

## 4

# Power – a political philosophical starter

## 4.1 Aim and outline

In this chapter, we will elaborate on the concept of power to inform the following discussion of the justification of criminal law. This conceptual clarification also provides us with a gateway into the core problem of political philosophy and in turn to Kant's political philosophy as a response to this problem, which will be discussed in the next chapter. Connecting to political philosophy in this way is important, because, as already suggested, we should discuss criminal law as part of a political and legal order, meaning that it should be developed with reference to the basic political philosophical principles for this order.<sup>194</sup>

The chapter starts out by considering a dictionary definition of 'power' in 4.2. Following this, in 4.3, we enter into a brief outline of power in social theory and philosophy of law. Section 4.4 seeks to structure some basic conceptual features. These will be further elaborated in 4.5 and 4.6, where we will reflect on the nature of power by applying a rather pre-political example, or, in other words, one from the state of nature. This will lead us to the final

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<sup>194</sup> As already shown in 3.3, this is also a central viewpoint in contemporary Anglo-American philosophy of criminal law.

section of the chapter, 4.7, where (what I will refer to as) the conundrum of political philosophy is introduced.

## 4.2 Dictionary and theoretical approaches to ‘power’

Dictionary entries are often good starting points for getting off the ground with conceptual analysis. This is also the case for ‘power’. According to the *Oxford Advanced Learner’s Dictionary*, ‘power’ can refer to several meanings: 1) control, as in the ability to control people or things, 2) political control of a country or an area, 3) energy that can be collected and used to operate a machine, to make electricity, etc., 4) the public supply of electricity, 5) (relating to energy) the quality of having great power or force, or of being very effective, 6) physical strength used in action; physical strength that somebody possesses and might use, 7) (in people) the ability or opportunity to do something, 8) a particular ability of the body or mind, 9) (plural) all the abilities of a person’s body or mind, 10) the right or authority of a person or a group to do something, 11) a country with a lot of influence in world affairs, or with great military strength, 12) (in compounds) strength or influence in a particular area of activity, e.g., economic power, 13) the influence of a particular thing or group within society, 14) mathematics: the number of times that an amount is to be multiplied by itself, 15) of lens: the amount by which a lens can make objects appear larger, and, finally, 16) a good or evil spirit that controls the life of others.

As we can see, there are many ways to use the term. At the same time, this list is evidence of the complex character of power. Not only are there several different usages of the term, but many of these are also quite closely related. Consider, for instance, 11, ‘a country with a lot of influence in world affairs, or with great military strength’. Here, the term ‘strength’ is applied in the definition, which seems in turn to relate to at least Nos. 5 and 6, and possibly others as well. Only a few of these, for instance Nos. 14 (mathematics) and 15 (lens), seem less relevant to us. This complexity is also a reason why disciplinary approaches would tend to focus on or at least emphasise particular sides of, or aspects of power, depending on research interest. In this regard, it can be

useful to turn to some such disciplinary perspectives to see what they can offer us in terms of conceptual starting points for the philosophy of criminal law.

### 4.3 More on power in social theory and the philosophy of law

To clarify the concept of power, it seems reasonable to look to social theory or sociology, which appears – as already indicated by the discussion in Chapter 3 – to be the fields most dedicated to the issue of power.<sup>195</sup> But the philosophy of law proves valuable to us in this regard as well. We will begin with the latter, which appears to lie closest to the philosophy of criminal law, before we move on to social theory.

The philosophy of law, as we have already seen, is deeply engaged with normative issues relating to force, coercion, and sanctions.<sup>196</sup> The relevance of the concept of power to this discussion seems clear. This is also reflected in legal theory, not the least in John Austin's command theory.<sup>197</sup> Here, the core aspect of legal rules is precisely that they can be *enforced*. Although Austin's command theory has been (rightly) criticised, notably by HLA Hart, for its excessive emphasis on this aspect of legal rules, surely it captures an important feature of law as we know it.<sup>198</sup> Such commands, it seems, must rely on or express some kind of power to be considered as commands proper in the first place. Despite its importance, deeper conceptual analysis of power is rarely seen in the philosophy of law, likely because of its complex character. This is at least suggested by Yankah's discussion of the concept of coercion:

Coercion is elusive both because the concept itself is controversial and it often plays different roles in our normative thinking. Indeed, most scholars who employ the concept of coercion rarely define it with precision. Even

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195 In this section I will mainly refer to 'social theory', as the focus is on conceptual discussion in sociology.

196 By the term 'philosophy of law', I refer here to analytical/conceptual discussions concerning the core features of law.

197 Austin (1832) pp. 13–33.

198 For Hart's critique of Austin, see Hart (1997) pp. 18–25.

scholars who propose explicit definitions of coercion typically concede that coercion is a highly contextual concept, which turns the moral work to which the concept is put.<sup>199</sup>

Yankah also acknowledges that ‘coercion’ represents ‘but one manner of manipulating the will of others and, thus, is but one form of social power’, and that power is a ‘broad concept’.<sup>200</sup> This goes also for the related concept of authority, which is also much discussed in the philosophy of law.<sup>201</sup>

There is clearly much of value in such legal philosophical analyses. This point of view implies, however, for obvious reasons, a focus on the nature of law, legal norms, and sanctions, as Yankah’s analysis illustrates, and thereby an emphasis on how one ‘macro-power’ institution, such as the state, can force a person to comply with its norms, not quite unlike the dominant perspective in social theory. However, as already suggested, this may not be the best starting point for us to understand power. Also, discussions within philosophy of law seem in this regard to be anchored in discussions in philosophy and social theory more broadly, calling on us to explore these discussions as well.<sup>202</sup>

Can social theory offer us proper starting points for understanding the concept of power and its importance for the philosophy of criminal law? Clearly, the concept of power is central to social theory. As Robert A. Dahl points out, power is basically what social theory is about, meaning that large chunks of the discipline are relevant to our investigation:

That some people have more power than others is one of the most palpable facts of human existence. Because of this, the concept of power is as ancient and ubiquitous as any that social theory can boast. If these assertions needed any documentation, one could set up an endless parade of great names from Plato and Aristotle through Machiavelli and Hobbes to Pareto and Weber to demonstrate that a large number of seminal social

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199 Yankah (2008) p. 1217.

200 Yankah (2008) p. 1205.

201 See e.g., Ripstein (2004).

202 Yankah (2008) pp. 1217 ff.

theorists have devoted a good deal of attention to power and the phenomena associated with it.<sup>203</sup>

This is, however, not to say that conceptual analysis of power has a long history in social theory. In 1957, in his seminal article, Dahl stated that ‘curiously enough, the systematic study of power is very recent, precisely because it is only lately that serious attempts have been made to formulate the concept rigorously enough for systematic study.’<sup>204</sup>

Weber’s concept of power, for instance, is one of the core reference points for later social theory which theorists build onto, develop, or disagree with. According to Weber, power, is ‘the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests.’<sup>205</sup> Others have contributed to further conceptual refinement. Dahl himself, for instance, starts out from considering *A* to have ‘power over *B* to the extent he can get *B* to do something that *B* would not otherwise do’ and provides a helpful distinction between *the base* (or source of) power, the *means* applied in exerting it, the *amount*, and the *scope* (or range) of power one may have.<sup>206</sup> Such conceptual approaches remain, however, debated, and in the end one may come to think of this discussion as, again in the words of Dahl, ‘a bottomless swamp.’<sup>207</sup> At least, it seems clear that power is, as Weber points out, ‘sociologically amorphous’, as ‘[a]ll conceivable qualities of a person and all conceivable combinations of circumstances may put him in a position to impose his will in a given situation’, linking us back to the intricacy thesis from 3.4 above.<sup>208</sup> In line with this, Dahl points to the difficulties in operationalising the concept in social research.<sup>209</sup>

As such, while important attempts have been made at conceptual analysis, these come with challenges related to making use of them, for instance, in adapting them to the philosophy of criminal law. The complexity in the

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203 Dahl (1957) p. 201.

204 Dahl (1957) p. 201.

205 Weber (2013) p. 53.

206 Dahl (1957) p. 203.

207 Dahl (1957) p. 201, himself referring to one position in the discussion on power.

208 Weber (2013) p. 53.

209 Dahl (1957) pp. 205–214.

concept of power and the challenges to its operationalisation call on us to be a bit cautious, including not to get lost in the extensive discussions one can find in current social theory. Adding to this, social theory tends to focus on power as a macro-phenomenon, and issues about social and political power, including economic power and power in international relations. This means that other aspects of the phenomenon may be excluded or at least, played down. Macro-perspectives on power may to some extent fail to account for what is termed ‘interpersonal power’. John Scott, in his overview of social power, uses this term and explains ‘interpersonal power’ in this way:

Interpersonal power is rooted in face-to-face contexts of interaction. It is based not on the content or source of an order, but on the personal attributes of the individual making it as these are perceived by individuals who have a direct knowledge of one another. People are able to relate to each other as individual selves, and not simply as the occupants of social positions with authorised or delegated powers. Interpersonal power operates through the personal resources of physique and personality that individuals bring to their encounters and through the various resources on which some depend and to which others can give access. It is in this way that one person can make another bend to her or his will and so become a principal in an interpersonal power relationship.<sup>210</sup>

Within Scott’s outline too, which can be said to reflect the state of the art of social theory, this form of power is, however, downplayed in favour of a focus on ‘large-scale structures of power and resistance, of domination and counter-action’, to which interpersonal power adds. But interpersonal power seems to be a central issue for some research perspectives at least. One example of this is criminology and its interest in power relations in prisons. Ugelvik’s study of power and resistance in prisons, which also starts out with a conceptualisation of power, provides us with a good example of this.<sup>211</sup> So it might be particularly relevant to criminal law as well. I will return to this suggestion.

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210 Scott (2001) p. 28.

211 Ugelvik (2014).

Analysis of the concept of power may also lead us to other, more specific concepts. Weber, for instance, formed a concept of ‘domination’ which refers to ‘the probability that a command with a given specific content will be obeyed by a group of persons,’ which, for obvious reasons, particularly applies to contexts such as politics, bureaucracy, and so forth, core issues for Weber’s social theory.<sup>212</sup> Domination, one might say, is a specific symbolic form of macro-level power, which has been considered key to some of the republican political philosophers that we will return to below in 5.2. It is closely related to terms such as ‘authority’ and ‘control,’ as well as ‘coercion’ as discussed by Yankah. Adding such concepts may be a wise move but introduces a new dimension of conceptual complexity for us as we seek to gain the needed conceptual starting points from which to work.

So, while the conceptual analysis of ‘power’ may indeed be interesting as well as helpful, we should be mindful of its limitations, which applies to an equal extent to the extensive debates on the subject as it does to the difficulties in operationalising such conceptualisations of power. Different research subjects and interests may have different needs in this regard.<sup>213</sup>

In order to make progress for its own part, the philosophy of criminal law should, in my view, start out at a quite basic level. Even if the insights of power in social theory and philosophy of law is relevant to the analysis, for now, I will try to provide a more simplistic conceptualisation of power, simply to get the analysis started. In that regard, focusing on interpersonal power in the relation between two individuals, may be a helpful move. One reason for this is that it will help to steer us into the key issue of political philosophy, something I will return to in the later parts of this chapter. Such interpersonal power should also be easily recognisable by the criminal law scholar: After all, this is the most central characteristic of crimes such as assaults, robbery, murder, rape, and domestic violence, which, in turn, most philosophers of criminal law refer to in their discussions of the need for and justifiability of

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212 Weber (2013) p. 53.

213 See also, e.g., Dahl (1957) p. 202, who in regard to his suggested formal definition underlines that this is not easy to apply in concrete research problems, ‘and therefore, operational equivalents of the formal definition, designed to meet the needs of a particular research problem, are likely to diverge from one another in important ways.’

criminal law. As this illustrates, power runs even deeper than what the last sentence in the quotation from Scott on interpersonal power above indicates: Interpersonal power does not only amount to how ‘one person can make another bend to her or his will and so become a principal in an interpersonal power relationship’, but goes further than this, ultimately to the ability of one person to *annihilate* another.

## 4.4 The basics of power: Some general features

In order to provide us with some starting points for understanding power without getting drawn into the extensive discussion on the subject in social theory, in this section I will try to unpack some basic (analytical) features of power.

Power, it seems, has a practical character: It refers, most basically, to some kind of capacity to affect or *change* certain states or features. Given that we are located in the physical world, power primarily refers to physical force. To be powerful in ordinary language is often considered equal to being mighty, in the way Goliath was (believed to be) mighty. Power, then, seems to be thought of as a native concept referring to brute physical force.<sup>214</sup> While this at least provides a starting point, a number of nuances, modifications, and additions are required. We can, for instance, distinguish between the use of the term power in the sense of pure mechanical or natural force, and power in the context of agents capable of acting.<sup>215</sup> While a stone may be heavy to lift and may, if it falls down from the mountain, injure or even kill, for instance, a hiker, neither the stone nor the mountain performs any act if the stone falls down and kills this hiker. This seems to make a certain difference to the way we use the term ‘power’: When we focus on power of the kind human agents

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214 See also e.g., Yankah (2008) p. 1205 on ‘raw power’ and ‘brute power’, relating to the ability to ‘compel someone, by brute strength alone’.

215 See also e.g., Yankah (2008) pp. 1204 (footnote), suggesting that ‘there are natural and other non-human forms of power’, but also considering the central case to be ‘social power, exerted to make others conform to an individual or institutional will’.



may have, power seems to concern the capacity of making the world conform to one's *choices*, or, if one prefers, 'the ability to compel change'.<sup>216</sup>

Power is in any event a *relational* concept: It says something about the capacity of something or someone in relation to something or someone else. Furthermore, here, it seems to make a lot of difference when not only the one exerting power is an agent, but also the one being subject to it. If we imagine a gardener who chooses to remove a stone from the garden and therefore throws it into the pond on the other side of the fence so that it sinks to the bottom of the pond, we might say that the gardener had it *within his powers* to throw the stone, but it would still be a bit pretentious to say, for instance, that the stone was *subject* to his power or that he has power *over* the stone. There seems to be something about the stone lacking the capacity to make its own choices, have interests, and so forth. In this sense, the stone that is thrown into the water cannot even be said to be powerless. Rather, it does not belong to the realm of power (subjects) at all. Conversely, if the gardener has captured a foreign trespasser in the king's garden and brings him against his will to the king's court, one may say that the trespasser becomes subject to the king's power.

If one accepts this, power of the kind we are interested in seems to relate to the (potential) *clash* of choices that takes place between agents, primarily human beings, and how this plays out. This point invites us to clarify what 'choice' means in this context, as well as to take a closer look at how this clash of choices and power considerations can play out. Power, it seems, is a matter of how we can engage with the world, i.e., what lies within *our powers to do* at any given time and how different situations provide opportunities and restraints as well as reasons for acting in certain ways:

Without the powers, you can wish for anything – to walk on the moon and be home in time for dinner – but it is not a choice you may make. Your wishes may all come true, but you only *do* things by exercising your powers.<sup>217</sup>

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216 Yankah (2008) p. 1204 (footnote) who at p. 1205 also refers to Bertrand Russel's view of power as 'production of intended consequences'.

217 Ripstein (2009) p. 40.

This connects to concepts such as practical reason, agency, and acts, which are central not only to practical philosophy, but also to criminal law. The concept of agency, which is at the heart of criminal law theory, can even be said to be the other side of the coin of the concept of power.<sup>218</sup> Thereby, we may also have come closer to an explanation of the lack of attention paid to the concept of power in criminal law scholarship as discussed in 3.3 above: Discussions revolving around this usually focus on the side of the coin labelled acts and agency. It is primarily through *acts* that power plays out in society, even if, for instance, cultures and social structures may be important with regard to what opportunities you have to act in certain ways. This is particularly so for criminal law, with its traditional focus on individuals, their engagement with each other, and their responsibility for what they do in that regard. Therefore, the act focus becomes central to criminal law as well. However, while the concept of action will be significant later on, for now we will stick to the power side of the coin. This is helpful as it leads our discussion into issues relating to power and practical reason, and, further on, what we can call the conundrum of political philosophy.

The reflections above show that power is not only relational, but also always *contextual*: How much power you have, depends not only on who you are, but also on who you are up against and in what kind of situation. The trespasser may have had a fair chance against the gardener, but when he is brought to the court, his position will be much weaker. The king, for his part, may be powerful when facing a single individual. However, if this person proves to be another king with a greater army behind him, he will not. And if the mighty sleeps, his might is of less help to him. The relational as well as the contextual aspect of power is well captured in Hobbes' famous statement: 'Even the strongest must sleep; even the weakest might persuade others to help him kill another.'<sup>219</sup> This contextual issue, which we will elaborate on later, is also closely related to what Weber describes as the 'amorphous' character of power, more precisely, the many different forms or sources of power, a topic which the next section will illustrate.

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218 The concept of action, or agency, has been a key issue in German as well as in Anglo-American criminal law scholarship. See further, for instance, Radbruch (1903) and Duff (1990). We will return to this issue in chapter 7.

219 Hobbes (1651) at xiii.

## 4.5 Riflemen, bear-psychologists, and deontologists

To further elaborate on the complex character of power, including how power, choice, and practical reason are related to each other, we may imagine Lucy, walking around in the forest to find nuts, fruits, or berries to eat. Suddenly, she faces a great bear. It may seem a bit awkward to say that the bear has power over her: While certainly having the physical strength to even kill Lucy, the bear acts on instinct. Still, the bear can (in some way or other) be said to act, and it is not as straightforward to predict how the bear will behave in the situation. Luckily for Lucy, though, Thomas comes along. Armed with a rifle and the ability to (make the choice to) shoot and kill the bear, Thomas can clearly be said to have power over the bear's life (and, in the situation, even over Lucy's life). This only applies, though, if Thomas is able to use the rifle. Also: the better the rifle, the greater we can say that Thomas' power over the bear would be. If he has an extremely good rifle, capable of hitting its target at long range, Thomas can be said to have more power over the bear than he would if the rifle were an old and unreliable one that might not work after all and at best at very close range. The fact that the bear does not understand the nature of the risk it is up against, does not change this: Its fate depends on what Thomas is capable of and what choice he eventually makes.

There are, however, also other aspects of the situation that contributes to our assessment of Thomas' power over the bear. The choice of shooting (or not) would always be executed within an *intellectual context*, that is, Thomas' knowledge, competence, and reasoning on this basis. These are factors that may vary between individuals, which affect what power we will ascribe to Thomas (for instance). If he is also a bear psychologist, being able to scare the bear or distract, clam down, and even tame it, Thomas has more ways to act to influence the situation in ways that serve Thomas' ends. Some of the available choices may even extend these, while others may limit or exclude other alternatives.

An important point, then, is that power is not necessarily only a matter of *physical* force. Rather, having a rifle for shooting the bear and having the capacity to manipulate it, can be seen as *different forms of power*.<sup>220</sup> The first,

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220 See e.g., Poggi (2001).

shooting, is a physical form of power, the latter a kind of psychological power, and, as we will return to later, modern society also encompasses numerous other categories. Before we go further into this, the *native supremacy of physical power* should still be underlined. Physical power is, in a situation like the one sketched here, the default alternative. If one of the involved parties chooses the physical power track, the other is, regardless of whether they prefer another way to solve the conflict that arises, *only guaranteed* to win the clash by being more physically powerful. This is a tragic, but important premise for social life, which has a strong influence on us and which, as we will see, is important also for civil society, the state, and criminal law. However, it is also a very troubling principle, as it leads to a propensity to solve conflicts by physical force, which is contrary to the fundamental idea of freedom in society (more on that later in the next chapter). It is also, for reasons we will come back to, a troubling principle to apply to larger groups, as it may, for instance, result in alienation, uncontrolled spirals of violence, and so forth.<sup>221</sup> As seems to be a basic principle of Weber's concept of domination, symbolic forms of, or expressions of power, are often required to control groups of individuals, particularly when it comes to larger groups. But the native supremacy of physical power is still a basic principle, our predicament as material beings, so to speak.

## 4.6 Power as a factual-normative concept

Despite this native supremacy of physical power, use of power is (as already clarified) not merely a causal process: To explore why and how, we must, as noted above, elaborate on the nature of choice as a component in our understanding of power. Here, we connect to the premise that the term 'power' is used in a factual as well as in a normative sense, a feature of our language

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221 The Icelandic sagas, such as the *Njáls saga* from approximately 1280, provide vivid historical illustrations of this. This also illustrates how closely we are here to the history of criminal law. The saga also contains a central theme for Nordic law as well as the later analysis: 'With law shall our land be settled, and with lawlessness wasted'. The first part of the phrase is the opening words of the preamble to the Danish law of Jutland (1241), enacted by King Valdemar II, and is also included in the one of the first regional codes of Norway, *Frostatingsloven*, enacted around 1100. See further Chapter 7 below.

that we have already touched upon with regard to terms such as ‘state power’ and ‘penal power’.<sup>222</sup> Power, at least as long as we are speaking about power in human relations, seems to be a complex factual-normative concept.

On the one hand, power refers to what we can do in a factual situation, that is, the ability to effect certain outcomes in the world, even when it conflicts with the choice of others. But it presupposes, as mentioned, a choice to do so. Choice implies ‘can’. An agent in a practical situation, responding to the question: *what should I do?* starts out from certain presuppositions about what he or she can factually do (is capable of doing).<sup>223</sup> However, the reasoning on this is also essentially connected to what we are *allowed* to do, and in both regards, we may think of power as a matter of *competence*. Clearly, one may say that one is competent to do something when referring to the premise that one has the necessary knowledge and skills. With regard to whether one is allowed to do something, talking about competence may appear a bit strange. However, considering morality as ‘self-legislation’, for instance, can be reconstructed in this way. This normative competence aspect of power is also reflected in the language of law: We often think of legal norms as providing *normative competence* for someone to do something, for instance when we talk about the normative competence of public officials, such as the police, and more fundamentally, when referring to, for instance, state power. From this point of view, it makes sense to say that public officials *cannot* make use of torture as a means of investigating crimes, even if they are capable to do so in terms of their control over the suspect, who may be handcuffed and so forth.

This point of view also shows how power can be (and indeed, often is) a matter of complex normative structures, including specific institutional arrangements as part of that. A judge, for instance, has the power to have an individual (much physically stronger than the judge) incarcerated, but then only because the judge operates within a set of normative (legal) rules that empower the judge to do so. The judge’s ability to have the individual imprisoned is at the same time dependent on that legal system being factually capable of executing judgements. Often, we cannot disengage normative powers from the factual capacities they connect to, even if for instance we may

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222 See 3.2 above.

223 See the quotation from Ripstein in 4.4.

focus only on one of these two, in a study of the rules of criminal procedure. This often-seen interconnection between normative and factual power aspects in the nature of a legal order is something we have already seen expressions of in Yankah's emphasis on coercion as a core aspect of law, and we will see more of it as we dig into Kant's political philosophy.<sup>224</sup>

The basic point for now, however, is that the moment that we reflect upon what we can (factually) do, we are immediately faced with normative issues as well. This inherent relation between factual-can and normative-can is reflected in how practical situations are resolved. In a given situation, we have a certain factual power, which is opportunities or possible courses of action, but in choosing among them and deciding what to do, we (can) reason about what we consider ourselves to be morally allowed to do, and there can be a complex interplay between these two perspectives. Such concerns tend to become more pressing when we are considering using brute power against others.<sup>225</sup> On the other hand, normative correctness can also be an (additional) source of power: The agent who knows he is not only able to shoot, but is also legitimised to do so by others, may be said to have more power than one who can shoot, but only at the cost of being censured for such an act.

Underlying this discussion is a topic which will become central to this discussion: *conceptions of freedom*. Kant's concept of freedom differs from, for instance, the one usually ascribed to Hobbes, where one is free to the extent that one is not impeded by external obstacles – a view which strongly connects freedom to the factual side of power.<sup>226</sup> We are, in Kant's view, however, not 'free' to abuse or steal from others, even if there are no factual obstacles preventing us from doing so. We are free to do something only to the extent that we act within the norms of what is reasonable. Therefore, we cannot meaningfully say that our freedom to act is *hindered* by criminal norms that prohibit murder of fellow human beings. It would be more apt to say that

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224 On Yankah, see 4.3 above. Regarding Kant's view of the state and power, see chapter 5.

225 This can be viewed, then, as another way to reach the insight stressed by Yankah (2008) p. 1199, that 'if the law is inherently coercive then, considering that coercion *prima facie* requires justification, the law requires vigilant challenging and never-ending inspection and justification.'

226 See, for a critical discussion of Hobbes' concept of liberty, Skinner (2008).

such prohibitions (contribute to) *demarcate* freedom. This is key to Kant's philosophy of law, which we will return to in the next chapter.

While the factual side of power focuses on what we manage to do, the normative dimension focuses on what we are allowed or obliged to do. Hence, it is contingent on a capacity for normative reasoning. Here, it is useful to keep in mind that we also use the term 'power' to refer to intellectual capacities of this kind – aptly illustrated by Kant in his third critique investigating *the power of judgement*. In this sense, the term power refers to *intellectual faculties*, as also indicated by 9) in the dictionary entry as noted in 4.2 above.

The question, then, is what kinds of intellectual and normative powers we are speaking about. Another way to phrase this question is in terms of what *rational* capacities we have and what this implies. What view we have on this issue is reflected in how we (can) *evaluate* the different options we have, which we can seemingly do according to differing standards. In the bear situation, for instance, Thomas may reason in a cost-efficient way, that is, consider how different ways of acting would affect his own situation. Thomas, facing the bear, considers what his different alternatives requires of him, as well their effects. Using the rifle may be the least demanding alternative in terms of the invested effort, as shooting the rifle is easy and effortless. However, shooting also comes with a cost: in shooting the bear, Thomas may have used his last bullet. There is also the risk that he misses. Applying bear psychology instead may require more effort but would also open more opportunities: Whereas shooting the bear might provide meat, fur, and a hunting trophy, using bear psychology and keeping the bear alive would maintain this option, but also offer other options. Taming the bear, Thomas gains a strong ally (for others a terrifying deterrent), company, and more. But Lucy, a committed deep ecologist, intervenes and makes it clear to Thomas that the bear should not be seen as an object at Thomas' disposal, but a creature of value in itself. Thomas and Lucy's points of view can be described as a distinction between, on the one hand, the ability to reason (only) in terms of cost-benefit analyses, that is: consequentialism, and a kind of deontology, which (also) recognises that there are norms that oblige us to perform, or abstain from, certain forms of action, regardless of their (beneficial) consequences. Here, then, we have returned to the notion of 'rationality' and its alternative conceptions which are also present in Nordic criminal law.<sup>227</sup>

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227 See 2.2 above.

## 4.7 The political philosophical conundrum

So far, we have seen that the issue of power is intimately connected to a number of important premises relating to who we are and what we can do. Hence, we are about to develop here a kind of *anthropological* starting point for the following discussion of the philosophy of criminal law. However, it is first and foremost when we turn to the possibility for *social conflict and power* that we get to the core *political philosophical* conundrum. So, let us continue the story, along Kantian lines.

As Lucy has returned to the tribe, Thomas now comes up against Jean-Jacques, a resident in another tribe. Both have caught sight of a valuable fruit, free to be picked, and both make claim to it. While Thomas has his rifle, Jean-Jacques has a knife. Not many of the reflections about Thomas in the previous section, facing the bear, would change. Lacking full trust in the stranger, Thomas considers Jean-Jacques not only a competitor for the fruit, but also a potential threat, and having the rifle, Thomas has the upper hand and can at any time end Jean-Jacques's life or force him to become a slave. Thus, Thomas can be said to hold the power in the situation. However, the opposite party, Jean-Jacques, is not quite in the same situation as the bear. Jean-Jacques is, for instance, in possession of the same intellectual capacities as Thomas. This introduces a stronger element of unpredictability in the game. While, in line with the principle of native supremacy of physical power, Thomas may prove to be the strongest one after all, Jean-Jacques may be in possession of intelligence and rhetoric skills to outmanoeuvre Thomas. Both also have their respective tribes, who might be able to assist them or at least retaliate, if, for instance, one of them kills the other. This may lead to war, or at least a spiral of violence. Thomas might appear to be most powerful in the situation, but if Jean-Jacques's tribe is bigger, has better weapons overall, and is also viler, the picture would start to look a bit different.

As such, power can be about the specific situation between two individuals, but this situation must sometimes also be seen on the basis of the broader social context within which this situation plays out, giving further support for Weber's observation that power may play out in amorphous ways. In particular in a modern context, so many features of daily life can influence power relations, including economical resources, tradition, cultural symbols and religion, political influence, weapons, knowledge, social networks, and



more.<sup>228</sup> At the same time, power in social relations is particularly difficult to account for as human agency is not as predictable as, for instance, nature. Humans have the ability to think, make choices, change power situations, and, not the least, collaborate with others.

But if the conflict were to be limited to Thomas and Jean-Jacques, and if it played out as a conflict and a clash of (physical) power, one of them, at least, would be bound to suffer some negative consequences, being killed, maimed, or at least threatened to act according to the interest of the other. If the two were guided solely by instinctual reactions, this could easily be where the story ends. However, now the magic happens. Worried by this situation, Jean-Jacques begins to *reason* and starts discussing with Thomas about their joint desires for the asset and the different implications of violence being performed. Thomas agrees to the call to reason, and exploring their respective interest in the fruit, in staying alive and safe, but also their worries towards each other, they go into a process of abstraction, realising that they are not that different in their fundamental interests and needs, leading Jean-Jacques to form a conception of a human being that unites them. They recognise each other as members not only of their respective tribes, but also as of a higher regime: a rational regime, which even puts them on track to reach principles for solving the conflict over the fruit.

Explaining how this moment would come about is beyond my capacity, and one may guess, beyond the capacity of anyone else residing within the rational regime. All we could do is to make some kind of *conjectural beginning of human history* of the kind provided by Kant, referred to as ‘not for a

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228 This, as we will return to, reflects itself in forms of violence. Here, in regard to that, one often distinguishes between different forms of violence, such as for instance, physical violence, psychological violence, economic violence, and more. For one example, e.g., Isdal (2018), pp. 41–68, who for his part distinguishes between physical violence, sexual violence, material violence, psychological violence, and latent violence. While such concepts typically aim to highlight the way in which the victim is affected by the act of the perpetrator, typically, this mirrors what kind of power situation there was in the relation between the offender and their victim. In areas such as domestic violence, a key issue is precisely to understand and regulate the complex ways that a spouse may abuse his or her partner, child, or other related person. Issues relating to criminalisation will be subject for discussion at a later stage of this book, when the normative framework for power and its misuse is in place.

serious business' and a 'mere pleasure trip'.<sup>229</sup> What is certain, though, is that this was a crucial moment. As Kant puts it:

The occasion for deserting the natural drive might have been only something trivial; yet the success of the first attempt, namely of becoming conscious of one's reason as a faculty that can extend itself beyond the limits within which all animals are held, was very important and decisive for his way of living.<sup>230</sup>

The interesting question, then, becomes whether Jean-Jacques, Thomas, and their peers could somehow think of a normative order that they could rationally acknowledge as a framework for their interaction, one where they were all recognised and respected as participants of that rational community.<sup>231</sup> If so, that would indeed be of great value, because as the earth is limited, they (and their tribes) could not simply go each in their direction and never see each other again.<sup>232</sup> Addressing this normative problem requires Thomas and Jean-Jacques to explore a number of complex issues that are involved in this political philosophical conundrum, some of which we have already touched upon: What is a human being? What is rationality? What fundamental rights does a human being have against other human beings? What is right and wrong to do against each other? Who should rule and by what rules? How should conflicts be resolved? The latter questions are important as they stress that the situation in which Thomas and Jean-Jacques find themselves calls on them not only to clarify rules for their behaviour, but also to establish institutional arrangements required for their co-existence. This is not least important to properly discuss the nature and principles of criminal law, something we will return to in Chapter 7.

For Kant, the most fundamental question for philosophy was precisely the first of the above-mentioned: *what is a human being?* In the *Jäsche Logik*, for

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229 Kant (1786) 8: 109.

230 Kant (1786) 8: 111–112.

231 See also e.g., Forst (2013) p. 154 on 'the principle of justification', 'that no one should be subject to norms or normative arrangements that cannot be properly justified to him or her as a free and equal agent of justification.'

232 A central premise for Kant, see further below in 5.5.

instance, he posed four basic questions for philosophy: *What can I know? What ought I to do? What may I hope? and What is man?*<sup>233</sup> The first question was a subject of metaphysics, the second of morals, the third of religion, and, finally, the fourth of anthropology, to which Kant added: ‘Fundamentally, however, we could reckon all of this as anthropology, because the first three questions relate to the last one.’<sup>234</sup> In line with this, ideas about human beings and how they are situated in complex power contexts provide foundational premises for discussions about the nature and justification of law. I will unpack more of the relevant basic premises as we work our way through Kant’s political philosophy and view of criminal law in the following two chapters.

Before that, one important premise should be put in place: We must also suppose that they revealed an ability to choose their way of acting in accordance with their reasoning, or, as Kant put it: ‘He discovered in himself a faculty of *choosing* for himself a way of living and not being bound to a single one, as other animals are.’<sup>235</sup> Some reject the very idea of human beings being able to (reason and) choose in any meaningful way, and there is a broad range of views on the question of whether we actually can (choose) to do something (and not something else), a discussion which is typically organised around a distinction between free will, determinism, and compatibilism, a discussion which spills over into the philosophy of criminal law.<sup>236</sup> Many who reject the idea of free will thereby also reject retributivism as a way to justify criminal

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233 See Kant (1800). The name *Jäsche Logik* refers to Kant’s lectures on logic as compiled by his student Gottlob Benjamin Jäsche (1762–1842). There are several such lectures by Kant, on many topics, named by the students whose notes from the lectures are reconstructed from, including the *Mrongovius anthropology* that we will encounter later. Jäsche compiled the lectures on Kant’s request, and it is generally considered a fairly reliable expression of Kant’s views of logics.

234 Kant (1800) 25, see also e.g., Louden (2011), p. xvii. This connects also to the topic of criminal law’s person, a topic which has gained more attention in recent years. See e.g., Lernestedt/Matravers (2021). See also e.g., Montenbruch (2020), for instance p. 159 on criminal law’s ‘*Menschenbild*’.

235 Kant (1786) 8: 112, italics added.

236 See e.g., Hörnle (2016). Kant would, as it were, not speak of freedom of will in this meaning, see 5.4 below. At this point of the analysis, however, I do not use ‘will’ in Kant’s meaning but stick to the terminology most common in this discussion.

law and turn to other views of criminal law.<sup>237</sup> This is a complex issue which cannot be explored in depth here. The following argument builds on Kant's view: For Kant, the determinism-indeterminism problem cannot be solved once and for all. On the one hand, we, as members of a phenomenal world, are subject to the causal laws (we impose on it). Free will cannot be explained by such causal laws. These – if anything – suggest that we, as phenomenal beings, are subject to the same causal laws as the rest of nature. On the other hand, we cannot refute free will either: Whether we are free at a noumenal level cannot be decided from a phenomenal point of view. What we can experience, however, is that free will is presupposed by us as practical agents in our reasoning about what we (and others) should do. The moral command that we *ought* to do something implies *can*, and we should take this as the premise for our normative reasoning, which then, will be the starting point for the following discussion.

Two related points are also worth stressing here, as they become of importance to us later on. First, to be(come) a free agent is not necessarily (only) a blessing for mankind:

He stood, as it were, on the brink of an abyss; for instead of the single objects of his desire to which instinct had up to now directed him, there opened up an infinity of them, and he did not know how to relate to the choice between them; and from this estate of freedom, once he had tasted it, it was nevertheless wholly impossible for him to turn back again to that of servitude (under the dominion of instinct).<sup>238</sup>

This freedom of choice, which even made individuals capable of evil, thereby came with a *responsibility* to use, and to use it *right*, making it a duty for us to address the political philosophical conundrum and reason's principles for

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237 See e.g., Caruso (2021). This is a recurring theme in the philosophy of criminal law. An older, but very important expression of this is the views of the already-mentioned German criminal law scholar von Liszt, see 6.7 below. In Nordic criminal law it may, through the viewpoints of the criminologist Olof Kinberg (1873–1960), be said to have led to Sweden abolishing the insanity defence, as the only Western country to do so. For more on Kinberg's views, see Kinberg (1935).

238 Kant (1786) 8: 112.

solving it. Second, and relatedly, it is worth stressing that the freedom-of-choice-view does not imply that individuals are (always) free in the sense of being completely rational and unhindered by, for instance, their life situation. Kant does not consider human beings as *perfectly* rational beings.<sup>239</sup> Allen W. Wood sums up these two features of Kant's theory of freedom when he describes rationality as primarily a *problem* for human beings, one that we ourselves are responsible for solving:

In Kant's view, human beings are human at all only through the actions of others who educate them ... Kant also holds that the development of our human predispositions is a social process, a result of the collective actions of society (most of which are unknown to and unintended by individual agents ...). Moreover, in Kant's view the evil in human nature is a social product, and our fulfilment of our moral vocation *ought* to be social in nature ... our only hope for human moral improvement lies in an ethical community with shared or collective moral ends. (On all these points, the common characterization of Kant as a moral 'individualist' could not be more mistaken.) ... Human beings are *capable* of directing their lives rationally, but it is not especially characteristic of them to exercise this capacity successfully. Rather, rationality must be viewed as a *problem* set for human beings by their nature, for whose solution not nature but human beings are responsible.<sup>240</sup>

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239 Kant's view of rationality is sometimes subject to oversimplified descriptions in Nordic criminal law scholarship. Andersson/Bladini (2021) p. 38, for instance, claims that Kant 'stated that every individual has an autonomous sphere in which free will is fully accessible and defined by logic and reason', and therefore defines the relation to others as 'unproblematic', a description that does not well account for the complexity of Kant's view of human beings. More apt in this regard is Koivukari (2020) p. 224, considering it a 'crude over-simplification to claim that modern criminal justice relies solely on rational individuals who are capable of calculating the costs and benefits of their actions, and in every situation willing to act in accordance with what benefits them. Immanuel Kant, for instance, discusses at length man's empirical nature in contrast to abstract ideal being.' Koivukari questions, however, to what extent such empirical aspects are taken into account in criminal justice and theory.

240 Wood (2003) p. 41 and p. 51 (Kant-quotations omitted).

In other words, we find ourselves situated in a phenomenal world which in many ways challenges our ability to fulfil our potential for, and our obligation to, reasoning and rational agency. Power in society is at the core of this challenge: ‘the first question of justice is the question of power’.<sup>241</sup> Relying on political traditions, cultures, and power structures alone is not a legitimate way to deal with this challenge. So, it is time to ask: What does a rational framework for our co-existence actually amount to? The next chapter outlines Kant’s answer.

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241 Forst (2013) p. 159, see also quote on the front page from pp. 160/163.