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3

Power and criminal law scholarship: Some starting points

3.1 Aim and outline

Contributions to the philosophy of criminal law often start out by discussing key concepts such as wrongs, guilt, and justice. Perhaps, though, we would be better served by setting a different course. Framing the discussion through the concept of *power* may at least be refreshing and possibly help us bring out some important perspectives and themes. In particular, such an analysis, which is the topic of this and the following chapter, may provide a good entrance point to Kant's republicanism and criminal law, which will be the topic from Chapter 5 and onwards. Here, a central idea is that, contrary to the idea that there are (certain) legal rules that we should use hard treatment to uphold, making the power aspect of law 'secondary', power goes to the heart of the very nature of law, criminal law in particular.[138] To prepare the ground for a discussion of this, we are well served by starting out in this chapter and the following one with some conceptual meditations on the concept of power and its place in criminal law scholarship.

138 Quotation from Ripstein (2004) p. 5, who ascribes this view to John Stuart Mill.

This chapter situates the concept of power in contemporary discussions in the philosophy of criminal law. To do this, I draw on the contemporary Anglo-American discussion on the nature and justification of criminal law. Introducing this discussion provides important perspectives and resources for our discussion of the principles of criminal law in Chapters 7–9. The German discussion will, for similar purposes, be introduced and utilised at a later stage of the analysis.[139] Reviewing these discussions serve at the same time to connect the discussion of Nordic criminal law to a broader, international debate on the justification of criminal law. When we expand our perspective to include these discussions, the playing field gets bigger and includes, as we will see, viewpoints often associated with Kant, which are excluded in the Nordic discussion.

In this chapter, more specifically, in 3.2, what is sometimes coined as 'the penal paradox' in relation to the concept of power will be introduced, before 3.3 reviews the concept of power in Anglo-American criminal law philosophy. This review will demonstrate that, although power is a prevalent concept in the literature, it has not been subjected to conceptual clarification and analysis to any great extent. This is in itself intriguing, and it invites a reflection on the reason for this gap. This will be the focus of 3.4. The analyses and reflections in this chapter will pave the ground for Chapter 4, where we will delve deeper into the concept of power.

3.2 Power, 'the penal paradox', and the need for justification

The concept of power is, and has been for a long time, a recurring topic for legal and political discussion.[140] The issue of power in law and politics seems to have a dual character. On the one hand, power is something we value, something we turn to for protection as well as for justice to be done. State power, including police power as well as military power, is generally recognised as essential to maintain state sovereignty as well as to protect individuals in a society. On

139 See 6.7 below for German criminal law scholarship.

140 See e.g., Arendt (2007).

the other hand, power is also often considered something of a problem. We stress the need for separation of powers and highlight troubling aspects of state and police power. To some extent, we even apply separate terms, such as 'violence' for the most serious instances of power (abuse). Such terms are furthermore not only relevant when we talk about misuse (or transgressions) of state power but also when we address the abuse of one citizen by another, which is – unfortunately – a well-known issue to criminal law scholars and practitioners. The various meanings or aspects of power is another reason why it should be subjected to analysis and conceptual clarification.

The duality in discussions of power is evident in the practice of criminal law: Defence solicitors and human rights advocates often remind us of the problems with (too much) state power. The police, prosecutors, and victim support organisations are, for their part, more often concerned with the (ab)use of power in (private) relationships, gangs, and more, and consider state power essential to address such social problems. The duality is also visible in the academic discussions on the nature, fairness, and limits of criminal law. Markus Dirk Dubber, for instance, speaks of the 'prima facie illegitimacy of penal power', criminal law as 'the state's most awesome power, the power most in need of legitimation' as well as of what he calls the '*penal paradox*': '[T]he sharpest formulation of the general paradox of power in a liberal state, i.e., the violent interferences with the autonomy of persons upon whose autonomy the state's legitimacy rests'.[141] Many others say the same, albeit in other words.[142] Furthermore, this is usually a starting point for attempts to (at least to some extent) justify this kind of power. Victor Tadros, for instance, describes punishment as 'probably the most awful thing that modern democratic states systematically do to their own citizens', as a starting point for his discussion of the proper justification for criminal law.[143] It can be added that statements of this kind can be found in German as well as in Nordic literature. An historically important example from the former discussion is Feuerbach's observation that punishment is 'eine Art des Zwangsrechts überhaupt'.[144] A recent example

141 Dubber (2018) pp. 1–2.

142 For one of many examples, see e.g., Bois-Pedain/Ulväng/Asp (2017) p. 1.

143 Tadros (2011) p. 1.

144 Feuerbach (1799–1800) p. 31.

from the Nordic discussion is Kristiina Koivukari's claim that criminal law is 'violent and *per se* wrong'.[145]

From remarks such as these, we easily get the impression that we are talking about some kind of *physical* power – use of force: Punishment typically implies some form of hard treatment and the state would not be able to do this awful thing if it was not powerful, that is, possessed the capacity to make individuals obey its commands. But clearly, power is more complex than that. Some forms of power are uniquely connected to certain institutions, in, for instance, the way '[s]tates claim powers that no private person could have'.[146] Here, however, the term 'power' also seems to refer to a certain kind of normative competence to use force, for instance. This is perhaps the most common way to use the term. For example, we talk about *state powers* as well as *penal power*, referring not primarily to the physical force but to someone (an institution) being *authorised* to rule over others. Furthermore, regarding the power of the state, it seems clear that it relies not only on physical force but also on economic power and even 'softer' forms of power connected to a certain normative standing or authority in a society, relating to, for instance, democratic values, nationalism, or other normative traits.

Given this complexity, it is not evident what we are actually talking about when we discuss power. However, what has been said so far illustrates how the criminal law, as a distinct *form of power*, is subject to a particular justification challenge – perhaps more than any other area of law. To even begin to approach this challenge, however, we must clarify what we are talking about when we talk about power. For this reason, it is worth looking further into contemporary (Anglo-American) criminal law philosophy to examine the extent to which this issue is addressed and whether it provides more clarity to the discussion.

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145 Koivukari (2020) p. 43. More on Koivukari's critical view in 9.5 below. For more Nordic examples, see e.g., Holmgren (2021) pp. 20–21 on the need for 'motivation' of punishment in view of a basic moral principle stating that you should avoid doing harm to others.

146 Ripstein (2009) p. 145.

3.3 Conceptualisations of power in contemporary philosophy of criminal law: An Anglo-American outlook

To what extent is the concept of power subject to attention in contemporary Anglo-American philosophy of criminal law? Considering the extensiveness of the literature on this issue, I have limited this introductory investigation to some core contributions/contributors. Furthermore, this outline is organised according to the different methodological approaches of the works in question. I will structure the discussion by distinguishing between *analytical-normative theories of criminal law* (represented by, among others, Duff), works that *combine normative and socio-historical perspectives* (such as Dubber) and *socio-historical perspectives* on criminal law (such as Farmer's or Lacey's). In each category, I account for some central contributions to the discussion. These categories are helpful not only as a way of organising the discussion, but also to understand the way in which different scholarly projects feed into a broad and multifaceted discussion on the nature and justification of criminal law. Different works and the approaches they represent contribute different aspects of this complex discussion. The scope and categories of the Anglo-American philosophy of criminal law will also be helpful to us as we delve further into German and Nordic criminal law scholarship. For instance, as already touched upon, it is particularly the analytical-normative theories that we are currently lacking in contemporary Nordic criminal law scholarship. At the same time, it is important to stress that the categories applied here are simplified. Notwithstanding, they are useful in showing different starting points and (somewhat) different research focuses.[147]

Before we proceed, it is worth stressing that, as criminal law and punishment very much concern power, all of the writings that we are about to address are concerned with power in one way or another. The focus here, however, will be on whether they show particular concern or attention to *the nature or conceptualisation of power and its implications for criminal law*. Furthermore, the following sections do not make any normative claims: whether these

147 For more on the methodological discussion in contemporary discussion on criminal law, see e.g., Duff (1998) and Matsuzawa/Nuotio (2021).

works *should* have paid (more) attention to the concept of power is not the issue, at least not yet.

Starting out with the analytically-focused normative philosophies of criminal law, works of Antony Duff, Michael S. Moore, and Victor Tadros provide prominent examples.[148] While these authors arrive at somewhat different conceptions of criminal law and its justification, they all share an interest in the question: How can one normatively justify the institution of criminal law? Scholars working on this issue typically approach it by means of an analytical-normative approach characteristic of normative philosophy. This orientation easily leads into conceptual issues relating to matters such as acts, wrongs, and punishment. The focus is on coherent normative argumentation, not on sociological and historical analysis. In order to make the argument as clear as possible, studies of this kind often opt for 'clean' and therefore usually hypothetical and less realistic cases as objects of analysis.[149] However, positive law is also referred to, but not to justify the argument. Rather, it is applied mainly to test whether the principled solutions offered correspond to (how we have organised) our criminal law and criminal justice systems. Dissonance here may be a challenge to such analyses but does not defeat them. It might be the practice and not the theory that is misguided. The framing of the subject is often national criminal law, although international criminal law is still considered as a kind of exception or extension useful as test case for core concepts and principles in these theories.[150]

Among the theories applying this perspective, Michael S. Moore's moral theory of criminal law has for some time now been the most clear-cut example of a retributive conception of criminal law that ties the institution of criminal law strongly to moral blame.[151] One could call this a kind of strong legal moralist view of criminal law. If we were to accept Kant's philosophy of criminal law as a hardcore retributivist theory, we already here see that this is not such an 'illegitimate' position as the discussion in Nordic criminal law might

148 Duff (2018a), Moore (2001), and Tadros (2011).

149 See at this point in particular Tadros (2011) pp. 6–8. See, however, also Duff (2018a) pp. 3–5 emphasising rational reconstruction, starting out 'from where we happen to be' (p. 4).

150 See e.g., Duff (2018b).

151 See, in particular, Moore (2010). For a discussion, see e.g., Vogt (2018) pp. 46–51.

indicate.[152] Others have, however, challenged this view, favouring a more modest version of 'legal moralism'. Antony Duff's conception of criminal law and criminalisation, developed in a series of works over several decades including *The Realm of Law*, is another important example, advocating a form of 'negative legal moralism'.[153] The mentioned work consists of and reflects a thorough analysis of several issues and components required for a comprehensive theory of criminal law and its main focus, criminalisation. Still, the concept of power is not subjected to a separate analysis, and it is not explained in itself. The focus is rather on that specific form of power called criminal law and punishment to be justified as part of the legal order, an objective that requires normative theories and concepts. Duff starts out from three key features of criminal law: crime, the criminal process, and punishment. The state as context for criminal law is clearly set out from the beginning.[154] Thus contrary to Moore, Duff's view of criminal law is closely connected to political philosophy, acknowledging the public law aspect of criminal law. For instance, Duff emphasises the public aspect of law and law's relation to the *res publica* in this way:

> … if we are to develop a plausibly modest version of legal moralism, and understand the role that criminal law should play in a decent republic, we must indeed focus on the idea of 'public wrongs', but our starting point should be the 'public' rather than 'wrongs': we should begin, that is, by thinking not about wrongs, but about the public realm – the realm in which public wrongs are identified. Rather than starting with the whole realm of moral wrongs as our canvas, and then asking which of them should be the criminal law's business, we must think about the criminal law's business, as a distinctive kind of legal institution: and to do that we must think about the polity's business (its *res publica*), since the criminal law's proper business must be to contribute, in some distinctive way, to the polity's business.[155]

152 Whether Kant is aptly described in this regard is another question, to be discussed in chapter 6 below.

153 Duff (2018a) pp. 58–59, considering wrongfulness a necessary basis for criminalisation.

154 Duff (2018a) pp. 9–10.

155 Duff (2018a) p. 79. See also e.g., Duff (2010a) p. 300.

This view of criminal law starts out from a conception of criminal law as part of the overall constitution of the state. The constitution of the state and its presupposition is in itself not always a central topic in works of this kind. Still, this connection, as well as the importance of Duff's contributions to the debate, makes this an important work for the present discussion.

Tadros' take on criminal law, as elaborated in *The Ends of Harm*, may for its part have interesting connections to the concept of power, since criminal law here is basically seen as a security project, that aims to protect citizens from harm by preventing harmful acts in society.[156] The normative implication of this view is the claim that this is an important task for the state. By its instrumental justification – which, as Tadros underlines, still operates within the context of non-consequentialism – one might expect the conceptualisation of power to play a greater role in the discussion. This is, however, not the case. In a related work, *Wrongs and Crimes*, Tadros *inter alia* discusses political liberalism. Here as well, power is briefly mentioned, but not explored in itself.[157]

Contrary to Moore's strong moralist position, Duff's and Tadros' conceptions of criminal law therefore demonstrate the connections between criminal law and political philosophy. Still, they do not go far in exploring these connections as a topic in its own right, and the concept of power is not among the many issues that are explored. In the quotation from Duff, though, there are republican perspectives of a kind to which I will return.[158]

Moving on to scholarly approaches combining *normative and socio-historical perspectives*, Markus Dirk Dubber's police power-project, developed in several works including *The Police Power* and *The Dual Penal State*, are worth looking into for several reasons.[159] General normative standards for criminal law constitute an important background for Dubber's project.[160] But it is not primarily oriented towards providing a normative account of criminal law. Dubber is just as concerned with revealing the lack of respect for acknowledged principles for legitimate state power. To achieve this, he approaches criminal law from historical and legal perspectives, including the remnants

156 Tadros (2011).
157 Tadros (2017).
158 See 5.2.1 and following.
159 See Dubber (2005a) and Dubber (2018).
160 See e.g., Dubber (2004).

of 'police power', or lack of constitutional and legal regulation implementing the normative principles and binding state power.[161] Applying concepts such as 'police power' and 'penal power' as a critical perspective to underline the importance of normative principles and investigations, Dubber also challenges criminal law scholarship and its role in the theory as well as in the practice of criminal law. As such, Dubber clearly takes steps in the direction of a form of power analysis. With reference to the historical perspectives, as well as to the tension between police power and the constitutional law, there are clearly a lot of presuppositions about social and political power and its establishment. As we will return to, the critical perspective offered by Dubber undoubtedly calls on us to reflect on what power actually is, as well as to what extent it can be justified. While the issue of power is clearly central to Dubber's project, the concept of power is, however, apparently not elaborated upon at a conceptual level.

Along the way, we have now gradually been drawn towards two related research perspectives on criminal law, that is the *political perspective* and the *sociological-oriented perspective*. In contemporary Anglo-American scholarship we find clearer examples of both of these, which are also closely related. As for contributions that emphasise the political perspective, Chiao's analysis of 'criminal law in the administrative state' is a good example. Due to its conception of criminal law as part of public law, today located within the administrative state, Chiao's approach can be said to combine the normative-analytic approach mentioned above with a socio-historical orientation. Criminal law, to Chiao, is not an isolated entity, but rather a 'means to an end, and that end is: to help secure the rule of stable and just political institutions', starting from an 'egalitarian principle of fair cooperation'.[162] The transformation of the state is central to Chiao. As new forms of governance emerge, we should start out by considering what role the criminal law should have as part of *this* state. However, also according to Chiao, criminal law has distinct features: It is 'perhaps the most dramatic instance of coercive state power familiar to us today'.[163] To Chiao, this should be subjected to general 'principles of political justification,

161 Dubber (2005a) and Dubber (2018).
162 Chiao (2018) p. 5.
163 Chiao (2018) p. 29.

principles that seem so crucial in other areas of public law and public policy'.[164] However, the nature of the political community that criminal law and, more broadly, the administrative state, are supposed to address, is not analysed, for instance by conceptual or sociological work on the notion of (social) power. Hence, to Chiao the issue of power is not an object of analysis in itself.

In any event, this approach seems to bring more historical-sociological contingency into the conception of criminal law, compared to that of Duff, for instance. At the same time, on a general level, Duff and Chiao share an orientation towards a *republican* basis for the conception of criminal law. This also goes for other contributors, such as Malcolm Thorburn, who likewise advocates a *public* law point of view. This republican strand of thought, which also this book adheres to, will be picked up below in relation to Kant's political philosophy.[165] For instance, Thorburn's account seems to connect to issues of power, since he draws comparisons to parents' authority over their child (which is partly, at least, a matter of physical superiority).[166] We will reconnect to Thorburn's account later. For now, the point is that the concept of power is not a central aspect of his analysis.

As we move further along in the direction of sociologically oriented works, we approach projects that can be said to adhere to sociological and critical perspectives. In the Anglo-American discussion on criminal law, authors such as Alan Norrie, Lindsay Farmer, and Nicola Lacey can be seen as adhering to such perspectives in their analyses of criminal law.[167] This approach is connected to a methodology that considers social and historical perspectives essential for understanding criminal law. It often relies on a (stronger or weaker) rejection of general or universal normative and conceptual 'truths' about criminal law and considers the principles and concepts at work in criminal law as shifting and socially contingent. The latter perspective gives rise to a strong orientation towards the mechanisms at work in producing and changing such concepts and principles. A clear expression of this critical approach can be found, for instance, in Norrie's view of the Enlightenment

164 Chiao (2018) p. 30.

165 See on Kant in chapter 4 and 5.

166 For a critical appraisal of this viewpoint, see Eldar (2018).

167 See e.g., Norrie (2001), Lacey (2016) and Farmer (2016).

reformers of criminal law. Norrie takes to task the very idea of law relying on a rational, coherent normative foundation:

> The reformers' ideology was one of free individualism, of certitude of rights and deterrence, of liberty and prevention. Men like Beccaria and Bentham, Kant and Hegel emphasised different elements in their particular national contexts but these were common foundations of their thought. It is tempting simply to see these ideas ahistorically, as part of the triumph of reason and progress in human affairs associated with a general process of enlightenment. In general, indeed, this is what many lawyers and legal theorists do. They are, however, wrong to do so, for these arguments also served important social interests and embodied particular ideological stances and strategies. It was these ideological positions, I will argue, that embodied particular conflicts and contradictions, and these as a result *became embedded in the law itself*.[168]

This category, thereby, contains works that may be more aptly termed socio-legal and/or sociological studies, meaning that we are stretching the term 'philosophy of criminal law' here. A notable feature of such works is that they often reject the possibility of a philosophy of criminal law understood as a general theory or set of rational normative principles. Even so, these works involve something of a philosophical take on criminal law, albeit a sceptical one.[169] Not all of the contributors in this regard are as strong in their rejection of the possibility for carving out principles for a justifiable criminal law as is, for instance, Norrie. Farmer, for instance, emphasises the importance of sociological, historical, and institutional framings of issues such as criminalisation. Modern criminal law, according to Farmer, is very much a matter of securing *civil order*, that is, 'not primarily about moral community, but the

168 Norrie (2001) pp. 19–20.

169 See e.g., Duff (2005) pp. 357–359, commenting on Norrie's *Crime, Reason and History* (Norrie (2001)). While considering Norrie to reject the 'rational and principled' views of some other authors, Duff observes that Norrie 'seems to have his own aspirations to, or yearnings after, grand theory', finding something that Duff describes as 'still pretty grand theory, since it aims to identify essential features not just of this or that legal system, but of a whole class of modern legal systems' (quotes from p. 358).

co-ordination of complex modern societies composed of a range of entities or legal persons that are responsible, in a range of different ways, for their own conduct, for the wellbeing of others, and for the maintenance of social institutions'.[170] This approach, Farmer claims, is 'a frame through which we can make sense of the criminal law as a whole'.[171]

This socio-legal perspective may be particularly noteworthy for our interest in power. Power seems to be a typical focus for sociologists and political theorists, including critical sociologists applying the perspective of Michel Foucault. Hence, we would expect to find a stronger engagement with power here.[172] The concept of power itself does not, however, seem to be central to investigations of criminal law in this category either. Some of Lacey's central works illustrate this. The concept itself appears, of course, but then mainly to highlight, in the same vein as several of the works we will encounter in this book, specific forms of power, such as 'economic power' and 'cultural and symbolic power'.[173] Also, Lacey considers 'interest' to be central to her analysis of criminal responsibility, alongside ideas and institutions.[174] Often, works in this vein seems to rely on a Foucauldian perspective on knowledge.[175]

While the above-mentioned contributions have emphasised normative perspectives on criminal law, other works, such as those of David Garland, are more correctly characterised as belonging to the sociology of (criminal) law. Unsurprisingly, we find here more depth in the analysis of the nature of power, in particular as Garland, in his *tour de force* of the sociology of criminal law, discusses the works of Foucault.[176] As the focus here is on normative theory, however, I will leave sociological and criminological points of view aside for

170 Farmer (2016) p. 299.

171 Farmer (2016) p. 300.

172 Closely related to this perspective is, it may be added, feminist perspectives on criminal law, where power perspectives are central, see e.g., Burman (2007) p. 98: 'Power is a central issue for feminist legal studies. Gender relations are often defined as power relations.'

173 Lacey (2016) p. 79.

174 Lacey (2016) p. 79 ff.

175 This goes, for instance, for feminist perspectives on law, see e.g., Smart (1989).

176 Garland (1990).

now and to some extent re-connect to such works later on in the analysis.[177] In the following, I will instead turn to some general observations.

From what we have seen so far, contemporary philosophy of criminal law pays little attention to the conceptualisation of power, despite a seemingly broad consensus that criminal law is, in fact, about power. This is particularly so for the analytical-normative approaches to the philosophy of criminal law. Power seems to be somewhat more important in sociologically informed political philosophy. I will consider some reasons for why this is so in the next section. First, however, it is worth highlighting that the broad set of approaches to criminal law in contemporary criminal law philosophy that I have outlined above shows some of the complexity of the enterprise of understanding the nature and justification of criminal law. While we need to turn to normative philosophy to properly discuss the nature of criminal law and its justification, one of the notable features of these Anglo-American contributions is that all the above-mentioned perspectives appear to be relevant, in one way or another, to discussions about criminal law. If this observation is correct, we need a comprehensive normative theory into which these perspectives feed. A central claim in the following is that a Kantian republican theory can integrate and utilise several (but not all, of course) of these different knowledge perspectives.[178] For now, however, our interest concerns the notion of power and its place in the philosophy of criminal law, more specifically: why we have not seen more analysis of it in the extensive discussion outlined above.

3.4 Why is the concept of power not elaborated on (more) in criminal law scholarship?

When searching for an explanation for the absence of explicit conceptualisations of power, several possible explanations come to mind. While none of these tentative explanations can be said to provide good reasons for *not*

177 See, in particular, 9.6 below, where we connect to John Braithwaite's macro-criminological views.

178 See further Chapters 7–9 below.

engaging with the concept of power, they are useful for us to clarify why we should engage with it.

One reason could, for instance, be that the concept of power is considered of little or no relevance to the discipline. But this hardly appears plausible given the nature of law, and criminal law in particular. Dubber's work, placing the concept of power at its apex, should be sufficient to illustrate this. Nordic warnings of the power of criminal law testify to the same.[179] Power is, one could claim, an inherent part of criminal law, which is why it is highly relevant, not to mention necessary, to explore and clarify our understanding of this concept. Since this irrelevance-thesis clearly fails, we should look for a better explanation.

Another reason could be the well-established character of modern legal orders. In medieval times, the king fought the church for the position as the ultimate authority in society, including the right to punish. In such periods, the issue of power and the need for (aspiring) authorities to establish themselves as authorities, thereby becoming able to gain control of societal practices such as destructive blood feuds, would have been stronger than today. Today, one might think, with the emergence of modern states, power has been brought into more stable forms, with the result that our attention should shift from power as such to *the use of* power, such as punishing people, and *justification* of such practices. With this shift, we can build on previous discussions and analyses of power and the current state of the discussion (pun intended). This, which we may call the monopolisation thesis, appears to be more reasonable than the irrelevance thesis: the emergence and success of the current socio-political organisation may be part of the explanation for the absence of explicit discussions of the concept of power in criminal law scholarship. This, in turn, connects closely to another explanation, suggesting that power should be discussed at a broader level than merely the philosophy of *criminal* law. In this regard, it is telling that issues such as force and coercion appear more frequently in discussions pertaining to the *nature of law* and the importance of sanctions in this regard, for instance. Later on, we will encounter Austin's command theory, which stresses this aspect. Another, more recent and more moderate example is Ekow N. Yankah, claiming that '[o]ur concept of law

179 See e.g., 2.4 above.

would be incomplete, and perhaps undefined, without understanding that coercion constitutes at least part of it'.[180]

But for at least three reasons, outsourcing the subject of power to historical processes and contemporary discussions about the state and the nature of law in general does not serve the philosophy of criminal law well. These will be further explored in Chapter 7 below, but I will briefly introduce them here. First, the emergence of the state and the legal order does not make power disappear; it merely converts it into a distinct form of power at the hands of the state. So, the notion of power seems still to reside within the state and its law and constitute a central feature of its different areas, criminal law included. It is clear, then, that we need to account for this aspect of the state and its criminal law when discussing the justification of the state and the criminal law. Second, and relatedly, while states today hold power, clearly, they operate with different forms of power and use these differently as well, leading to different forms of states and legal orders – totalitarian, democratic, and so forth. This affects their criminal law as well. Generally, different means are available for a state to fulfil its aims. In order to distinguish between and consider different states, legal orders, forms of criminal law and other related means, we need a suitable conceptual apparatus. Third, to speak about the state having 'monopolised' power through law may in itself be misleading. A state that fully assumes power would be hard even to imagine, and a state that aims to protect the freedom of citizens, privacy as well as markets, which most Western legal orders claim to do, must accept that huge amounts of power remain in society. This implies that citizens can use power against each other and towards the state as well. The need to deal with this fact, clearly leads us into the domain and role of criminal law. So, even if we were to accept the monopolisation thesis, it cannot be reasonably interpreted as de-powering society to the extent that we do not have to talk about power in the interaction between citizens and the need to regulate this. Rather, understanding the different forms of power at play may provide an important basis for discussing, for instance, what one should consider as *wrongs* relevant to criminal law and how one should respond to such

180 Yankah (2008) p. 1198. This is a viewpoint that we will return to in the discussion of Kant's political philosophy in Chapter 5 (Yankah himself connects to Kant, see, e.g., p. 1232). Before that, we will reconnect to Yankah's discussion of coercion in 4.3 below.

wrongs. In addition to these three reasons, there is the problem of criminal law *beyond the state*: the international community is characterised precisely by the lack of an ultimate authority that controls power and the use of force comparable to the nation state. International criminal law is, one may say, an attempt to deal with the most gruesome outcomes of this predicament, but, overall, at the international level, power is still the key issue, affecting also, for instance, the nature and role of international criminal justice.[181] And, as new political structures emerge, such as the already mentioned EU and its criminal law aspirations, issues pertaining to power become more noticeable.[182]

Moving on, another piece of the explanation for the lack of attention paid to the concept of power in criminal law scholarship could be that the concept is too straightforward to require investigation. Power may be thought of as a kind of 'native' concept, in the same vein as physical force – or hard treatment, as punishment is often considered to be. We all know what physical force is, in the same way as we know what a rock and a fist is. We can call this the simplicity thesis. Again, while it may provide some explanation, the simplicity thesis does not prove to be very convincing as a justification. Clearly there are forms of power that go beyond physical power and that invite us to consider the nature of power more closely. In addition to the already mentioned example of economic power, we also speak of, for instance, rhetorical power. Many criminal law orders contain offences regarding 'abuse of power', which clearly does not merely refer to the use of physical power (which most often would be classified as 'violence').[183] As already touched upon: if we are to measure how serious one type of action is, regardless of whether it is as a potential subject for criminalisation or an action performed by the state as part of its exercise of power, we need to be able to differentiate between different forms of power. This requires a conceptual basis. The same goes for the recurring problem of factual power (the

181 See in this regard, Bergsmo et al (2020). The discussions relating to states in transition and transitional justice should also be mentioned here, see e.g., Baumann (2011) and Knust (2013). As I will return to, this study will be limited to the criminal law in the nation state.

182 As already mentioned in 2.4, this is a topic paid much attention to by Nordic criminal law scholars.

183 If needed, one example of this can be found in the sexual offence in the Norwegian criminal code sect. 295 regarding abuse of power relations, where dependency, formal positions, and more are central.

power of the fist) versus normative power (state power, of which the law itself is a central part). So, again, the simplicity thesis may work as an explanation, but it is clearly insufficient for justifying the lack of conceptual clarification of power. And, we might add, the fact that criminology and sociology, as we will return to, take such interest in (forms of) power, should be an indication of its relevance for the philosophy of criminal law as well.

Perhaps there is also an issue at the other end of the scale, so to speak. Contrary to the simplicity thesis: maybe power is too broad and fuzzy a notion to be subjected to analysis. This we can call the intricacy thesis. Discussions in sociology, for instance, demonstrate the complexity of power. Here, the highly influential contributions of Michel Foucault (1926–1984) easily come to mind as well as the critical theory in humanistic and social science studies from the 1970s and onwards. A central part of Foucault's project was to expand our understanding of power. This meant, for instance, that it was not sufficient to look at macro-power in society. Micro-power perspectives at very concrete levels were emphasised: As citizens, we are 'disciplined' already by the most subtle forms of power, that is, in the ways we are expected to move, dress, talk, and so forth. From this perspective, there is not even a contradiction between freedom and power. In the words of Thomas Ugelvik:

> From a perspective inspired by Foucault's concept of power, there is no contradiction between power and freedom; instead, the two are interwoven and mutually constituted. Furthermore, there is no original unfree position that is then subdued and oppressed by power; on the contrary, power is an element that forms part of any social relationship, any meeting between people. Power is everywhere and is, therefore, something that it is not possible (or desirable) to avoid completely.[184]

184 Ugelvik (2014) p. 5. Ugelvik (p. 6, see also pp. 41 ff.) calls this point of view 'Nietzschean' as 'there is no freedom without power or power without freedom' and also emphasises power as 'practical' and 'performative': 'It is practical because it is only by performing an action that crosses some boundary or other that one can, in practice, show that one is free to cross boundaries. If power and freedom are inherent variables, it is precisely by confronting various forms of power that people can 'do' freedom in practice. In these circumstances, the authorities' boundary that is crossed represents an absolutely necessary part of the free action. It is performative because boundary-crossing actions affect the actor.'

This makes the concept of power much more intricate. Striving to unmask power along these lines, a typical feature of this kind of scholarship, can be productive, but may also result in a certain unwillingness to be specific about what power is. In order to take on a critical perspective towards society, to consider contradictions, justification gaps, paradoxes, and more, continuously observing how power develops and flows in society and in the legal system, it would be important to not take on a power position in the process. A key principle for the Norwegian sociologist and abolitionist, Thomas Mathiesen (1933–2021), for instance, was precisely to be 'unfinished'.[185] In a different setting and for different reasons, it has also been claimed in political theory that 'power' is an essentially contested concept.[186] Such a complex, open-ended conceptualisation of power may lead criminal law theory away from it: Criminal law is only about certain (serious) forms of power, and no one would doubt that the state displays and uses power when keeping someone imprisoned for life, for instance. Then, attention easily shifts to the normative principles for such legal rules and practices. If 'Foucauldian power is everywhere, and it is everywhere intertwined with forms of knowledge and subjectification processes', it may simply be difficult to make use of it in a study.[187]

The intricacy thesis may indeed have some merit. A very broad and/or intricate concept of power can be hard to apply. Power, from the point of view of criminal law, could become too broad a concept to be helpful and, one might conclude, we are better served by more specific concepts. Still, it might be that the there is more bite to this concept than what seems presupposed here. From a criminal law point of view, it is here useful to return to Garland's study. Rehearsing Foucault's analysis of power, Garland, for instance, highlights power as a *relational* concept, and suggests a conceptualisation of power as 'the name we give to the capacity to realize a desired goal in a particular situation, and in human cultures the goals which may be valued and sought after are

185 Papendorf (2006).

186 See e.g., Lovett (2010) p. 65, describing this point of view as the 'standard explanation' for why political and social theorists have not defined power, ascribing this to e.g., Lukes (2005).

187 Ugelvik (2014) p. 44.

many and varied'.[188] This, as we shall see, is something that can be built upon and added to, which we will do in the next chapter. More generally: Contributions to political and social philosophy demonstrate that we can actually do meaningful work on this concept as well.[189] We will return to this later.[190]

Already here, however, it should be stressed that criminal law is a part of our legal order, and criminal law scholars have to make it clear whether or to what extent it – as the distinct form of power that it is – can be normatively justified. This require of us to clarify what we understand as power and what normative role it has. But despite offering useful perspectives, it is fair to say that Foucault's interest in power was not mainly a conceptual one. In the words of Mariana Valverde:

> Despite some incautious remarks in interviews that some people took as a theory of power in general, in Foucault's published writings and in his lectures, power relations are always of a particular sort. The scholar's task is thus not to philosophize about power in general, since such a thing does not exist, but rather to map the historical fortunes and misfortunes of the different forms of power (with their associate knowledges).[191]

Criminal law scholarship should therefore look elsewhere to find a conceptual basis for our discussion of criminal law and power. Before turning to this issue in the next chapter, however, I want to add a different and perhaps less pleasant way to explain the absence of power in criminal law scholarship: The discomforting nature of the subject. For the liberal-minded, which is what philosophers of law and legal scholars (for good reasons) often are, power may be perceived as a worldly, unworthy, and rather unpleasant topic. There is, as it were, more than enough power and power abuse in society, so it is an issue that one might not want to rationalise and possibly thereby promote. Rather, power is something to be controlled and brought into proper frames, a point

188 Garland (1990) p. 169. See also Ugelvik (2014) p. 16, who rejects the too complex-view and instead seeks to operationalise Foucault's view in his criminological study of freedom and resistance in prisons.

189 Lovett (2010) pp. 64–84.

190 More about this in Chapters 7–9 below.

191 Valverde (2008) pp. 17–18.

of view that naturally leads attention to normative issues: The task is seen as one of limiting power by bringing it into justifiable forms. Digging into the dirty depths of power may even come to have the kind of impact that many (unjustly) see Machiavelli to have fallen victim to, becoming a manipulative plotter and protagonist for evil rather than an honest thinker.[192] We can call this the repulsiveness thesis.

As sympathetic as such concerns may be, they do not offer a good reason for disregarding the concept of power. Justified power is also power and there is no reason to downplay this fact. If liberal criminal law theory does not delve into the nature of power, it risks missing a fundamental feature of criminal law: Paying closer attention to the concept of power may allow us to see the nature and justifiability of criminal law a bit differently and, possibly, more precisely. In the next chapter, I will argue that the concept of power facilitates political philosophical analysis, in particular by leading us straight into the fundamental conundrum of political philosophy itself. And, as I will return to, the terminological overlap between power as force and power as legitimate state competence, may suggest that both sides of it must be accounted for.

This, however, requires us to get off the ground with the concept of power. How can we achieve that? First of all, we are well advised to take some lessons from the above-mentioned points of view. The concept of power does clearly seem to have a core in terms of physical force, which may be useful to analytical enterprises of the kind on which we are embarking. But we should also be mindful of the fact that there is much more to the concept and that power can take subtler forms than mere brute physical violence. And, in line with Dubber's critical engagement with legal scholarship, we should be mindful of the power of the state and similar political entities as well as how discussions of the justification of criminal law can easily become part of state power's own legitimation regime. Perspectives such as these, it can be added, seem to gain traction in contemporary discussions about the criminal law, in Nordic scholarship as well.[193] Adding to that, we will now reflect on the concept of power and see how this leads to the political philosophical conundrum we would have to address.

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192 There is, however, reason to think that this is unfair to Machiavelli, which for some, such as Quentin Skinner, is an important figure in the republican tradition which will be explored below. See 5.2.1 below.

193 See for instance, Heivoll (2017) on police law.