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Nordic criminal law scholarship and 'Nordic criminal law': A critique

2.1 Aim and outline

In this chapter, I will provide some further reflections on Nordic criminal law scholarship and the status of 'Nordic criminal law' as a normative reference for this discipline. In 2.2, I will say something about the view of the Nordic criminal law ideology which is dominant in the discipline. I will restrict myself to an overview of central viewpoints and the literature advocating these. A more thorough analysis of contemporary Nordic criminal law scholarship would be of great interest but is outside of the scope of this book. The central point here is that although the dominant viewpoints in the discipline appear to be sound, there is clearly a need for a more thorough justification. In 2.3, I will search for an historical explanation for this by going into the discipline's historical evolution and the demise of normative philosophy in Nordic criminal law scholarship. In 2.4, I will discuss the contemporary revival of normative perspectives, which, however, has not yet resulted in a more thorough normative explanation and justification of Nordic criminal law. In 2.5, I sum up some important observations for the further analysis, including the absence of Kant (in addition to some similar philosophical perspectives) in Nordic criminal law scholarship.

2.2 Nordic criminal law scholarship's ambiguous relation to the philosophy of criminal law

Nordic criminal law scholarship is – as many would hold – something more than simply 'criminal law scholars from the Nordic countries working on criminal law'. It refers to a community of scholars in a deeper sense. For instance, Nordic criminal law scholars are familiar with each other's works and have extensive knowledge of criminal law in the different Nordic countries. To a large degree, Nordic criminal law scholars can communicate in their mother tongues and interact with each other through institutional arenas such as Nordic journals and seminars.[37] The criminal law orders they study have a lot in common, having developed in tandem and with reference to each other. Sometimes, their analysis of criminal law cuts across the Nordics.[38] Nordic faculties of law have often recruited researchers from different Nordic countries. For such reasons, referring to 'Nordic criminal law' is, actually, almost as natural for a Nordic criminal law scholar as it is to talk about Swedish or Danish criminal law.[39] One could perhaps say that criminal law is one of the areas where legal scholars are the most open to identifying themselves and the law they study as 'Nordic'. And when they (this author included) do so, they usually do it in a favourable way: The ideal and wisdom of this style of criminal law seem to unite Nordic criminal law scholars, or at least, a great deal of them.

Underlying this is a fairly broad consensus of what Nordic criminal law is ultimately about, reconnecting us to the general mode or ideology of Nordic criminal law introduced in 1.1. Key notions such as 'liberal criminal law',

37 See e.g., *Nordisk Tidsskrift for Kriminalvidenskab*.

38 See, for instance, Elholm/Feldtmann (2014) for a 'Nordic perspective' on jurisdiction, starting out from analysis of the different jurisdiction rules in each of the different Nordic countries. Not all contributions to the field apply an explicit Nordic perspective, see e.g., Holmgren (2021) who makes use of Swedish, German and Anglo-American theory when analysing the Swedish law of sentencing. But also here, the analysis is dominated by viewpoints and principles, such as the principle of humanity and *ultima ratio*, central to the Nordic criminal law ideology.

39 Examples of references to Nordic criminal law are easily found in the literature, see e.g., Anderberg (2022) and Nuotio (2023a).

'rationality and humanity', criminal law as '*ultima ratio*', and more indicate a shared ideology: A particular view of criminal law and its role in society, one which recognises the societal importance of criminal law, but is also very sceptical towards it, or at least, towards the extensive use of it as a social means. As explained above in 1.1, the emphasis is on humanity and rationality, social effectiveness, (relatively) low levels of punishment, and a strong focus on rehabilitation-oriented prisons, as well as emphasis on positive general prevention and social means other than criminal law to create well-functioning societies.[40] The central point here is that in this way, 'Nordic criminal law' is not only a mode of criminal law, but just as much a mode of criminal law *research*. It constitutes the 'worldview' of and guiding principles for the criminal law scholars (the majority of them, at least) in the Nordics. One must work hard to find a 'law and order' criminal law scholar in the Nordics, advocating extensive use of criminalisation and punishment to solve societal problems.

So far, one may get the impression that Nordic criminal law scholarship is founded on quite strong normative conceptions of criminal law. The problem, though, is that what 'Nordic criminal law' more precisely amounts to, and how it can be justified, is not evident. So, we must look closer to find a more detailed explanation and justification of Nordic criminal law.

Basic normative starting points are typically found in the introduction to general outlines of criminal law, but these are often fairly short and not

40 For a valuable introduction to 'Nordic criminal law', see Nuotio (2007). Emphasising these characteristics is also common among the critics of (also Nordic) criminal law, see, for instance, Koivukari (2022) p. 136: 'Rationality, humaneness, legitimacy and *Rechtsstaatlichkeit* are all values or features linked to Nordic criminal law and policy. Even though any of these features might bear slightly different meanings and connotations in different contexts, they all have a strong connection to an understanding of criminal law as a system, a system that strives for coherence, norm hierarchy, objectivity, proportionality and legality ... It seems that in particular Nordic neo-classicism commits itself to this kind of systemic understanding of criminal law by emphasising the requirements of proportionality and foreseeability or legal security as well as humanisation of the criminal justice system'. I return to Koivukari's and similar critical views towards the end of the book. At the same time, these key notions are not limited to the Nordic context, but applied also in, for instance, German criminal law science, see, for a discussion from the point of view of 'the rhetoric of criminal law', Dubber (2018) pp. 33–95. I will return to Dubber's works below in 3.2 and 3.3.

particularly elaborate regarding the specific nature of *Nordic* criminal law.[41] At several points, the literature even appears to display a certain disagreement on the issue. For instance, Träskman has emphasised the so-called neo-classical view of sentencing, in particular related to the works of Jareborg and Andrew von Hirsch, as a shared feature of Nordic criminal law.[42] But although proportionality can certainly be said to hold importance in the Nordic countries at large, this neo-classical theory never really gained foothold in Norway and Denmark.[43] Furthermore, when Nordic criminal law scholars frequently use the term 'rational' in describing Nordic criminal law, there is a fundamental ambiguity in the notion of a 'rational' criminal law: As already touched upon in 1.2, 'rational' criminal law is often understood in terms of facts, social *utility* and a sound distribution of the social costs of crime.[44] But at the same time, social *justice* is also considered important in this regard.[45] The prioritisation between these aspects may vary between scholars.

Some legal scholars have sought to clarify the concept of 'Nordic criminal law', and thus contributed to the elaboration of Nordic criminal law and its 'exceptionalism'.[46] Träskman, for instance, considers it to be characterised by: 1) 'an emphasis on caution in the use of the criminal justice system', relating to the *ultima ratio*-principle, 2), a corollary of 1), the notion that 'the criminal policy measures are to be *rational and socially defensible*' – meaning that crime cannot be expected to be abolished, but should rather be regulated and reduced to tolerable levels, and 3) a strive to reduce the level of repression,

41 See e.g., for Finland, Tapani/Tolvanen (2016) pp. 22–48, and for Denmark, Elholm in Elholm/Baumbach (2022) pp. 53–88.

42 Träskman (2013) p. 335. For more on the so-called neo-classical view, see e.g., Hirsch/Jareborg (1991).

43 Träskman (2013) p. 346 points this out as well.

44 See e.g., Träskman (2013) p. 355 referring to the Finnish criminologists Inkeri Anttila and Patrick Törnudd.

45 See e.g., Lahti (2021) p. 5.

46 See also Christensen (2022) on the role of the Nordic journal *Nordisk Tidsskrift for Kriminalvidenskab* in this regard. As Christensen emphasises, non-academic institutions and persons have also been important in promoting Nordic criminal law scholarship.

adding that '[t]his means that it is characteristic of the criminal policy to work purposefully against the expansion of the penal system'.[47]

Another influential, if not the most influential contribution, is Jareborg's conception of the 'defensive' criminal law ideology – in contrast to the 'offensive' approaches to criminal law found in some other countries.[48] The term 'defensive' refers first and foremost to the state of being reserved, cautious, and non-aggressive, while being 'offensive' is understood as being eager and forward (in football, for instance, being defensive is about guarding one's own goal, while the offensive team attacks the goal of the opponent). While Jareborg does not explicitly connect the defensive criminal law ideology to 'Nordic criminal law', the implicit connection seems obvious and is made by others.[49]

Jareborg's account is a key contribution to contemporary conceptions of Nordic criminal law. It seems to fit well with the terrain: For instance, a key aspect of Nordic criminal law is precisely *not* to think of criminal law as a 'tool' to be actively used to solve social problems. Rather, criminal law and punishment should be restricted to what is absolutely necessary to protect – defend – the core values and structures of society, a view that leads to a well-founded scepticism towards 'active' use of criminal law as a social instrument. Crime is rather a social phenomenon that we cannot fully get rid of, and crime control through criminal law is costly, less efficient and should be used sparsely.[50] It is telling that Jareborg's influential article appeared in an anthology featuring key Nordic criminal law scholars in the 1990s with the title 'Beware of punishment'.[51] Jareborg's terms in a sense work even better in English than in Swedish: In English, being 'offensive' can also mean being rude, and Nordic criminal law scholars indeed regard the 'offensive' form of criminal law as more or less insulting, considering it as inhuman, irrational, crude and, well – offensive. Russia and the U.S., both states with high incarceration rates,

47 Träskman (2005b) p. 158.

48 An English version can be found in Jareborg (1995). This should also be read in tandem with other works of Jareborg. For English texts, see e.g., his discussion of 'crime ideologies' in Jareborg (2002) pp. 72–87. See also Jareborg (2005) on '*ultima ratio*'.

49 The importance of Jareborg's discussion of Nordic criminal law is recognised in, e.g., Träskman (2013) pp. 335–336.

50 For an apt and explicit statement of this view, see Anttila/Törnudd (1992) p. 205 reporting on the Finnish reform of the criminal code.

51 Snare (1995).

often are applied here as examples of forms of criminal law to be avoided.[52] Nordic criminal law, one might say, emphasises soft forms of power, a point which we will return to later on.

Jareborg's viewpoints is also clearly expressed in a short German text from 2000. Here, he establishes two ideal types which are contrasted to each other. In the list below, the left side would be comparable to the defensive ideology and the right side to the offensive ideology, even if these expressions are not used in this text:[53]

Rule of law ('Rechtsstaatlichkeit')	*Efficiency*
Proportionality	*Prevention*
Humanity	*Law and Order*
Radical crime ideology	*Collective crime ideology*
Self-critical criminal law morality	*Moralist criminal law morality*

Jareborg's preference for the left version is clear from his view of the right version, which he considers a road map to state terrorism.[54]

Then again, Nordic criminal law scholars are neither naïve nor radicals. While, for instance, abolitionism became influential in Nordic legal sociology through the works of Mathiesen in particular, it did not make much impact on criminal law scholarship.[55] Generally, Nordic criminal law scholars do recognise the importance of criminal law (as we know it) for society and show due respect to the criminal justice system and its functions and needs. Many Nordic legal scholars have engaged in close dialogue with political and legal institutions, providing them with expert input and advice, and to some extent, even defended the criminal justice system against what has been considered as unjustified critique and too progressive reform initiatives, as for instance the

52 See, for instance, Greve (2005).

53 Jareborg (2000a) p. 414 (translated from German).

54 Jareborg (2000a) p. 414: 'ein Wegweiser, der zum Staatsterrorismus zeigt'.

55 See e.g., Mathiesen (2015). Tapani/Tolvanen (2016), for instance, emphasises the importance of taking abolitionism seriously, but considers it hard to find a better founded and functional system as replacement for the criminal justice system. See also e.g., Andenæs (1996) pp. 33–39 and, beyond the Nordics, the critical appraisal of (different forms of) abolitionism in Greco (2009) pp. 207–227.

reception of the Norwegian Criminal Policy Report in 1978 well illustrates.[56] Here, it is worth noting that it has been common to see professors of criminal law moving on to become Supreme Court judges or to achieve other key roles in the Nordic criminal justice systems (or *vice versa*). For instance, Francis Hagerup (1853–1921), who we will return to, was even Norwegian prime minister for two periods. His close colleague Bernhard Getz (1850–1901) left academia to become General Director of Public Prosecutions in Norway, and became, along the way, deeply involved in making the Norwegian criminal procedure code of 1887 and the criminal code of 1902. Without an understanding and recognition of the intimate relation between the state and its criminal law, filling such different roles would not be likely.

The duality of normative criticism of and engagement with (or even involvement in) the criminal justice system seen in Nordic criminal law science, also causes a certain tension: Nordic criminal law scholars have somewhat different 'profiles' in this regard. While some are more prone to adopt a mainly critical approach to the state and the criminal justice system, others, in particular in the Danish-Norwegian pragmatic tradition, approach the discussion through a perspective from 'within' the criminal justice system.[57] Variations of this kind, however, are best characterised as differences within the family.

When we delve deeper into the normative foundations of and justifications for Nordic criminal law ideology, an interesting contrast to this markedly normative profile of Nordic criminal law scholars becomes apparent. While the defensive Nordic criminal law ideology has been advocated and defended for some time, the attempts to justify it at a more foundational level are rather few. There is a historical explanation for this, which is closely connected to the aims of this book. I will venture a brief outline of this story, beginning with the emergence of what we may call modern Nordic criminal law scholarship

56 See e.g., Andenæs et al. (1979) but also the retrospective view of the Minister of Justice delivering the progressive report, Inger Louise Valle, see Valle (1989) p. 180. The intertwinement of law and politics in Nordic criminal law was much stronger in earlier epochs, something I will return to in 2.3 below.

57 For an example of the latter, see Kjelby (2013) pp. 49–53, describing his study of prosecution law as founded on a 'user perspective' (p. 49, in quotation marks).

towards the second half of the 19th century and its views on normative philosophical projects such as the justification of criminal law.[58]

2.3 The demise of normative philosophy in Nordic criminal law scholarship

Nordic criminal law has for a long time been heavily influenced by German philosophy and law.[59] This is where it primarily draws its fundamental ideas from, including its emphasis on the principle of guilt and the importance of the legality principle, as well as several of its core concepts. While Norwegian legal science did not establish itself on its own terms until the 19th century, the Finnish, Swedish, and Danish legal science (the latter with Norwegian contributions as well, a result of the union between the two countries between 1537–1814) all have a longer history.[60] For instance, Hannu Tapani Klami considers the founding of the Academy of Turku in 1640 as the starting point for Finnish legal science.[61] This first period of Nordic legal science includes natural law scholars influenced by Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694). Pufendorf, in particular, who himself spent parts of

58 A disclaimer may here be appropriate: The following outline will restrict itself to some main figures and lines of development and does thereby not provide an in-depth analysis. A thorough study and analysis of the development of Nordic criminal law scholarship would be desirable. This, however, cannot be offered here.

59 From a historical point of view, see Björne (1995) p. 10, speaking about the German-Romanic literature's strong influence on Nordic legal science.

60 Broader historical perspectives on criminal law and Nordic criminal law scholarship can be found in Hauge (1996), while some periods are studied in more detail, such as the shift to the 20th century and the emergence of positivism, see e.g., Häthen (1990) on Sweden primarily, and Flaatten/Heivoll (2017) on Norway. In addition, legal historical perspectives have been developed on both specific regulations and their developments as well as key figures in Nordic criminal law scholarship, see e.g., Michalsen (1997). Nordic criminal law scholarship must, of course, be seen in connection with the broader developments within Nordic legal scholarship more generally. On this subject, there are extensive discussions which would go beyond the scope of this book. For a thorough historical analysis, see, however, Björne (1995), Björne (1998), Björne (2002), and Björne (2007).

61 See Klami (1986) p. 137.

his academic career in Lund in Sweden, was highly important for the evolution of modern legal scholarship, criminal law scholarship included, not only in the Nordics.[62] While philosophical engagement of this kind was to emerge there as well, Danish-Norwegian legal scholarship was somewhat more practically oriented compared to Swedish and Finnish legal scholarship, a dividing line to which we will return.[63] Gradually, criminal law science evolved as a distinct branch of Nordic legal scholarship, in Finland, for instance, with the works of Matthias Calonius (1738–1813) in the latter decades of the 1700s.[64]

The modern Nordic criminal law orders developed in the first part of the 19th century.[65] In the first period, a view of criminal law as part of public law emerged.[66] This development is closely related to the emergence of the *Rechtsstaats*-ideology, with the Age of Enlightenment and the critique of brutality and arbitrariness in the criminal justice system as an important

62 As I will return to below in 8.3.2, Pufendorf has been important in particular for the development of the doctrine of criminal responsibility. Here, we should mention that the discussion after Pufendorf has two related lines, one pertaining to the purpose of criminal law and punishment, another to the criteria for criminal responsibility (imputation). While these cannot be strictly separated, we will focus here on the first issue, but return to the second in Chapter 8 below. On Pufendorf and Nordic criminal law scholarship, see e.g., Wahlberg (2003) pp. 27 ff. on Finland, and Jacobsen (2011b).

63 The development of Nordic criminal law science and the demise of normative philosophical perspectives in it, is part of a broader issue concerning the development of Nordic legal philosophy more generally. There is extensive literature on the latter subject, into which it is not within the scope of this book to go deeper. See e.g., Kinander (2004) for an analysis and critique of legal realism.

64 See further for Calonius' works on criminal law and his 'divine but empirical natural law doctrine' in Wahlberg (2003) p. 1–130 (quote from p. 129).

65 See Björne (1995) for an overview of the Nordic legal science in this period. The tendency to consider the field as a 'Nordic' legal science emerged gradually but became dominant first towards the later decades of the 1800's. The Nordic legal meetings, for instance, started in 1872, this year in Copenhagen. See Björne (2002) pp. 2–3 and pp. 22–24.

66 See e.g., Björne (1995) p. 251 and Björne (1998) pp. 249–250 on the development in German legal science. See also below in 7.7 on the public law point of view and its importance in contemporary criminal law philosophy.

background.[67] Kant and Hegel, the key figures of German idealism, and also Feuerbach, were important references for the contemporary Nordic criminal law scholars.[68] An outcome of the *Rechtsstaats*-ideology in the Nordics is, for instance, the Norwegian Constitution of 1814, influenced by the Continental constitutionalist movement. The Constitution, in turn, led to the Norwegian criminal code of 1842, a criminal code that was formed with reference to conceptions about the purpose of the state and the relation between law, morality and religion, formed by the contemporary political philosophy.[69] The influential Danish-Norwegian legal scholar Johan Frederik Schlegel (1765–1863) was a Kantian.[70]

In the first half of the 19th century, viewpoints drawn from German idealism were also influential in criminal law scholarship: The Finnish legal scholar Karl Gustaf Ehrström (1822–1886) was a Hegelian, but also emphasised reform of the criminal, claiming that, in the words of Klami, 'deterrence was not a part of the essence of punishment at all' and that it was 'reformation that negated the guilt of criminal behaviour and belonged to the essence of punishment'.[71] His colleague Knut Lagus (1824–1859) favoured other contributions to German idealism and is described as an 'eclectic' with regard to the philosophy

67 I will not go further into the Age of Enlightenment and its impact on criminal law in the Nordics, however see Anners (1965) as well as some remarks below on figures such as Montesquieu, Beccaria, and Rousseau. Björne (1995) pp. 305–336 discusses the impact on the Enlightenment on Nordic criminal law and criminal law science, but – unfortunately from the point of view of our discussion – plays down the importance of the philosophy of criminal law in this regard (p. 306).

68 I use the term 'German idealism' in a broad sense, basically as a reference to a philosophical epoch in Germany, starting out with Kant but then leading into romantism. For a further analysis, see e.g., Guyer/Horstmann (2021) Sect. 4, showing that substantially, Kant's position cannot be reduced to a label of this kind.

69 See, for instance, Rørvik (2013a).

70 See Björne (1995) pp. 185–188 and Mestad (2013).

71 Klami (1986) pp. 208–209 (quote from p. 209). See also Björne (1998) pp. 215–217 and also p. 380 on the broader recognition of Hegel's philosophy of criminal law in Nordic legal science in the early decades of the 1800's.

of criminal law.[72] Ehrström's successor Jaakko Forsman (1839–1899) was a retributivist, considering punishment as 'reversing the crime'.[73] Among the late contributors to this classical period of Nordic criminal law scholarship, we should mention the Danish legal scholar Carl Goos (1835–1917), whose ideas were closely related to natural law and the classical criminal law. Goos studied Danish constitutional law as well. He was also the one who wrote about 'Nordic criminal law' in the Nordic legal encyclopaedia, testifying to his status in the discipline.[74] Goos, amongst others, advocated a viewpoint that we will encounter later on: the importance of upholding the legal order. Punishment, according to Goos, was about upholding the law for the sake of society.[75] We see, then, that Goos has elements of utilitarian as well as retributive considerations.[76]

So far, then, we have seen a normatively engaged discipline emerging in close contact with German philosophy and legal science in its foundational epoch. However, throughout the 19th century, things were changing. In Norway in the 1840's, the founder of Norwegian criminal law scholarship, Anton Martin Schweigaard (1808–1870), set out by vehemently rejecting German philosophy and the legal science informed by it, turning instead to a form of social utility-oriented pragmatism. His article on German philosophy concluded: 'The German philosophy has caused much evil; it has led many

72 On Lagus, see Klami (1986) p. 208, stating that Lagus did not accept 'the Hegelian objective idealism which was the opposite of *Rousseau*'s, *Fichte*'s and *Kant*'s ideas of Law and the State as conventional limitations on an individual freedom which was in principle unlimited.'

73 Klami (1986) p. 210, quote from Forsman. On Forsman, see also Björne (2002) p. 192.

74 Goos (1882) and Goos (1889). In addition to this encyclopaedia, a Nordic journal for imprisonment, *Nordisk Tidsskrift for Fængselsvæsen og øvrige penitentiære Institutioner*, and then the still existing *Tidsskrift for Retsvidenskab*, were founded, facilitating the Nordic legal scientific discussion, see further Björne (2002) p. 30.

75 Goos (1875) p. 6.

76 See also the discussion of the development in Goos' viewpoints in this regard in Frosell (1987).

good minds astray. It is time to do away with it.'[77] Kant, Hegel and other idealist philosophers were key targets for his critique, but he found Feuerbach's deterrence-oriented viewpoints more acceptable.[78] Feuerbach's viewpoints had already gained strong influence in Denmark-Norway through the works of Anders Sandøe Ørsted (1788–1860). Through the Bavarian criminal code of 1813, Feuerbach would also influence the aforementioned Norwegian criminal code of 1842.

Ørsted considered criminal law as a means of deterrence and prevention, viewpoints that resonated well with the pragmatic inclinations in Norway and Denmark in particular, of which Ørsted's intellectual development is representative: Ørsted, often considered the father of modern Danish criminal law, wrote a dissertation on Kant and praised him as the great sage from Königsberg, but later moved on to Fichte, only for his (later) conception of law to turn to what are called practical and realistic viewpoints.[79] The Swedish professor Johan Hagströmer (1845–1910), for instance, was also influenced by Feuerbach.[80]

Gradually, then, scholarship on criminal law was disconnected from its political philosophical basis, a detachment that even may be claimed to be

77 See Schweigaard (1835) on German philosophy (the quote translated is from p. 300), and Schweigaard (1834) on German legal science. Schweigaard seems to have been even more negative to other idealist philosophers than to Kant, but also Kant is characterised in negative ways, see e.g., on Kant and issues relating to political philosophy and criminal law in Schweigaard's text from 1835 at pp. 247–248, but also e.g., pp. 252–254 where Fichte is ascribed responsibility for having destroyed what good there was to find in Kant. Hegel is the end point of this negative development, this 'high priest of hair-splitting and harassment' (*sic*), p. 296. In letters, the German Hegelian Eduard Gans (1897–1839) was described as a 'charlatan', see Rørvik (2009) p. 74. But Schweigaard's discussion of Kant has been criticised, see e.g., Stubberud (2009) p. 115–118, claiming that it is too incomplete to merit attention and that Schweigaard's critique of Kant is particularly unfair.

78 See further, e.g., Jacobsen (2010). On Feuerbach, see e.g., Hörnle (2014).

79 E.g., Langsted/Garde/Greve (2014) pp. 23–24 ascribes Ørsted this role in Danish criminal law. See, however, Rørvik (2013b) p. 163 pointing out that Ørsted's discussion of criminal law contained also more fundamental viewpoints, e.g., pertaining to the relation between law and morality.

80 See further on Ørsted, e.g., Hurwitz (196) p. 59–60, Björne (1998) p. 63 and on Hagströmer, Björne (2002) p. 146.

inherent in Feuerbach's philosophy of criminal law.[81] How strong and immediate the breach in the Nordics with the previous philosophy of criminal law actually was, is an open question.[82] But clearly, there was a shift away from 'metaphysics' and towards empiricism as knowledge standard and towards social utility as a normative reference point, decoupled from the normative philosophy of Kant and Hegel.

In Norway, for instance, Hagerup held somewhat different views compared to Schweigaard. Hagerup was inspired by scholars such as Friedrich von Savigny (1779–1861) and Rudolf Ihering (1818–1892) and, in criminal law, Franz von Liszt (1851–1919), who was central to the emergence of modern German legal science and criminal law science.[83] Even if Hagerup's views on criminal law are complex, he was, particularly in his younger years as a scholar, clearly sceptical to 'metaphysics', and therefore hostile towards Kantian philosophy.[84] More generally, political and normative philosophy was not very prevalent in this period. The perspective of this period was instead one of positivism and empiricism, in theory of science as well as in legal scholarship in general.[85] It was, in Hagerup's own laconic words, a time when everything that smelled like 'dissection rooms and laboratories' had 'a particular force of attraction on the spirit'.[86]

This development did not only result in the emergence of sociology as a scientific discipline. It also led to a 'modernisation' of the aims of criminal law, as illustrated by the conflict between the classical and modern schools of criminal law, the latter with Liszt as key proponent. In Norway, alongside Hagerup, Getz should again be mentioned.[87] In Denmark, Carl Torp (1855–1929) was a key proponent for the modern criminal law ideology. In Finland, Allan Serlachius (1870–1935) was a central figure in this regard.[88] Dedicated

81 See further on Feuerbach, and Greco's re-actualisation of Feuerbach, in 6.7 below.

82 See more generally, Kjølstad (2023).

83 On the nature and development of German criminal law scholarship, see, further below in 6.7.

84 On Hagerup's view of criminal law, see Jacobsen (2017).

85 For this epoch, see e.g., Häthen (1990) and, for Norway, Flaatten/Heivoll (2017).

86 See Hagerup (1893) p. 5, commenting on the influence of Lombroso's theories.

87 See further about Getz, in e.g., Vogt (1950).

88 See e.g., Klami (1986) p. 211, who also describes Liszt as Serlachius' 'master in criminal law' (p. 206.)

to positivism was also the influential Swedish legal scholar Johan Thyrén (1861–1933).[89] Many of these scholars, however, had more than one side to them, suggesting a complexity in the issue at hand to be addressed later.[90]

Later, towards the mid-20th century, the Danish realist legal philosopher Alf Ross (1899–1979), while not first and foremost a contributor to Nordic criminal law scholarship, probed into issues of criminal law as well.[91] Ross was particularly outspoken in his rejection of normative philosophy of the kind advocated by Kant. The title of Ross' central work at this point, *Kritik der sogenannten praktischen Erkenntnis, zugleich Prolegomena zu einer Kritik der Rechtswissenschaft* (1933), testifies to this. Ross characterised natural law as 'a harlot … at the disposal of everyone'.[92] By turning to a sort of (meta-ethical) moral emotivism, he had allies in the Swedish legal philosophers of the Uppsala-school, Anders Vilhelm Lundstedt (1882–1955), Karl Olivercrona (1897–1980), and Per Olof Ekelöf (1906–1990), who for their part were heavily influenced by the non-cognitivist views of the philosopher Axel Hägerström (1868–1939), professor of philosophy in Uppsala from 1811.[93] Ross and his Swedish companions were, in turn, central to the development of what has become known as Nordic legal realism. They agreed on a notion of criminal law, its irrational normative language included, as a means to affect behaviour in society. According to Ross, one could simply do away with the conflict between retribution and prevention, the former being merely a feeling to be utilised as a means to achieve the latter: 'Retribution, censure, is

89 See Jareborg/Zila (2020) pp. 85–86, who connects Thyrén to Liszt's viewpoints, and also mentions Karl Schlyter (1879–1959) and Ivar Strahl (1899–1987), however, the latter two inspired by others in the positivist movement.

90 See here, for instance, the observations made by Björne (2002) about Thyrén (p. 381) and Serlachius (pp. 385–386).

91 While Ross discussed not only the aims of criminal law but also central doctrinal subjects, such as intent, his contributions to the discussion are more aptly described as legal philosophical, relating to his general legal philosophical project. His studies in criminal law were carried out late in his career (after he had turned 70 years of age) and suggest at points radical departures from core viewpoints in the contemporary Danish criminal law. On Ross as a doctrinal scholar, see Jareborg (1989), and for a more general perspective on Ross' intellectual career, see Evald (2010).

92 See Ross (1959) p. 261.

93 For some key works, see Lundstedt (1920), Olivecrona (1940) and Ekelöf (1942). For an overview, see e.g., Hauge (1996) pp. 296–300.

an emotional, hostile reaction which in itself acts as a punishment, i.e. directively, preventively.'[94] Ross also distinguished sharply between the aims and the justification of punishment.[95] In this way, Ross advocated a distinction between the general aim of penal legislation and the justification and (just) distribution of punishment.

Ross and the contributors from the Uppsala School had allies in the less theoretical minded, pragmatic criminal law scholars such as Stephan Hurwitz (1901–1981) in Denmark and Johs. Andenæs (1912–2003) in Norway.[96] These two saw little potential in theoretical abstraction for legal scholarship. Hence, they could join in the chorus rejecting normative philosophical approaches, such as for instance Ross advocated, turning to social utility considerations – general prevention in particular – in their justification of criminal law. This, however, did not bar Hurwitz and Andenæs, for instance, from being normatively engaged. Their jurisprudence is clearly informed by normative considerations. Hurwitz, for instance, recognises 'justice considerations' as a limit for criminal law, as well as 'general cultural ideas', such as humanity – thereby indicating that justice has a deeper, non-contingent character.[97] Ideas such as these are not elaborated upon and discussed at a theoretical level. In Finland, Brynolf Honkasalo (1889–1973) advocated 'relative' viewpoints, considering criminal law as a means to prevent crime, even if he paid attention to the importance of just retribution for criminal law to achieve this end.[98] Sociological and criminological perspectives were also central to Inkeri Anttila (1916–2013), as referred to several places in this book. To this

94 Ross (1975) p. 28.

95 See e.g., Ross (1975) p. 44: 'The traditional opposition of retribution and prevention (*quia peccatum— ne peccetur*) is meaningless because the opposing answers are not concerned with the same question. To maintain that punishment is imposed *in order to* prevent crime is to offer an answer to the question of *the aim of penal legislation*. To say that punishment is imposed *because* the criminal has incurred (legal, moral) guilt, is to offer an answer to the question of the (legal, moral) *justification for imposing penalties*.' See also p. 45: 'To say that the aim of punishment is to fulfil a moral duty is to mix two incompatible dimensions; the dimension of actual interests and the dimension of moral evaluation and validity'.

96 On Hurwitz, see Garde (2018). On Andenæs and his influence in Norway, see e.g., Jacobsen (2011a).

97 See Hurwitz (1952) p. 91.

98 See e.g., Frände (1990) p. 253.

epoch, one may also include for instance the Swedish professor Alvar Nelson (1919–2018), whose 'defensive' attitude towards criminal law can be seen in several writings, including this quote from 1970:

> Still, one senses – perhaps stronger than before – the need for humanitarian responsibility. Even in the area of criminal regulation, today one recognises that it is humans that one legislates *for*, and not humans that one legislates *against*. With this insight, it is natural to collaborate with those that the legislation concern, to maintain dialogue and together seek to find constructive solutions instead of repressive means. To fight new views and new techniques with criminal legislation and implementation is in vain. Once more one recognises the truth in the saying: 'The sword does not put out the fire.[99]

The shift that began in the middle of the 1800's, turning away from natural law-oriented justifications, did not thereby result in Nordic criminal law scholarship fully rejecting normativity, but rather turning more towards utility arguments and empirical perspectives. The outcome of this is seen in many works, for instance in the works of the Icelandic criminal law professor Jónatan Thormundsson:

> Criminal law is essentially *a punitive law*. Punishment is imposed on somebody because he is proven guilty and convicted of having committed a criminal offence and must 'pay' for it with his liberty or part of his property. This does not necessarily mean that we favour or implement retributive justice. In modern Iceland several constructive goals and means are attached, which further justify punishment by making it less detrimental and more humane, and by making it serve preventive and rehabilitative purposes at the same time.[100]

Correspondingly, this shift did not occur in a principled, philosophical manner: there was, so to speak, never a Bentham of Nordic criminal law. At the

99 See e.g., Nelson (1970) p. 220.

100 Thormundsson (1998) p. 4, see also e.g., Thormundsson (1994).

same time, the viewpoints that Nordic criminal law scholarship turned to in order to legitimise the claimed-to-be utilitarian criminal law, regardless of whether they referred to Feuerbach's emphasis on general deterrence or Liszt's emphasis on special prevention, themselves faced problems of justification, something to which I will return. While such problems have been central driving forces for the continued discussions in the philosophy of criminal law, in Nordic criminal law scholarship a certain normative-theoretical 'closure' and a turn to social, and often 'all things considered' points of view in this epoch, ensured that justification gaps and possible normative incoherence did not require much attention. The influential meta-ethical viewpoints relating to non-cognitivism and emotivism provided an (for some perhaps merely convenient) intellectual background, doing away with any need for a systematic normative justification of criminal law.

2.4 The return of normativity?

The value-informed, pragmatic approach characteristic of the scholars just mentioned is even more evident in Nordic criminal law scholarship in the latter decades of the 20th century. Then, the normative perspective gradually reclaimed its place in Nordic criminal law scholarship. Concepts such as justice returned to the discussion, for instance relating to the critique of rehabilitation ideologies and the so-called neoclassical turn in Nordic criminal law, or 'humane neoclassicism' as it has also been referred to in Finland.[101] The normative contributions of scholars such as the Danish scholar Vagn Greve (1938–2014) and Per Ole Träskman (1944–2019), the latter of Finnish origin but spending much of his academic life in Denmark and Sweden, should not be underestimated.[102] However, these scholars' normative engagement with

101 See e.g., Heckscher et al. (1980). Regarding the two related expressions, see Lappi-Seppälä (2020) pp. 210–211, stating that the latter alternative refers to 'a penal orientation that combines the requirements of legal security with the aim of humanization of the criminal justice system'.

102 See generally, e.g., Lappi-Seppäla (2020) p. 229 pointing to 'the influence of an active and liberal-minded generation of penal reformers in all the Nordic countries' when explaining 'some successful examples' in recent decades relating to penal policy choices in the Nordic countries.

Nordic criminal law cannot be described as philosophical in style. While clearly normatively engaged and often critical towards contemporary developments in criminal law, for instance the way it was used to deal with the drug problem, they did not elaborate on general justification theories, but instead focused on socio-legal and pragmatic perspectives.[103] Socio-legal perspectives were also central for the emergence of feminist perspectives by authors such as Tove Stang Dahl (1938–1993).[104] Later critical approaches have built onto such perspectives.[105]

Despite a certain re-normativisation, Nordic criminal law scholarship still seems to be influenced by the anti-metaphysical view and scepticism towards normative philosophy which emerged from the middle of the 19th century and onwards. For instance, in 2002, Greve had this to say about the foundation of what he called 'criminal law theories' – a claim that demonstrates the lasting influence of Ross and the Uppsala school on the discipline:

> As such, the term 'theory' is used in a quite different meaning than when speaking about a scientific theory. Criminal law theories are human choices, and as such they are political, non-scientific decisions: One cannot decide on their correctness: There is no truth criteria. However, one may demonstrate the meaninglessness of a certain view set forth. Demonstrating such meaninglessness could be done through a logical or linguistic analysis, revealing inner contradictions (….) in the argumentation chain. It can also be done thorough empirical investigations, showing with sufficient certainty that one cannot reach the given aims through the proposed means (…).[106]

Some contributors to the recent normative drive in Nordic criminal law scholarship have, however, more of an analytical-theoretical approach, such as Jareborg, whose important contribution to the understanding of Nordic criminal

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103 For critical perspectives on drug criminal law and EU criminal law, see e.g., Träskman (2011) and Träskman (2002).

104 See, for instance, Stang Dahl (1994).

105 Later on, in 9.5, we return to the role of critical perspectives within the republican account to be developed.

106 Greve (2002) p. 33.

law has already been mentioned. Jareborg's scholarly approach has been much more philosophically oriented than most of the scholarship in this discipline. While clearly recognising the importance of 'ideologies' for criminal law and criminal law scholarship, Jareborg's studies of criminal law have, first and foremost, been influenced by analytic philosophy in the tradition of Wittgenstein, as well as philosophical pragmatists such as Hilary Putnam and Richard Rorty, and it has not taken the route into normative philosophy of law.[107] Jareborg's defensive criminal law ideology appears mainly to be considered as a cultural value phenomenon closely related to the *Rechtsstaats*-ideology, ultimately a well-functioning normative language that improves society and the human condition.[108] This is reflected in the fact that Jareborg, for instance, recognises the historical importance of classical criminal law figures such as Feuerbach and Binding (while distancing himself from Beccaria and Bentham), but without addressing their viewpoints to any extent.[109]

At this point, it should be added that viewed as (national) research communities, the normative-theoretical engagement of Nordic criminal law scholarship seems to grow as one travels eastwards. The traditional pragmatic style of Nordic criminal law seems today to have its stronghold in Iceland and Denmark. While normative in style, I am not aware of any deeper engagement with the normative foundations of criminal law here, although, for instance, the discussion about the emerging EU-criminal law has spawned important studies.[110] Human rights perspectives have also been emphasised.[111] Norway was in the same situation for a long time, but more theoretical perspectives started to develop at the turn of the millennium, mainly in relation to specific

107 For a core work, see Jareborg (1969), see also e.g., Jareborg (1992), for instance pp. 19–28 concerning different conceptions of 'metaphysics', and Jareborg (2002). On the importance of 'ideologies' for criminal law and criminal law scholarship, see e.g., Jareborg (2000). See also, e.g., Jareborg/Zila (2020) pp. 67–68 on 'justice'.

108 This is also characteristic of my own approach in Jacobsen (2009a).

109 See Jareborg (1995) p. 35 (footnote). However, see also Jareborg (1980) p. 44 where the connections to German classical criminal law are toned down.

110 See e.g., Elholm (2002).

111 See e.g., Baumbach (2014).

issues in criminal law.[112] In Norway, a somewhat broader discussion is now emerging, connecting legal scholarship to philosophical, historical, and sociological perspectives.[113] The discussion in Swedish criminal law scholarship is richer in a theoretical sense, partly due to the works of Jareborg, but it also contains other theoretical perspectives, including more critical takes.[114] The principled engagement seems to be at its greatest in Finnish legal scholarship. Inkeri Antilla and Patrick Törnudd observed in 1992 an ongoing generational shift in Finland, where 'the youngest generation seems to be less interested in the social sciences and in the policy relevance of criminal law than in purely theoretical issues'.[115] Scholars such as Raimo Lahti, Dan Frände and Kimmo Nuotio have facilitated a comparatively rich discussion in Finnish criminal law scholarship on the principles of Nordic criminal law, today with a number of contributors.[116] Both in Sweden and Finland, the emerging EU-criminal law has provided a central reference point for discussing the principles of criminal law.[117]

This 'geographical diversity' reflects more general legal, cultural, and academic traditions in the Nordics, the Finnish one being closest to the

112 An important, early work in this regard is Husabø (1994) on euthanasia and related topics. See also the shorter, but more general Hegelian contribution by Kinander (2013). I myself had a first stab at the criminal law in a *democratic Rechtsstaat* in view of terrorism legislation in Jacobsen (2009a). Here, Kant did play a significant role, but merely as one piece of a larger puzzle, mainly due to lack of insight and understanding of his philosophy in general. This prevented me from properly accounting for important aspects of criminal law, its state dimension in particular.

113 Many of these perspectives are represented in Fredwall/Heivoll (2022).

114 In the first regard, see e.g., Ulväng (2005) on concurrence of crimes and sentencing principles in regard to multiple offenders, and Asp (2005) on criminalisation of preparatory acts. See, furthermore, e.g., Lernestedt (2003). In Sweden notably, feminist and gender perspectives have also gained traction, see e.g., Berglund (2007).

115 Anttila/Törnudd (1992) p. 206.

116 See e.g., Lahti (2000), Frände (2012) and Nuotio (2007). For a helpful overview of Finnish criminal law scholarship in the period 1970–2010, see Lahti (2017). Parts of the Finnish literature is, unfortunately, not accessible to me due to the language barrier between the Scandinavian languages and Finnish.

117 See e.g., Gröning (2008), Öberg (2011), Melander (2013), Kettunen (2015), and Koivukari (2022).

theoretically oriented German branch of legal scholarship.[118] In terms of systematisation of law, for instance, Lahti describes Finland as being 'in this respect nearer to German penal thinking than the other Nordic countries'.[119] This connection implies that the normative-philosophical gap identified here appears to be smaller in Finland than in, for instance, Norway, Iceland, and Denmark. This makes a book of this kind particularly relevant for the western part of the Nordics. At the same time, the Finnish discussion is first and foremost closely related to the discussion in German legal scholarship, not philosophical discussions on their own terms, suggesting a certain potential for this kind of analysis also there.

2.5 The villain of the play

Despite important contributions and the development towards, or rather, back to more normative engagement, a fuller account and justification of Nordic criminal law seems to be needed.[120] It is the aim of this book to address this need, and the analysis so far has provided us with several more specific observations facilitating the investigation. For instance, it is notable how Nordic criminal law scholarship in its foundational periods was intimately connected to a broader discussion pertaining to the nature of law and the state. Later, in Denmark and Norway in particular, the perspective became narrower, limiting itself to more pragmatic, empirical perspectives and with

118 At this point, in particularly, we connect to a much deeper historical and comparative discussion about the nature, developments and characteristics of the different Nordic legal orders. As the normative project on this book does not rely on more specific viewpoints in that regard, I will not pursue this here. See, however, e.g., Husa/Nuotio/Philajamäki (2007).

119 See Lahti (2020) p. 10. Variations are seen also in criminal law and criminal policy, see e.g., Antilla (1975) pp. 92–96, pointing out that while Norway was a forerunner in introducing preventive detention, Finland was the Nordic country 'less willing to give up the principles of classical criminal law, and to replace punishment with other measures'.

120 This, I will venture, will become clearer when we unpack, for instance, the many perspectives at play in contemporary Anglo-American philosophy of criminal law in 3.3 below.

social utility as an overarching normative reference point. One might ask whether something got lost along the way here. Another important observation is the variety of historical viewpoints in the Nordic discussion as well as the fact that many of the most interesting contributions appear to be complex with regard to their view and justification of criminal law. How this plethora of relevant viewpoints can be tackled within a philosophy of criminal law, without merely resorting to an unwarranted juxtaposition of conflicting principles, provides a central topic for the following discussion.

But perhaps the most intriguing observation is how figures like Kant and Hegel came to disappear from the discussions.[121] There is certainly a lack of thorough engagement with normative philosophy in Nordic criminal law science more generally, even after the re-emergence of normativity in Nordic criminal law scholarship. Even Goos has become criticised for lack of proper engagement with the German philosophy that he turned to in order to make room for the 'absolute' viewpoint at the heart of his conception of criminal law.[122] But with regard to Kant and Hegel notably, we are not merely talking about an absence in terms of disinterest in their philosophies, but of clearly negative characterisations and an outspoken rejection of them as contributors to understanding criminal law. As Kant will play a central role in this book, I will elaborate on the dominant view in the Nordics of Kantian philosophy and criminal law.

Kant was, as we have already seen, indeed highly influential in Nordic criminal law scholarship's foundational epochs but later turned into one of the key villains of the play. For about one and a half centuries, then, there was little discursive space for Kant in Nordic criminal law scholarship. Few paid much attention to him and to the extent they did, they offered negative appraisals. In the story just told, we find most of the engagement with Kant in Ross, who is not usually considered a part of Nordic criminal law scholarship. Rather, Ross' engagement with the subject starts out from his broader legal philosophical point of view and within the framing of his own approach to the discussion on the aims and justification of criminal law. As such, it is

121 This is also pointed out by Kinander (2013) pp. 179 ff. regarding Norwegian criminal law.

122 See Frosell (1987) p. 164 considering it a significant weakness in Goos' account of criminal law.

perhaps not surprising to see engagement with Kant here.[123] In any event, as already mentioned, he was clearly rejecting Kant's conception of practical reason. For Ross, one might say, Kant's practical philosophy was not to be taken seriously, to put it mildly. At this point, Ross is certainly representative for Nordic criminal law science.

Notably, though, two premises have co-functioned to create that situation. First, there is the more general rejection of 'metaphysics' and shift towards empiricism and 'realism' from the middle of the 19th century and onwards, later to be supplemented by the non-cognitivist claims from Ross and others. Kant's intellectual project has most often been understood as strictly metaphysical, not without reason. The title of his central work on law is after all *The Metaphysics of Morals*. Therefore, many Nordic legal scholars have viewed Kantian philosophy to be of precisely the kind style of thinking one wanted to move away from in favour of an orientation towards empirical facts, perspectives, and arguments. Secondly and relatedly, Kant's theory of punishment has often been read as a kind of hardcore retributivism, categorically calling for punishment without any regard for social consequences.[124] This view of Kant has been dominant in Nordic criminal law scholarship as well. As a consequence, he has often been taken to be a prime representative of the opposite of what Nordic criminal law has been considered to be about.

One easily finds evidence of the co-function of these two closely related premises. One example is Greve's discussion of theories of criminal law, seeing Kant as a central representative of retributive theories. Greve considers this 'too metaphysical', and even claims that it is logically impossible for retribution to be a purpose of criminal law (a viewpoint drawn from Ross, by the way).[125]

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123 See in particular Ross (1975) pp. 54–57 on the 'restrictive principles' of criminal law, where Ross provides a more engaged analysis of Kant's criminal law than often seen in Nordic literature,

124 See, for instance, Holtman (1997) p. 3: 'Traditionally, Kant's account is labelled as "thoroughgoing" retributivism, and many overviews cite it as their paradigm retributivist example.' We will return to the international debate on Kant's philosophy of criminal law in Chapter 6 below.

125 Greve (2002) pp. 35–36. See also p. 47 where Greve points to a historical tendency where preventive arguments sometimes come under attack, leading to 'a fleeing to metaphysical considerations about justice', clearly a negative development in Greve's view.

Another example can be found in Icelandic criminal scholarship, where Thormundsson briefly mentions Kant in relation to 'old-fashioned and adamant' retributive viewpoints.[126] A further example of how this marginalisation of Kant has occurred in Nordic criminal law scholarship can be found in works of the Norwegian criminal law scholar Jon Skeie (1871–1951), who put much energy into the history of criminal law as part of his doctrinal legal scholarship. Regarding the philosophical development, Skeie stresses the importance of the Age of Enlightenment, mentioning Locke, Montesquieu, Rousseau, Voltaire, Beccaria, Hommel, and Michaëlis.[127] Following this, Kant's view is described as the opposite of the utility-oriented criminal law philosophies, before Skeie quickly goes on to claim that 'about at the same time', Feuerbach delivered his theory of general deterrence, and moving on to address Hegel and later criminal law philosophy in Germany.[128] Skeie thereby disconnects Kant from his intimate connections to Enlightenment thinking and notably Rousseau, while at the same time seeing his view of criminal law and punishment as a quite one-sided and categorical retributive philosophy. In this way, Kant, in the broader history of the philosophy of criminal law, is merely a parenthesis, quickly sidestepped by Feuerbach, whose Kantian background is not mentioned.[129] A third example, this time from Finland, is Anttila and Törnudd's more general remark about Nordic criminal law's rejection of retributivism: 'It should be clearly understood that few Nordic crime experts have any sympathy for a "just deserts" philosophy based on either populist clamour or metaphysical demands for retribution ("punishments must be inflicted because a crime has been committed")'.[130] While not explicitly mentioning Kant, it is likely that his philosophy of criminal law was amongst those that the authors had in mind. More recent contributions uphold the view of Kant as a prime example of 'absolute' justifications of criminal law.[131]

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126 Thormundsson (1994) p. 93.

127 Skeie (1937) pp. 30–32.

128 Skeie (1937) pp. 30–32.

129 See further 6.7 below.

130 Anttila/Törnudd (1980) p. 122.

131 See e.g., Holmgren (2021) pp. 56–58, see also on Kant and the talion principle at pp. 196–197.

The problem, of course, is that both premises – the rejection of metaphysics and the view of Kant as a hardcore retributivist – can be challenged.[132] The 'positivist' ambition of limiting science strictly to empirically or analytically justified knowledge is futile, as already aptly pointed out by the quote from Jareborg earlier in this chapter. Moreover, Ross' non-cognitivist philosophy has itself been subject to critique.[133] And while Kant's intellectual project has important metaphysical dimensions, Kant's theory of knowledge is still a sophisticated blend of rationalism and empiricism, arguably more open to the importance of the empirical perspectives so central to the Nordic 'style of thought' than what it has been claimed to be. Some prominent Kant-readers even note the wide acceptance of 'the anti-metaphysical implications of Kant's position'.[134] Secondly, there is good reason to question whether Kant's criminal law can really be understood as a crude and categorical form of retributivism. More recent interpretations suggest that it is not.[135] In fact, viewed in relation to the broader political philosophy of Kant, with its roots in Enlightenment thought and re-emergence in contemporary philosophy, Kantian criminal law has potential to offer us ways to account for the complexity we have observed within the Nordic criminal law discussion. More generally, the normative republican tradition, which this book turns to in order to rethink the principles of Nordic criminal law, has not been considered.[136]

In line with the broader Kantian revival in political and legal philosophy, in other words there seems to be room to explore whether closer engagement with Kant could refresh the Nordic discussion on the nature and aims of

132 The same goes for conceptions of Kant's ethics prevalent in Nordic criminal law scholarship, see e.g., Jareborg (1992) pp. 36–38. However, it is not necessary to go into that subject as well, see further 5.4 below.

133 See e.g., the critique in Stubberud (2004). More generally, Greco (2009) p. 144, for instance, claims that 'der Nonkognitivismus *seit langem depassé* ist'.

134 O'Neill (2015) p. 4.

135 See further Chapter 6 below. Here we could also add Ross, who – in usual fashion – rejected the view of Kant as a retributivist: 'People simply parrot one another's hearsay that the absolute theorists claim retribution, and not prevention, to be the aim of punishment. No one stops to consider how unreasonable such an assumption is; how a thinker of Kant's calibre could have thought anything so foolish.', see Ross (1975) p. 63.

136 Skeie (1937) pp. 32–34.

criminal law and provide us with starting points for a normative philosophy for Nordic criminal law. I think it can. To see how, however, we must start out elsewhere. For now, we leave Nordic criminal law scholarship, but we will return to it towards the latter stages of this investigation.

In view of the discussions outlined so far, we must address three related challenges. First, and most generally, we must be able to account for the basic principles of criminal law and their justification on a more general level: Historical, social, and cultural premises and traditions are not capable of providing us with a normative justification of 'Nordic criminal law'. Rather, we must be able to explain why it is a sound expression of foundational normative principles. If it is, that is not only of relevance to Nordic criminal law science but would be a model for a sound criminal law also elsewhere. Secondly, and closely related, we must clarify what role power has in law as a normative project.[137] This is challenging for several reasons. One is that power is often considered as a factual issue, and sometimes even a problem for law and its rule. At the same time, law, and criminal law in particular, aims to be (a certain form of) power, capable of fulfilling its functions in society. This connects us to a fundamental problem in political and legal philosophy: it indicates how closely linked criminal law is to the overall normative project of the state. Third, and relatedly, we must look for a way through the historical conflict between on the one hand, the pure normative analytical or rationalist conceptions of criminal law that does not account for the state of society, the causes of crime, the effects of criminal law, and so forth, and on the other hand, empirical, and merely utility oriented conceptions of criminal law devoid of normativity. Here, German and Anglo-American philosophy of criminal law offer more and richer perspectives, not seldomly through Kantian references, suggesting that we should take a step out of the Nordic discussion to enrich and rethink it. In the end, the villain of the play we have just witnessed may prove to be not Kant, but rather the lack of proper engagement with his practical philosophy.

137 See also e.g., Pawlik (2012) p. 26: 'Wie sind Zwang und Freiheit auf einen Nenner zu bringen?'