Jacobsen, J. (2024). *Power, Principle, and Progress: Kant and the Republican Philosophy of Nordic Criminal Law.* Fagbokforlaget.
DOI: https://doi.org/10.55669/oa3301

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Introduction

1.1 The problem: What is Nordic criminal law and its normative foundations?

Nordic criminal law is often thought of as a specific kind of criminal law. The reference to the Nordics denotes a geographical area in the Northern part of Europe consisting of Iceland, Norway, Denmark, Sweden, and Finland, as well as the autonomous areas of Greenland, the Faroe Islands, and Åland. These societies and their political and legal orders have a lot in common as they were developed in close contact with each other, on an informal as well as on a formal level. In many regards, their criminal law orders resemble each other.[1] On a more concrete level, there are specific Nordic 'models' pertaining to certain issues relating to criminal justice.[2] There has also been close collaboration on issues like jurisdiction, police collaboration and crime prevention, continuously building on the Nordic countries' shared social

1 For overviews of criminal law in the Nordic countries in English; see e.g., for Danish criminal law, Langsted/Garde/Greve (2014), for Norwegian criminal law, Jacobsen (2023), for Finland, Nuotio (2023b), for Swedish criminal law, Bennet (2022) and for Iceland, Thormundson (1998).

2 See e.g., Fornes (2021) p. 97 and p. 138 on the 'Nordic model' for youth criminal punishment, where criminal cases involving children are part of the general criminal justice system, as opposed to legal orders with specific youth criminal justice systems, such as Germany.

and cultural background – as well captured, from a Finnish point of view, by Inkeri Anttila (1916–2013) in 1986:[3]

> Finnish legal culture is part of the general Nordic legal culture. All of the Nordic countries share a legal heritage, the broad outlines of which can still be seen. Furthermore, for several decades there has been a deliberate effort to harmonize Nordic legislation. In 1962, a special agreement on co-operation was prepared, and in 1960, a permanent body called the Nordic Criminal Law Committee was established. Efforts along these lines have been justified not only by tradition but above all, by the argument that these countries have grown closer to another also in their economic and cultural relations.

For such reasons, 'Nordic criminal law', and related expressions such as 'Scandinavian exceptionalism', have become something more than merely a geographical reference.[4] Rather, the expression 'Nordic criminal law' has come to denote a particular mode of criminal law – a distinct criminal law ideology, if one likes. For instance, Katja Franko sums up some of the core characteristics of Nordic criminal law as follows:

> It has been customary to describe the Scandinavian penal climate as exceptional … Few societies can match Scandinavian countries in their commitment to welfare … particularly if this is set against the late modern punitive and security tendencies to be seen in Anglo-American countries. Despite some trends to the contrary, elements of the idea of reintegration have retained their historic centrality in criminal justice and prison service ideologies … Norway has been no exception to the Scandinavian norm. Its prisons have become popular with foreign visitors engaged in penal tourism, particularly the island prison at Bastøy. On one of his visits,

3 Anttila (1986) p. 187. See also e.g., Nelson (1973) p. 282, Thormundsson (1998) pp. 13–14, and, more detailed, Takala (2005).

4 Regarding the geographical references: 'Scandinavia' and 'the Nordics' are often seen as synonymous, although the former refer to a more limited part of the Nordics (Norway, Denmark and Sweden). To avoid any confusion, in the following I will use the term 'Nordic'.

> the influential US documentary maker Michael Moore summarised the prison systems attitude towards prisoners as 'how can we make them good neighbours'. He described Norway as a society 'which operate[s] with a sense of we' … and puts high value on social inclusion. This stance is epitomised by the Norwegian Labour Party's popular slogan 'Alle skal med' (imperfectly translated as 'Everybody in').[5]

This style of criminal law is recognised also beyond the Nordic legal communities, often cherished and seen in connection with the evolution of the equality-oriented and trust-based Nordic communities and their welfare states.[6]

Yet, it is not quite clear what it is that we are talking about when we talk about 'Nordic criminal law', more specifically.[7] Taking more specific features of Nordic criminal law into consideration, it becomes clear that this cannot be pinned down in any straightforward way: the evolution of Nordic criminal law, and Nordic legal culture more generally, have been closely connected to the development of Continental law, German law in particular. Due to this, many of Nordic criminal law's principled and conceptual views are closely aligned with perspectives found in Germany, including the shared emphasis on the principle of guilt. At the same time, Nordic law is usually considered more pragmatic in orientation, favouring empirical knowledge, consequentialism, and an 'all things considered' point of view; hence, it is in many ways more relatable to the Anglo-American style of thought. But then again, as already mentioned, Nordic criminal law also distinguishes itself from Anglo-American criminal law for instance by its emphasis on equality and social inclusion, by comparatively low levels of punishment and a strong focus on rehabilitation-oriented prisons, as well as its emphasis on positive general prevention and the use of other social means than criminal law to create well-functioning societies. Adding to this, notable differences may also be observed within the Nordics: The Danish, Norwegian, and Icelandic legal orders have more of the

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5 Franko (2020) pp. 106–107 (brackets included in the original text). Michael Moore, best known for the documentary *Bowling for Columbine*, is not to be confused with the criminal law philosopher Michael S. Moore, who we will return to in 3.3 below.

6 See, for instance, Pratt (2008) on Scandinavian exceptionalism.

7 This is not only so for criminal law, but for references to other parts of 'Nordic law', see, e.g., on 'Nordic' constitutional law in Krunke/Thorarensen (2020).

pragmatic features of Anglo-American law; Sweden has a history of French influence; while Finland, for its part, sometimes appears as 'more German than the Germans themselves' (in the words of a Finnish colleague, actually). Differences are also found in the substantive criminal law and criminal procedure of these legal orders, even at a quite fundamental level. Sweden's rejection of the insanity defence, or Norway's distinct 'medical model', for that matter, are often highlighted examples, but far from the only ones.

One possible approach when attempting to clarify what 'Nordic criminal law' ideology is really about, could be to turn to political and legal authorities, such as legislators and courts. It is, however, not to be expected that one would find a thorough elaboration and justification of the principles of Nordic criminal law in such settings: Preparatory works, for instance, are normally more concerned with applying such principles to provide concrete legislative solutions, rather than investigating and justifying these principles in themselves.[8] Instead, when looking for deeper engagement with the principles of Nordic criminal law, it is more apt to turn to academic perspectives and the very scholars that are, perhaps, most intimately engaged in and sometimes also the fiercest of defenders of Nordic criminal law: Nordic criminal law scholars.[9] Historically, at least, these scholars have in various ways also played a central role in the formation and development of Nordic criminal law. We do, indeed, find extensive relevant literature in these research outputs. But, as we will see in Chapter 2, there is also, for different reasons, a limitation

8 Preparatory works vary, of course, in how and to what extent they go into the normative basis for their proposal. One example of a relatively 'principled' preparatory work is NOU 2002: 4 *Ny straffelov — Straffelovkommisjonens delutredning VII,* part of the Norwegian criminal law commission's work on the new Norwegian criminal code, where the harm principle is central. Even this example is, however, fairly superficial regarding the more foundational questions in the philosophy of criminal law.

9 Already here, we face a challenging issue of terminology: In the Nordics, similar to for instance in Germany, it is more common to talk about the 'legal science' and 'legal scientists', while in English, the terms 'legal scholarship' and 'legal scholars' are more common. For more on this issue, and more general starting points about legal science, see e.g., Jacobsen (2022b) pp. 41–59, and with a particular view to 'legal doctrine' in this regard, Jacobsen (2021b). In this book, I will vary between the most apt English word (scholarship) and the most common and favoured Nordic point of view (science), without implying any difference between them.

to this approach: despite the fact that many refer to and make claims about Nordic criminal law, there is a gap in the discipline when it comes to justifying 'Nordic criminal law' and exploring its deeper meaning. Addressing this challenge of justification is the primary aim of this book.

1.2 Why this book

The *first*, and most important reason for this book concerns the need for such a work in Nordic criminal law scholarship – my home base. As already touched upon, Nordic criminal law is often, for good reasons, claimed to be special in terms of its values and principles. Still, and almost paradoxically, despite this strong normative identity, normative theoretical projects like this book did not have favourable conditions in Nordic criminal law scholarship for almost a century. In Chapter 2, I will account for the historical reasons for this. This leaves us in want of a proper normative foundation for Nordic criminal law that clarifies why this should be advocated, preserved, and developed in a time of change and challenges in society as well as in criminal law. By 'normative foundation' I refer here to a rational philosophical justification for the institution of criminal law as part of the legal order, of the kind called for in the philosophy of criminal law.[10] Currently, there is a revived interest in the Nordics both in political philosophy and in the philosophy of criminal law, which can also be seen in criminal law scholarship.[11] To my knowledge, there are, however, no general contributions relating 'Nordic criminal law' and scholarship to the philosophy of criminal law. Not the least in the light of the contemporary development where Nordic societies and criminal law are

10 On the connection to the philosophy of criminal law, see further 1.3 below.

11 See e.g. on law and political philosophy, Slagstad (2001), philosophy of criminal law; Duus-Otterström (2007), and, from the perspective of criminal law scholarship, Nuotio (2008). Much of the discussion revolves around notions such as the '*Rechtsstaat*' and 'the democratic *Rechtsstaat*'. Another example of this is Jacobsen (2009a). These notions, as I will return to, are also closely connected to Kant, see e.g., 5.2.1 below. The following analysis can be seen as a Kantian-republican interpretation of these notions, and hence, for my part, a re-interpretation, more directly engaging with Kant's political philosophy, allowing me to address certain weaknesses in the last-mentioned work, to which I will return.

in a state of transition, which I will return to towards the end of the book, it is evident that there is a need for such a normative framework, or in the words of Philip Pettit, a *compass* for Nordic criminal law scholarship.[12]

While the focus of this book is on 'Nordic criminal law' as a normative reference point for Nordic legal *science*, we should also note that currently, there is work to strengthen Nordic legal collaboration, including in criminal law. For instance, in a report to the general secretary of the Nordic Council of Ministers, Inge Lorange Backer recommends more collaboration in legislation. Criminal law is one of the highlighted areas, due to the humane criminal law tradition in the Nordics, but also in light of contemporary challenges to this approach.[13] Hence, there is also a clear policy side to the subject of the present analysis, relating to the view and role of Nordic criminal law science in public and political debate.

Second, and relatedly, this provides a welcomed opportunity to further strengthen the dialogue between Nordic criminal law scholarship on the one hand, and the contemporary philosophy of criminal law on the other. While this book primarily advocates a Kantian-republican approach to the topic – to be further clarified in Chapter 5 in particular – we will, along the way, have the opportunity to relate to and review several important contributions to the philosophy of criminal law. This includes contributions to German criminal law scholarship as well as the contemporary Anglo-American philosophy of criminal law. The German discussion has been closely intertwined with the philosophy of criminal law for a long time now, with Paul Johann Anselm von Feuerbach (1775–1833) as the most important forerunner.[14] As regards the latter, the Anglo-American discussion, not underestimating the importance of contributions from, for instance, Jeremy Bentham (1748–1832) and later, HLA Hart (1907–1992), accelerated significantly towards the end of the previous millennium and today displays a wealth of positions and a broad and intriguing debate, connecting legal scholarship with philosophical and sociological views.[15] Nordic criminal law scholarship has, with some sig-

12 Cf. Pettit (2014).

13 See Backer (2018) p. 61.

14 See further 6.7 below.

15 On the theoretical development in the Anglo-American context around the turn of the 21st century, see e.g., Duff (2005) and Thorburn (2008) pp. 1077–1094.

nificant exceptions, not yet managed to reach the same level of engagement with the philosophy of criminal law.[16] One aim of this book is therefore to contribute to such a development by bringing Nordic criminal law scholarship in closer connection with the forefront of the contemporary philosophy of criminal law.[17] As such, it can also be read as a Nordic contribution to, in the words of Luís Greco, 'einer *universellen Strafrechtswissenschaft*, die den Wert eines jeden Gedankens ohne Rücksicht auf seine Herkunft als Arbeit an einer gemeinsamen Sache' – written in English, the new *lingua franca* of criminal law scholarship.[18] Writing this in English also allows us to cross the difficult crevasse dividing the Scandinavian languages and the Uralic Finnish language.

Third, again related to the above-mentioned reasons, the *republican* philosophy of criminal law has received more attention in recent years. The republican approach of the book, for instance, connects to works by authors such as Philip Pettit, John Braithwaite, Antony Duff, and Malcolm Thorburn.[19] This republican approach allows us to investigate criminal law from a power perspective while maintaining a strong commitment to freedom – a fundamental value in any reasonable account of the criminal law of the *Rechtsstaat*. In Nordic criminal law scholarship, this recent republican literature has not had

16 Regarding exceptions, there are in recent years some notable contributions where Nordic scholars add to the international discussions, see for instance Bois-Pedain/Ulväng/Asp (2017) on the state and criminal law and Lernestedt/Matravers (2022) on the criminal law's person. Later on, we will also encounter the works of Nils Jareborg, for instance.

17 Regarding the use of the term 'philosophy of criminal law', see 1.3 below. A short introduction to contemporary Anglo-American discussion is provided in 3.2. The German discussion will be kept on hold a bit longer: A short introduction to the contemporary German discussion is provided in 6.7.

18 See Greco (2009) p. 30, and regarding the role of English in this regard, Dubber (2014) p. 1. Regarding Nordic criminal law, I have, as far as possible, used English texts about Nordic criminal law, as they are more accessible for non-Nordic readers to access these. To some extent, however, I will rely on texts written in Nordic languages, which are, after all, the most important contributions to the Nordic criminal law scholarship. In these cases, I will provide English translations. In these translations, I have tried to maintain the 'voice' and style of the author and the specific quotation itself. Generally, I have omitted paragraph breaks from quotations.

19 Much of this discussion also claims relevance to other legal orders than Anglo-American legal orders, see e.g., Duff (2018a) p. 5.

a direct influence.[20] Part of the reason for this is perhaps (paradoxically) that several aspects of republicanism are quite familiar to Nordic legal scholarship, including its public law point of view. Some of the historical contributors to this line of thought, Charles-Louis de Secondat, baron de la Brède et de Montesquieu (1689–1755), and Cesare Beccaria (1738–1794), are also well-known to Nordic criminal law scholars.[21] Republicanism is also closely connected to the natural law point of view that made such impact in the formative years of the contemporary legal order and legal science for instance in Norway.[22] What the political philosophy of 'republicanism' actually implies, is, however, not obvious. As we will return to in Chapter 5, different republican strands of thought may suggest different takes on criminal law, so it may be worthwhile to look further into this. Hence, this book aims to make the political and legal philosophy of republicanism more relevant to criminal law scholarship, exploring – or rethinking – its relevance to our understanding of the principles of Nordic criminal law.

Fourth, again relatedly, I will draw on one specific branch of republicanism: Kantian republicanism. Kant has frequently been referred to in debates on criminal law, typically as an advocate for a categorical and quite harsh retributive view of criminal law. His views on 'blood guilt' and fierce defence of the death penalty in the *Metaphysics of Morals* are often used as evidence in support of this take. Clearly, this is key to the aversion to Kant often witnessed in Nordic criminal law, something I will delve deeper into in Chapter 2 below. However, at the same time, Kant has for a long time mainly been subject to rather short, and often also misguided and demeriting characterisations in Nordic criminal law scholarship. I will aim to compensate for this lack of proper consideration of Kant by engaging in a more detailed appraisal, starting out from his political philosophy, which, it can be added, has attracted

20 For Nordics, the term 'republicanism' may in itself be a part of the problem here: It tends to mean either the opposite of monarchy or the political ideology of the American republican party (the 'GOP'), but these meanings of the term are not relevant to this book. Also: There are a few exceptions to this lack of engagement with republicanism in Nordic criminal law scholarship, including Kettunen (2015) who briefly connects to republican points of view. See also, from a philosophical point of view, Vogt (2018) e.g., pp. 153–160.

21 See e.g., Anttila (1990).

22 See Kjølstad (2023).

attention in recent years, also in the Nordics.[23] In his political philosophy, Kant advocates a comprehensive republican theory of law, providing important starting points also for his approach to criminal law. This body of work is of interest for several reasons, including its analysis of the conceptual relation between the state and criminal law, a topic that has gained renewed attention in recent decades.[24] Taking this work into consideration may provide insights and analytical resources which may contribute to the construction of a robust normative theory of criminal law. Particularly its views on progress and reform, aspects of Kant's practical philosophy which are not always sufficiently recognised, contribute perspectives that, in my view, are essential for any proper account of criminal law. As I will show, Kant's work may be clearly relevant to the contemporary Nordic discussion on criminal law.

Fifth, despite its richness, there may still be something to add to the existing (international) discussion on the justification of criminal law. I will argue that much of contemporary normative criminal law philosophy would benefit from paying more attention to one key issue in criminal law: power – which is, as we will see, a key theme in Kant's political philosophy. As criminal law and punishment basically concern (the use of) power, this may be surprising. However, the central issue in the philosophy of criminal law has been the *justification* of that kind of use of power that punishment ultimately concerns, not conceptual issues relating to the nature of power in itself. This may easily result in a situation where the concept itself is somewhat neglected and central presuppositions for the discussion are not articulated to a sufficient extent. This book therefore aims to contribute to this discussion by focusing on the role of power in reasoning about criminal law and its justification. In my view, this will give us a fuller picture of the fundamental questions that need to be addressed when attempting to justify criminal law and also provide important premises for solving these issues. Clearly, we should be deeply sceptical to

23 For some important Nordic works in this regard, see Eng (2008) and Arntzen (2020), and in regard to criminal law, see for instance, Vogt (2021). When I talk about Kant's 'political philosophy', referring to his 'political and legal philosophy' would be more precise. This is, however, a complex phrasing, and as Kant's viewpoints on law are intimately connected to his entire political philosophy (and through that, philosophy in general) it seems apt to simply use 'political philosophy' in this regard.

24 For an important, fairly early discussion of the relation between the state and criminal law, see Jung (1998).

that kind of use of power against individuals that criminalisation and forms of punishment such as incarceration imply. But, at the same time, most would also recognise the importance of state power for the protection of individual rights, including criminal law's central role in this regard. So, how can these seemingly different normative viewpoints or perspectives be reconciled and brought into one overarching justification of criminal law? At least, we have to be clear about what we are talking about when we talk about 'power'. The distinct features of Nordic criminal law as less repressive compared to the criminal law of many other countries where long prison sentences and harsher prison conditions are more common, make this a particularly interesting case for highlighting and discussing criminal law and power.

Sixth, related to the preceding point, this perspective not only allows us to connect criminal law scholarship to philosophy, but also gives us a good opportunity to connect criminal law scholarship to empirical perspectives on Nordic criminal law. Traditionally, Nordic criminal law scholarship has considered itself to have close connections to criminology, at least much closer connections than to the philosophy of criminal law. There has for some time been a strong social and pragmatic orientation in Nordic criminal law, connecting criminal law scholarship to criminology and sociology. When Nordic criminal law scholars speak of Nordic criminal law as 'rational', they often seem to mean that it is fact-based and directed towards social utility. Central Nordic legal scholars, including Vagn Greve (1938–2014) and Per Ole Träskman (1944–2019), often emphasised the importance of criminological and sociological knowledge for criminal law and its reform. But there have also been certain obstacles to this interaction, for instance in Norway in the latter half of the 20th century, where the combination of the legal-pragmatic approach of the criminal law scholar Johs. Andenæs (1912–2003), the critical-normative approach of Nils Christie (1928–2015) in criminology and the abolitionist view of legal sociologist Thomas Mathiesen (1933–2021), did not result in a particularly good interaction.[25] More recently, there are signs of improved communication in this regard.[26] But, as I will return to in

25 Regarding Norwegian criminology and sociology developing critical views of criminal law, see further the politics of abolition advocated in Mathiesen (2015) and the emphasis on restorative justice in Christie (1977).

26 See e.g., Johansen/Ugelvik/Franko Aas (2013).

Chapter 9, this only serves to make the need for an overarching normative framework for this research dialogue even more visible. This book seeks to further strengthen the connection between criminal law scholarship and empirical perspectives, claiming that a well-founded normative framework for the discussion is of mutual benefit and provides a better foundation for their interaction. The conceptualisation of power in this book may offer us a particularly useful way to achieve this. Worth noting is also that 'Scandinavian criminal law exceptionalism' today is subject to discussion and critical analysis in sociology and criminology, a discussion that relates closely to our investigation of the nature and principles of 'Nordic criminal law' – as the legal scholar would typically approach it.[27]

These different, but related reasons for writing this book (in this way) mean that it engages with many different discussions in political philosophy, Kant-studies, the philosophy of criminal law, criminal law scholarship, legal history, criminology, and sociology, to name the most important fields. As a result, the book is likely to fall short of each of them: political philosophers would want more of Rousseau, Hobbes, Hegel, or Pettit for that matter. Kant-scholars may object to the lack of depth in the interpretation of Kant. Philosophers of criminal law may find the book adding little new to the discussion. And criminologists and sociologists may feel underappreciated, even if I try to reach out to them towards the end of the book. Scholars in these fields may (if they read the book at all) end up disappointed, which I actually expect them to, taking into account the author's lack of competence in these different fields. Still, I hope these readers can appreciate the effort to connect the different discussions and apply them in this theoretical endeavour concerning the normative foundations of Nordic criminal law. That may at least be a contribution to an improved dialogue, which there are good reasons for pursuing.

Ultimately, however, my most important reason for writing this is to contribute to the development of Nordic criminal law scholarship, providing it with the essential normative foundations on which criminal law scholarship so heavily relies. To see why this is so, a conceptual clarification regarding the term 'philosophy' of criminal law is helpful.

27 See e.g., Pratt (2008) and Ugelvik/Dullum (2011).

1.3 Criminal law scholarship and the philosophy of criminal law

This book forms part of an overarching endeavour to provide theoretical resources for Norwegian and Nordic criminal law and criminal law scholarship.[28] The ambition to clarify criminal law's normative foundations means that I am operating in the realm of philosophy, which is challenging. The nature and justification of criminal law is first and foremost the domain of the philosophy of criminal law, a branch of philosophy which is closely connected to political philosophy. As one would clearly expect philosophers to be better equipped to conduct philosophical analyses than would a legal scholar, the question arises whether a legal scholarly project such as this is meaningful or even justifiable. However, as modern criminal law scholarship has emerged as a discipline in its own right, the justification of criminal law has become a core issue in the field.[29] Today, legal scholars engage in such discussions as part of their general interest in criminal law.

To explain why they *should* do so, it is helpful to stress the distinction between philosophy as a scholarly discipline with its own credentials on the one hand, and philosophy as a way for us to organise our thinking by means of abstraction, systematisation, conceptualisation, and argumentation on the other. In the latter regard, as elaborated upon elsewhere, legal scholarship must connect to and develop their views on the nature and justification of criminal law.[30] Such philosophically informed discussions provide an indispensable basis for criminal law scholarship's reasoning on criminal law. Views about the nature and justification of criminal law provide reference points for what research topics one engages with, what views and arguments one advocates in text as well as in teaching, and how one as a scholar contributes to public discussions and reform processes, for instance. To quote Nils Jareborg: 'Die Strafrechtswissenschaft vor den Aufgaben der Zukunft? Eine Antwort ist:

28 This project is particularly pertinent for Norwegian criminal law scholarship, which was for a long time dominated by a negative attitude towards theoretical perspectives, favouring practical problems and problem-solving, see Jacobsen (2010). See also 2.3 below.

29 As already mentioned, German criminal law science provides a good example here, see further 6.7 below.

30 See Jacobsen (2023a).

Ohne Ideologiebewußtsein geht es nicht.'[31] Criminal law scholarship is so intimately related to the positive law, its justification, its evaluation, and its development, that it can hardly be considered conceptually and normatively neutral.[32] Jareborg puts this point very sharply:

> Jede Wissenschaft hat jedoch schon deswegen eine metaphysische Seite, weil jede Theoriebildung, jede Begriffsbildung, jegliches abstrakte Denken Produkte der menschlichen Phantasie sind. Unser mentales Leben enthält eine metaphysische Prägung, sobald wir beginnen, von dem Stimulanzchaos, das unsere Sinnesorgane erreicht, zu extrapolieren. In der Bedeutung, in der ich das Wort ‚Ideologie' verwenden will, haben auch die Naturwissenschaften einen ideologischen Grund. Unter ‚Ideologie' verstehe ich nämlich (eine organisierte Reihe von) grundlegende(n) Auffassungen hinsichtlich eines Aspektes der Wirklichkeit, Grundanschauungen in einem Gedankensystem. … Wissenschaft handelt in ihren grundlegenden Bestandteilen mehr davon, Wirklichkeit zu schaffen, als Wirklichkeit zu beschreiben. Der Traum der logischen Positivisten von einer wertfreien Wissenschaft war natürlich auch eine Ideologie, aber eine unfruchtbare Ideologie.[33]

As such, there are good reasons also for Nordic criminal law scholarship to investigate its criminal law ideology: Such an ideology makes sense of, provides direction to, and legitimises their research enterprises, including their contributions to upholding and developing the legal order of which they are part. In this way, this book could be seen as contributing to Nordic criminal law scholarship's theory of science.[34] It all depends, however, on this ideology *being well justified*.

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31 Jareborg (2000a) p. 415.

32 See also e.g., Tapani/Tolvanen (2016) p. 17 on criminal law scholarship's intimate relation to normative political philosophy.

33 Jareborg (2000a) p. 413. The term 'ideology' is often used in Nordic criminal law scholarship, see also e.g., Elholm in Elholm/Baumbach (2022) p. 54. For my part, I prefer to speak of a (normative) philosophy, which is the term applied in this book, see 1.3.

34 In the meaning of *Wissenschaftstheorie*, see e.g., Skirbekk (2019).

For that reason, criminal law scholarship should do philosophy in the latter of its two meanings, and in this regard interact closely with works in the discipline of philosophy and expose itself to the discussions and standards of that discipline. Aiming for that, and in line with the understanding of 'philosophy' as a means to organise our thinking, in the following I will refer to the project of this book simply as 'philosophy of criminal law'.[35] As a legal scholarly project, this undertaking can aptly be described as a form of 'rational reconstruction' and justification of the principles of Nordic criminal law, by drawing on and applying the justification standards of normative philosophy (in the sense of a scholarly discipline). In the words of Richard Dagger:

> Rational reconstruction thus aims to discover the reason or logic inherent in the law despite its irregular development over time and the various courses it takes from one place to another. In the case of criminal law, rational reconstruction must account for the leading features of criminal law and point the way to its reform or further development.[36]

At the same time, it may be added that the results of this analysis are not only, and not even primarily, of relevance to legal scholarship. Rather, they speak to the public and political discourse about how we – as individuals and as community – should reason about the legal order and the criminal law, in itself a central feature of the republicanism advocated in this book. Criminal law scholarship is one voice, with a particular view from within, in that public debate.

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35 In German, the term 'Straftheorie' is sometimes used, see e.g., Greco (2009) p. 203 about '*normative Lehre … die den Inbegriff der Bedingungen einer legitimen Strafe bestimmt*'. Terms such as this and 'penal/punishment theory' may, however, be less helpful regarding the need to justify the (entire) criminal law.

36 Dagger (2011) pp. 44–45, with reference to Duff, who in several settings has emphasised this approach, more recently in Duff (2018a) pp. 11–13.

1.4 Outline of the book

The book is structured as follows: Part 1 consists of this introductory chapter and the following Chapter 2, which adds to the present chapter by going somewhat further into Nordic criminal law and Nordic criminal law scholarship's ambiguous relation to the philosophy of criminal law. Here, we look into the historical development of Nordic criminal law scholarship and the demise of normative philosophy within it. This will also explain how Kant has been considered obsolete in this discourse.

Part II of the book consists of Chapters 3 and 4, both concerning power, criminal law, and criminal law scholarship. Chapter 3 sets the stage by addressing the lack of attention paid to the concept of power in criminal law philosophy. To do so, I turn to the Anglo-American discussion as a reference point, as it is one of the most vigorous and stimulating discussions today. This move serves several aims: It allows us to look beyond the Nordic discussion (closely related as it is to the German discussion), to refresh our approach, including by mapping out different scholarly approaches from which we can assess Nordic criminal law scholarship. Furthermore, turning to the Anglo-American discussion shows us that, somewhat surprisingly, the concept of power is not a central topic in this discussion, which invites us to reflect on why this is so. Chapter 4 delves further into the concept of power and shows how this can provide us with analytical resources for the further investigation into criminal law. However, it also points out a fundamental conundrum of political philosophy – the constitution and justification of political power – which we need to address in order to reason properly about criminal law.

Part III of the book, consisting of Chapters 5 and 6, addresses Kant's philosophy. Chapter 5 provides an overview of Kant's political philosophy. Following this, Chapter 6 takes a closer look at Kant's conception of criminal law. Kant's political philosophy proves to be more important for articulating a normative foundation for criminal law than is his conception of criminal law. Kant's views on criminal law are fundamentally disputed: The body of work is smaller, less accessible, and subject to widely different interpretations. Kant may even be said not to have developed what we today would think of as a philosophy of criminal law. Historical perspectives on his writings and their context could potentially bring us closer to the 'essence' of his view of criminal law, but that is not the path that I will follow. Instead, I will carve out some general political philosophical themes and principles that pave the

ground for constructing a republican criminal law. But also, by working our way through Kant's political philosophy and remarks on criminal law, we have entered the historical path leading to the contemporary German discussion, which we will briefly encounter towards the end of Chapter 6. Together with the overview of the Anglo-American discussion, this exercise provides a background for the republican criminal law theory to be unpacked in the remaining chapters of the book.

Part IV of the book, consisting of Chapters 7, 8 and 9, provides a rational reconstruction of a republican philosophy of criminal law, developed in relation to core discussions also in Nordic criminal law. Chapters 7 and 8 provide the general principles for and structure of a republican conception of criminal law that addresses the key concerns and topics raised by the preceding interpretations of Kant's work. Key in this regard is the right to external freedom as the basic right of the individual, and the duty to enter into a civil state to protect it. The civil state, I will argue, requires a normative baseline to fulfil its role as protector of public justice, which gives rise to what I call a *baseline conception* of criminal law. This has three *layers*, which I call the individual, the public, and the state authority layers, and, furthermore, three *functions* to serve: the declaratory, the retributive, and the preventive function (in order of priority). Chapter 8 elaborates on the three core functions. Chapter 9 builds onto the baseline conception by addressing its reform dimension. While providing a principled framework, this must be concretised in terms of specific criminal law regulation. This is a task for the legislator, one that requires continuous maintenance reforms to ensure that the criminal law is continuously adapted to societal development. At the same time, while actual legal orders deserve respect, they also create difficulties in living up to what Kant calls 'the true republic'. While the strive towards achieving this is bound to be a long historical process, states are nevertheless obliged to improve in order to approximate the true republic. This, it is claimed, has implications for criminal law and its use of punishment and hard treatment, which should be subject to a longer timeframe reform, in tandem with social developments and reform more broadly. These viewpoints connect us closely to the central features of Nordic criminal law.

The circle of this book is then completed in Chapter 10, constituting on its own the final part of the book, Part V. While Kant may appear as a surprising ally of Nordic criminal law scholarship, this chapter argues that there

are historical as well as principled reasons for considering him as precisely that. By reconnecting to Kant in this way, we may be able to revitalise the deeper ideas of Nordic criminal law. At the same time, Nordic criminal law is changing and challenged by general developments such as the punitive turn in criminal policy in recent decades, calling on us to consider whether we should keep using 'Nordic criminal law' as parole for the criminal law we are obliged to promote, or rather turn to its republican foundations. There are at least reasons for putting more emphasis on the latter.

The way the argument is set up implies that much of this book is a somewhat strenuous walk to get to what criminal law scholars are likely to be most interested in, that is: the republican conception of criminal law provided in Part IV of the book. While readers such inclined may proceed directly to that part of the book, the foregoing chapters do important work in paving the grounds for the discussion in Chapters 7, 8 and 9. In order to get the full set of premises, these chapters should be read as well.