critique? An essay on Foucault's virtue', in: D. Ingram (ed.), *The political. Readings in continental philosophy*, London: Blackwell 2002, p. 212-226; De Boer 1993 (*supra*, note 63), p. 169-174.

72 Foucault 1997 (*supra*, note 70); Th.W. Adorno, *Beitrag zur Ideologienlehre*, in: *Gesammelte Schriften. Band 8: Soziologische Schriften I*, Frankfurt am Main: Suhrkamp 1990; Th.W. Adorno, *Prisms*, Cambridge, Mass.: MIT Press 1984, p. 17-34; Butler 2002 (*supra*, note 71). See also S. Haslanger, *Resisting reality. Social construction and social critique*, Oxford: Oxford University Press 2012, p. 16-30, 423-426, and 446-476.

73 See F. de Jong & C. Kelk, 'Overarching thought: criminal law scholarship in Utrecht', in: F. de Jong (ed.), *Overarching views of crime and deviancy. Rethinking the legacy of the Utrecht School*, The Hague: Eleven International Publishing 2015, p. 21-88, p. 36-43.

74 De Jong & Kelk 2015 (*supra*, note 73), p. 47-53 and 56; this subsection is partly based on this publication. For a contemporary critique of the role of individualism in criminal law, see A. Norrie, *Crime, reason, and history. A critical introduction to criminal law*, Cambridge/New York: Cambridge University Press 2014.

75 M. Foucault, *l'Ordre du discours*, Parijs: Gallimard 1971; A.A.G. Peters, 'Recht als kritische discussie', in: C.J.M. Schuyt, C. Kelk & M. Gunning (eds.), *Recht als kritische discussie. Een selectie uit het werk van A.A.G. Peters*, Arnhem: Gouda Quint 1993, p. 209-238; A.A.G. Peters, 'Recht als vals bewustzijn', in: C.J.M. Schuyt, C. Kelk & M. Gunning (eds.), *Recht als kritische discussie. Een selectie uit het werk van A.A.G. Peters*, Arnhem: Gouda Quint 1993, p. 239-264; De Jong & Kelk 2015 (*supra*, note 73), p. 62-63.

76 C. Fijnaut, 'Een ruk naar de proceskant van het strafrecht', *Delikt en Delinkwent* 1972, p. 501-503; see also C. Fijnaut, 'Een strafrechtswetenschappelijk bolwerk', *Delikt en Delinkwent* 1985, p. 85-87.

77 A.A.G. Peters, 'Het rechtskarakter van het strafrecht' (inaugural lecture Utrecht University), in: C.J.M. Schuyt, C. Kelk & M. Gunning (eds.), *Recht als kritische discussie. Een selectie uit het werk van A.A.G. Peters*, Arnhem: Gouda Quint (1972) 1993, p. 15-34. In this connection, Peters obviously often referred to Jürgen Habermas' concept of a *herrschaftsfreie Diskurs*.

78 In his inaugural lecture of 1972, entitled: *Het rechtskarakter van het strafrecht* ('The juridical character of criminal law'; 1993, *supra*, note 75) Peters argued that the notion of criminal procedure harbours the juridical potential to emancipate the citizen from her relatively weak position, and to allow her to independently take part in the development of law, legal principles, and legal values.

79 P. Spierenburg, *Please, please me's number one. Maatschappelijke veranderingen sinds de jaren zestig en hun weerslag op het beeld van misdadigers en slachtoffers* (valedictory lecture Erasmus University Rotterdam), The Hague: Boom Juridische uitgevers 2013; D. Garland, *The culture of control. Crime and social order in contemporary society*, Chicago: University of Chicago Press 2001, p. 77-89, 154-163.

80 Etymologically, the word 'angst' is derived from the Latin *angustia*, which in its turn is derived from the Indo-European root *angh*, referring to the feeling of 'tightness', 'oppression'; see Glas 2001 (*supra*, note 53), p. 159.

81 Of this, many trivial examples can be given. Think of someone who finds herself, so to say in spite of herself and wringing her hands, in the company of people whose 'code language' she does not master, as a result of which a kind of symbolic short circuit occurs; or think of the experience of someone who is out of tune with a certain gathering, for example because she is clearly over- or underdressed. See for these sorts of examples Visker 2004 (*supra*, note 14), p. 238 and 242-243. See also S. Veitch, *Law and irresponsibility. On the legitimation of human suffering*, New York/Abingdon: Routledge-Cavendish 2007, p. 36.

82 Visker 2004 (*supra*, note 14), p. 241.

83 J.F. Lyotard, *The differend. Phrases in dispute*, Minneapolis: University of Minnesota Press 1988; Visker 2004 (*supra*, note 14), p. 241; Visker 1999 (*supra*, note 19), p. 357-374.

84 Nowadays, people are, or purport to be, 'perplexed' or 'bewildered' surprisingly often. For the concept of '*tragende Einverständnis*', see Gadamer 1975 (*supra*, note 17). For the heterogeneity of discourses, see: J.F. Lyotard, *The postmodern condition. A report on knowledge*, Minneapolis: University of Minnesota Press 1984; Visker 2004 (*supra*, note 14), p. 255-283.

85 The slowness and stableness of symbols is an effect of the triangular structuring pattern of symbolic orders; within a symbolic order, the relationships between people are not immediate, but are structured by a constant reference to a third term, a form of authority. Images, conversely, are characterized by a binary structuring pattern and are therefore swifter and more transient. See A.W.M. Mooij, *Psychoanalytisch gedachtegoed. Een modern perspectief*, Amsterdam: Boom 2002, p. 109-126; Mooij 2010 (*supra*, note 7), p. 203-219; Moyaert 1995 (*supra*, note 6), p. 45-51. More generally on the concept of visual culture: N. Mirzoeff, *How to see the world*, London: Pelican 2015.

86 Z. Bauman, *Liquid modernity*, Cambridge: Polity Press 2000. Cf. U. Beck, *Risk society. Towards a new modernity*, Los Angeles/London/New Delhi: Sage (1986) 1992, p. 153.

87 H. Ibsen, *Peer Gynt. Et dramatisk dikt*, Oslo: Gyldendal Norsk Forlag (1867) 2001. See also Z. Bauman, *Identity*, Cambridge: Polity Press 2004, p. 90.

88 In Norwegian, this of course sounds much better: *Dovregubben:* 'Der ute under himmelen, blant menneskene heter det: "Menneske, vær deg selv!" Her inne hos oss mellom trollfolkene heter det: "Troll, vær deg selv – nok!"'

89 H. Arendt, *The human condition*, Chicago/London: University of Chicago Press (1958) 1998, p. 22-78.
90 De Jong & Kelk 2015 (*supra*, note 73), p. 61.
91 Beck 1992 (*supra*, note 86), p. 200-203.
92 R. Foqué & A.C. 't Hart, *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie*, Arnhem/Antwerp: Gouda Quint/Kluwer Rechtswetenschappen 1990.
93 This is not to deny that the book has also been the subject of sometimes fierce criticism; see for example A.L. Melai, 'Doel en middelen. Instrumentaliteit als Archimedisch punt in het recht', in: G.C.G.J. van Roermund, M.S. Groenhuijsen & W.J. Witteveen (eds.), *Symposium strafrecht. Vervolg van een grondslagendebat*, Arnhem: Gouda Quint 1993, p. 165-192. And, if I have understood things correctly, the book has for some time even been put on the Index (of forbidden books) within some Law Schools in the Netherlands; but this seems to me to only attest to the book's importance.
94 A rather self-evident example is the doctrinal meaning of the criminal law concept of intention that, partly on account of requirements of legal functionality, differs from the meaning commonly attached to the same term in colloquial language. See F. de Jong, *Daad-schuld. Bijdrage aan een strafrechtelijke handelingsleer met bijzondere aandacht voor de normativering van het delictsbestanddeel opzet* (doctoral dissertation Utrecht University), The Hague: Boom Juridische uitgevers 2009; F. de Jong, 'Theorizing criminal intent: a methodological account', *Utrecht law review* 7 (2011) 1, p. 1-33.
95 Foqué & 't Hart 1990 (*supra*, note 92); see also A.C. 't Hart, *Recht als schild van Perseus. Voordrachten over strafrechtstheorie*, Arnhem/Antwerp: Gouda Quint/Kluwer Rechtswetenschappen 1991.
96 In the field of substantive criminal law, we should primarily think of what one could refer to as the principle of unlawfulness (no criminal liability without an unlawful act) and the principle of legality (no criminal liability in the absence of a valid statutory provision), and additionally, of course, the principle of culpability (no criminal liability in the absence of personal culpability). In the field of criminal procedure, we should of course think of the different procedural safeguards, including the increased importance of the different fair trial rights of Article 6 of the European Convention on Human Rights and Fundamental Freedoms and the case law of the Strasbourg Court.
97 See J. de Hullu, *Materieel strafrecht. Algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Kluwer 2015, p. 112-113, K. Rozemond, 'Legaliteit in het materiële strafrecht', *Rechtsgeleerd Magazijn Themis* 1999, p. 117-130. Also Foqué and 't Hart themselves already maintained that the term legal protection denotes at least two things: protection of the law and protection by the law.
98 Such as: calling people to account with an eye to retribution for committed offences (retributive purpose), the prevention of crimes that may be committed in the future (general prevention or deterrence), the correction and rehabilitation or temporary incapacitation of offenders with the aim of preventing recidivism, and the appeasement of public indignation and outrage, with the aim of preventing instances of self-procured justice. And even Antonie Peters, who always consistently defended the idea that the criminal law's protective dimension has priority over its instrumental dimension, acknowledged that the criminal process itself incorporates an important instrumental value in that it can help to channel and appease public feelings of discomfort that form the effects of crimes. See A.A.G. Peters, *Opzet en schuld in het strafrecht* (doctoral dissertation Leiden University), Deventer: Kluwer 1966, p. 287-294.
99 Witteveen 2014 (*supra*, note 70), p. 26.
100 M.S. Groenhuijsen, *Straf en wet. Beschouwingen over de betekenis van het legaliteitsbeginsel in het hedendaagse strafrecht, tegen de achtergrond van actuele legiti-*

matieproblemen (inaugural lecture Tilburg University), Arnhem: Gouda Quint 1987, p. 45-48.

101 I am well aware how perilous it is to use a term such as 'transcendent' in our post-postmodern times. Have we not learned, after all, that every form of foundational thinking can convince merely by putting on blinkers, and that it therefore necessarily suffers from a non-removable lack in justifiability? Yes. However, the contingency that ensues from the absence of a fixed Archimedean point does not in and of itself imply the impossibility of distinguishing between more plausible and less plausible propositions; what it does imply is that any proposition can be criticized fundamentally. However, within an academic context, this implication can only be considered advantageous. Cf. F.J. Mootz III, *Law, hermeneutics and rhetoric*, Farnham/Burlington: Ashgate 2010, p. 335-404.

102 See Visker 2004 (*supra*, note 14), p. 69-72; see also H. Boutellier, *Het seculiere experiment. Hoe we van God los gingen samenleven*, Amsterdam: Boom 2015, p. 89-105.

103 See www.cbs.nl; Boutellier 2015 (*supra*, note 102), p. 78.

104 This also implies that decisions by traditional authorities are increasingly being disputed. In criminal law this tendency could be thought to be manifested in, for example, the increased number of attempts at challenging the competency of courts and the increased number of complaints issued by interested parties on the basis of Article 12 of the Dutch Code of Criminal Procedure, against the decision of the public prosecutor not to prosecute (further) a certain suspect.

105 Foqué & 't Hart 1990 (*supra*, note 92), p. 129-151; see also De Jong 2012 (*supra*, note 8), p. 67-73; F. de Jong & L. van Lent, 'The presumption of innocence as a counter-factual principle', *Utrecht law review* 12 (2016) 1, p. 32-49.

106 B. van Roermund, *Law, narrative and reality. An essay in intercepting politics*, Dordrecht/Boston/London: Kluwer Academic Publishers 1997, p. 171-194.

107 See F. de Jong, 'Gezag, legitimiteit en de "vervlakking" van het algemeen deel van het materiële strafrecht', in: F. de Jong & R.S.B. Kool (eds.), *Relaties van gezag en verantwoordelijkheid: strafrechtelijke ontwikkelingen*, The Hague: Boom Lemma 2012, p. 11-44; De Jong 2013 (*supra*, note 31). The doctrinal substance of the central concepts of the general part of substantive criminal law is increasingly characterized by a strong emphasis on casuistic criteria, by a stronger focus on epistemological instead of substantive criteria, and by the use of relatively open-ended, flexible criteria, such as 'reasonable attribution', the 'nature of the act', and 'general rules of experience'.

108 F. de Jong & L. van Lent, 'De onschuldpresumptie onder de wals van een nationale identiteitsobsessie', in: C. Kelk, F.A.M.M. Koenraadt & D. Siegel (eds.), *Veelzijdige gedachten* (liber amicorum C.H. Brants), The Hague: Boom Lemma 2013, p. 255-281.

109 A topic to which Antony Pemberton recently devoted his impressive inaugural lecture in Tilburg: A. Pemberton, *Victimology with a hammer: the challenge of victimology* (inaugural lecture Tilburg University), Tilburg: Tilburg University 2015.

110 H. Boutellier, *Solidariteit en slachtofferschap. De morele betekenis van criminaliteit in een postmoderne cultuur* (doctoral dissertation University of Amsterdam), Nijmegen: Sun 1993; R. Rorty, *Contingency, irony and solidarity*, Cambridge/New York: Cambridge University Press 1989.

111 The triangular structure of the symbolic order of public criminal law encounters the competition of the binary structure of the identification with victims. See also note 85, *supra*, and Mooij 2002 (*supra*, note 85), p. 119-121.

112 These sorts of legislative initiatives are often referred to as 'symbolic legislation'; I would, however, prefer to speak of 'image-based legislation' or 'symptomatic legislation'. See C. Kelk, '"Symbolisch strafrecht" en "symbolisch straffen"', in: B.F. Keulen, G. Knigge

& H.D. Wolswijk (eds.), *Pet af* (liber amicorum D.H. de Jong), Nijmegen: Wolf Legal Publishers 2007, p. 177-199.

113 See C. Kelk, *De menselijke verantwoordelijkheid in het strafrecht*, Arnhem: Gouda Quint 1994, p. 9-21 and 45-55; C. Kelk, *Afgeschreven. l'Homme perdu*, Arnhem: Gouda Quint 1990; C. Kelk, 'Het strafrecht in de tang van het instrumentalisme', in: G.C.G.J. van Roermund, M.S. Groenhuijsen & W.J. Witteveen (eds.), *Symposium strafrecht. Vervolg van een grondslagendebat*, Arnhem: Gouda Quint 1993, p. 3-83. With reference to the British context, see: A. Ashworth & L. Zedner, 'Defending the criminal law: reflections on the changing character of crime, procedure, and sanctions', *Criminal law and philosophy* (2008) 2, p. 21-51.

114 See for example F. van Tulder & R. Kroon, 'Uitermate effectief? Beelden en feiten over misdaad en straf', *Nederlands Juristenblad* 2012, p. 2233-2238.

115 A very cynical plan is formulated in the legislative proposal that should make it possible to recoup from the convicted offender a portion of the costs of the investigation, prosecution, trial, and execution of the sentence. See the following Parliamentary papers of the House of Representatives: *Kamerstukken II* 2014-2015, 34067, no. 3 (Explanatory Memorandum) and *Kamerstukken II* 2015-2016, 34067 and 34068, C (Reply to the statement of objections). It almost goes without saying that, by burdening convicts and detainees with the costs of their stay in a penitentiary institution, on top of the debts they often already have, an additional spanner is thrown in the works of the already withered rehabilitation efforts. With Foucault we may say: the prison *produces* delinquents, and now more than ever.

116 The Classical School in criminal law dates back to the work of Cesare Beccaria (*supra*, note 50) and strongly emphasized the importance of codification and the principle of legality. The so-called neo-Classical School is of a somewhat more recent date and has incorporated a number of central insights delivered by Immanuel Kant and Georg Wilhelm Friedrich Hegel; it emphasized the notion of retribution and (hence) the principle of culpability. The Modern School dates back to the work of, amongst others, Cesare Lombroso (*l'Uomo delinquente*, 1876). In the final part of his inaugural lecture, Willem Pompe mentioned a number of indications that hinted at the development of a more humane Modern School, which would be more attentive to 'generally human' characteristics. In this connection he expressed his hope that this anticipated development would materialize and lead to the establishment of a 'neo-Modern School'; see W.J.P. Pompe, 'De persoon des daders in het strafrecht' (inaugural lecture Utrecht University), in: C. Kelk (ed.), *Gedachten van Willem Pompe over de mens in het strafrecht*, The Hague: Boom Juridische uitgevers (1928) 2008, p. 9-24. The neo- or ultra-Modern school of thought that appears to prevail today, however, all but conforms to this optimistic vision of Pompe. See on the Classical and the Modern Schools: C. Fijnaut, *Criminologie en strafrechtsbedeling. Een historische en trans-atlantische inleiding*, Amsterdam/Antwerp: Boom/Intersentia 2014, p. 59-83, 223-275, and 326-331; M.S. Groenhuijsen & D. van der Landen (eds.), *De Moderne Richting in het strafrecht. Theorie, praktijk, latere ontwikkelingen en actuele betekenis*, Arnhem: Gouda Quint 1990; De Jong & Kelk 2015 (*supra*, note 73), p. 23-25.

117 See for example the recent report of the Dutch 'Sociaal en Cultureel Planbureau': *Burgerperspectieven 2015-4*, The Hague: SCP 2015, p. 11-12. See also K. van den Bos & A.F.M. Brenninkmeijer, 'Vertrouwen in wetgeving, de overheid en de rechtspraak. De mens als informatieverwerkend individu', *Nederlands Juristenblad* 2012, p. 1451-1457.

118 Cf. Visker 2004 (*supra*, note 14), p. 251.

119 Bauman 2000 (*supra*, note 86), p. 39.

120 A.A.G. Peters, 'Individuele vrijheid en de positie van verdachten in het strafproces', in: C.J.M. Schuyt, C. Kelk & M. Gunning (eds.), *Recht als kritische discussie. Een selectie uit het werk van A.A.G. Peters*, Arnhem: Gouda Quint 1993, p. 79-106, p. 97-98; M. Weber, *Rechtssoziologie*, Neuwied/Berlin: Luchterhand 1967; E. Durkheim, *De la division du travail social*, Paris: Presses Universitaires de France 1967; De Jong & Kelk 2015 (*supra*, note 73), p. 53-55.

121 Peters 1993 (*supra*, note 120), p. 98; G.Th. Kempe, 'De publieke opinie en de strafrechter in de laatste halve eeuw', in: G.Th. Kempe et al., *Dilemma's in het hedendaagse strafrecht*, Nijmegen: Ars Aequi Libri 1974, p. 5-22.

122 I cannot resist the temptation of quoting the following text: in his daily small column ('*Voetnoot*') in the Dutch newspaper *de Volkskrant* of 18 January 2016 the Dutch novelist Arnon Grunberg wrote this under the title 'Solution' (*Oplossing*; my translation, *FJ*): '"Victimhood is an intensely subjective state of mind", said the Irish philosopher David Kenning in a fine interview with Janny Goen in *de Volkskrant* of last Friday. Kenning, who has personally experienced the Northern Irish conflict, thinks that the danger of radical Islam is being "blown up by the extreme right". One thing Kenning sees very well is that in our culture victimhood has attained a heroic status. Nothing is more desirable that being a victim; virtually everyone imagines him- or herself to be a victim. White Europeans are victims of refugees, refugees are victims of war and racists, racists are victims of anti-racists. Victimhood justifies aggression. Kenning sketches a vicious circle of anxiety, paranoia, and aggression. What is to be done now? We need to undermine the glorification of victimhood. Propagate wistfulness and calmness. The danger lies in wanting to solve all problems, instead of acknowledging that many problems are unsolvable. Doing something is often more disastrous than doing nothing.'

123 On the overarching and delinquent-centred views of Ger Kempe, Pieter Baan, and Willem Pompe: De Jong & Kelk 2015 (*supra*, note 73), p. 47-53.

124 C.J.M. Schuyt, 'De tegenstrijdige bindingskracht van het strafrecht', keynote lecture at the conference on the occasion of the eightieth anniversary of the Willem Pompe Institute for Criminal Law and Criminology, which took place in Utrecht on 1 October 2014; the lecture has been published under the same title in the journal *Strafblad* 2015, p. 500-506; W.P.J. Pompe, 'Strafrecht en vertrouwen in de mede-mens' (valedictory lecture Utrecht University), in: C. Kelk (ed.), *Gedachten van Willem Pompe over de mens in het strafrecht*, The Hague: Boom Juridische uitgevers (1963) 2008, p. 25-41.

125 For a fascinating study of the different tendencies to reduce human beings to monsters within science and society since the period of the scientific revolution, see Z. Hanafi, *The monster in the machine. Magic, medicine, and the marvelous in the time of the scientific revolution*, Durham/London: Duke University Press 2000.

126 C. Fijnaut, *Verleden, heden en toekomst van de geïntegreerde strafrechtswetenschap* (inaugural lecture Erasmus University Rotterdam), Arnhem/Antwerp: Gouda Quint/Kluwer Rechtswetenschappen 1986.

127 C. Kelk, *Strafrecht binnen menselijke proporties* (valedictory lecture Utrecht University), The Hague: Boom Juridische uitgevers 2008.