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

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Constructing the republic and its criminal law

7.1 Aim and outline

The previous chapters have outlined the republican tradition in European legal thought and then probed into Kant's political philosophy as part of that tradition. However, when it comes to the role of criminal law, Kant's republican political philosophy has proven difficult to delineate in any straightforward manner. This, one may say, is particularly so when compared to today's philosophy of criminal law and its nuanced discussions of issues such as the aims of criminal law, criminalisation principles, and criminal responsibility.[485] Notwithstanding, the more general aspects of Kant's political philosophy provide us with some key themes and principles that may work as reference points guiding us in the construction of a republican criminal law. These key themes and principles, I would venture, are particularly helpful to addressing the research problem we set out from: to understand the normative foundations of Nordic criminal law (scholarship).

To achieve this, several steps are required. The first step is to flesh out the key ideas and principles of our republican criminal law. Summarised, the

485 See for instance 3.3 for key positions and approaches in Anglo-American criminal law and 6.7 on German philosophy of criminal law.

following analysis consists of three basic claims. 1) When an (aspiring) sovereign claims (to represent) legitimate political power with rightful authority over the people, it appropriates the role of a protector of public justice. This implies, most fundamentally, an obligation to conform to, implement, and protect each individual's right to external freedom in society. Criminal law should be seen as a central part of the fulfilment of this promise in terms of addressing – in various ways, as we will see – violations of public justice that challenge the very normative foundations of the civil state. Criminal law is, in this sense, the *baseline* of the republic. This implies a *negative-constitutional role* for criminal law. As such, it is a supplement to the Constitution, which for its part provides the positive form of the republic's political structure, institution, and basic rights for its citizens. 2) The negative-constitutional role of criminal law can be structured along three core functions: the *declaratory*, the *retributive*, and the *preventive* functions of criminal law. All three functions relate to criminal law as the baseline of the republic, as they all aim to (contribute to) preventing the civil state from regressing to the state of nature, as a whole or in parts. 3) While these functions are essential to this conception of criminal law, they must also be applied in a given social context, making them context sensitive. This provides the legislator with an important role in considering and continuously re-forming the baseline in view of (developments within) the social context. It must consider the need for state protection of (different aspects of) the right to external freedom as well as the need for improvement to bring the state closer to the 'true republic': At each stage of history, it is the current political community's – *our own* – responsibility to bring the political community as close as possible to the ideal of the true republic. This implies a particular reformist dimension of criminal law, which will be addressed in Chapter 9. However, before we can venture into this reformist dimension, the principles of criminal law must be worked out, which will be the subject of this and the next chapter.

This chapter provides some general starting points and key characteristics of the general republican account that will inform the discussion of criminal law. The chapter is structured in the following way: The discussion will start out in 7.2 by identifying foundational themes and premises drawn from Kant's political philosophy. In 7.3, the focus is on some basic premises involved in the process of entering into a civil state with 'monopoly of power', thereby abandoning the state of nature. On this basis, 7.4 accounts for the constitution

of the civil state and its general principles. This establishes the two most basic requirements for a civil state. In 7.5, the general role and responsibilities of the legislator are discussed, while 7.6 considers whether the notion of 'state of nature' becomes obsolete as we move into the civil state or whether it maintains relevance for our analysis. Assuming that it maintains relevance, the argument turns in 7.7 to the overarching aim of the republican criminal law, relating to its baseline function and its three different layers. In the next chapter, Chapter 8, this is developed into three specific functions of criminal law: the declaratory, the retributive, and the preventive function.

Before we proceed, further elaboration is required on the choice of Kant as philosophical basis rather than other contributions to the philosophy of criminal law for the following analysis. First of all, the choice of this philosophical basis implies a claim that, contrary to the standard view in Nordic criminal law scholarship, Kant is a helpful dialogue partner in our strive to understand the normative foundations of Nordic criminal law. This does not reject the possibility that other political philosophical contributions may also be valuable. This applies for instance to other historical contributors to German idealism, such as Hegel – who, as already seen, is also a central figure in contemporary criminal law philosophy and who has also made an impact on recent Nordic criminal law philosophy.[486] Johann Gottlieb Fichte should also be mentioned. Wood observes that in criminal law philosophy, Fichte, 'Kant's greatest (and most consistent) follower', 'proves himself to be a better friend to the critical philosophy than Kant ever realized, by drawing conclusions from the Kantian philosophy more consequently than Kant does'.[487] Also, at many points, we will connect to issues that have been emphasised by historical contributors to the criminal law science in their analysis of criminal law and its justification. Criminal law's aspect of state authority, which we will connect to later in this chapter, was for instance an important premise for the German criminal law scholar Binding.[488] A broader analysis of historical contributions to the philosophy of criminal law and how these relate to premises in the following line of reasoning would indeed be valuable, but exceed the scope of

486 See e.g., Kinander (2013).

487 Wood (2010) pp. 121–122. See also for instance, Lazarri (2001), James (2020) and, from the point of view of sentencing, Bois-Pedain (2017).

488 See 6.7 above.

this study, which first and foremost aims to set out a republican framework for Nordic criminal law.

At the same time, it cannot be denied that the choice of Kant as reference point reflects a view that his political philosophy provides the most robust basis for our reasoning on criminal law. I hope the preceding analysis of Kant's political philosophy in Chapter 5 has shown its potential in this regard. Kant, the inventor of the critical philosophy, was also formative for German philosophy and the entire German criminal law tradition and the influence it came to have, even in the Nordics.[489] One should not be surprised when finding grounds already in Kant for insights that were to be highlighted and developed by later scholars such as Hegel, Fichte, and Binding. While having their own intellectual projects, several of the most important figures here worked in an intellectual context formed by Kant's philosophy and were students of and/or deeply engaged with Kant's philosophy. Many of these clearly held viewpoints that can be traced back to Kant, including Hegel's emphasis on freedom as the central idea for the political philosophy and Feuerbach's conceptual distinction between law and ethics.

Furthermore, when carving out a republican conception of criminal law, we connect to several ongoing discussions in the vibrant contemporary philosophy of criminal law.[490] Here, the following analysis will connect to some key contributions in the contemporary republican philosophy of criminal law in particular. such as the works of Duff. However, such contributions constitute philosophical projects on their own terms, which also distinguish themselves at important points from for instance, the Kantian line of thought pursued in

489 See 2.3 above. There are extensive analysis and discussion of the reception of Kant and the development in philosophy after Kant, discussions which rely on interpretations of Kant as well. Positioning in this debate delivers important premises for analysing the relation between Kant and later contributors to the philosophy of criminal law.

490 See 3.3 for an overview of the Anglo-American criminal law philosophy and 6.7 for the discussion in German criminal law science.

this book.[491] The following analysis does not consistently pursue and discuss such divides in the philosophy of criminal law. While such disagreements are important, these theories share general features and viewpoints which make them all relevant when pursuing the ambition of carving out the republican foundations of Nordic criminal law.[492] While a more thorough engagement with the contemporary philosophy of criminal law would be enlightening, this endeavour will have to be left to another occasion. Instead, this study will gradually reconnect to Nordic criminal law scholarship's engagement with these issues, which constitutes the research context for the analysis.

The contemporary philosophy of criminal law exposes the limitations of this study also in another regard. Criminalisation principles, criminal responsibility, and the nature of punishment and sentencing, issues that we will connect to in particular in Chapter 8, are all subject to extensive debates today, testifying to the complexity of these issues. Each of these deserves a study on its own. The current study is first and foremost concerned with providing an overarching normative framework for Nordic criminal law scholarship, thus providing a coherent set of starting points for further analysis of such specific topics. In this regard, the analysis will connect to some important discussions relating to the general characteristics of criminal law, and Nordic discussions in particular. While not going much into these discussions, a strength of the account of criminal law offered here, I would argue, is its ability to account for and give sound direction and starting points for further analysis.

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491 This is not saying that Kant is irrelevant to, for instance, Duff's philosophy of criminal law. This shows some signs of Kantian inspiration in *Trials and Punishment*: 'My aim is to explore the implications of the Kantian demand that we should respect other people as rational and autonomous moral agents – that we should treat them as ends, never merely as means – for an understanding of the meaning and justification of punishment. … I call this principle Kantian, since it is clearly related to Kant's notion of autonomy and respect; but I do not call it Kant's principle, since I do not aim to capture or express Kant's own views on the matter', Duff (1986) p. 6. In other aspects, Duff shows characteristics that clearly distinguish him from Kant, the former describing himself as 'by temperament a pluralist rather than a monist', see Duff (2018a) p. 265.

492 It is worth noting here that Kant seems to have become a common reference and dialogue partner also in contemporary Anglo-American philosophy of criminal law. See, for example, many of the contributions in Tanguay-Renaud/Stribopoulos (2012).

7.2 Some key Kantian themes to start out from

The outline of Kant's political philosophy and the role of criminal law in the previous chapters did not yield a clear-cut conception of criminal law. But it did provide us with a set of themes and principles that function as robust starting points for further discussion. The themes and principles that I want to highlight, are the following: *First*, the overarching aim of the republic is to secure the innate right of each to external freedom to the extent that it is compatible with the equal freedom for everyone else.[493] This ideal of external freedom should ultimately be understood with reference to the rational capacities of persons for self-legislation in accordance with reason. None of us is positioned to claim more freedom for ourselves than what is justified by reference to universal normative standards that each of us, as rational agents, can recognise. *Second*, to secure for each the rightful claim to external freedom, we are obliged to, and can even be compelled by force to enter into, as well as remain in, a civil state with others. This brings us out of the state of nature and its defects concerning the lack of security for rights. This is, perhaps, the most contentious premise, as it introduces a right to use power to secure the right to external freedom, which, as we will return to, is particularly relevant for criminal law. *Third*, the state should be constructed from the separation of powers between the legislator, the executive, and the court, where the legislator, as the representative of the people, sets the premises for the other state powers. *Fourth*, the state is legitimate

493 Already here one may distinguish this approach from other 'public law' conceptions, such as Chiao's, starting from a view of public law and punishment as 'a means of fostering social cooperation', see Chiao (2019) p. viii. Such effects, as I will return to later, may, however, be an important contribution for a society to come closer to its aim of public justice. As such, a 'Kantian' approach may not adequately be understood as a 'highly individualistic account of rights and wrongs' as Chiao here suggests. Chiao, for his part, starts out from an egalitarian view of 'anti-deference', inspired by for instance Pettit (mentioned in 5.2.1 above as a central contemporary proponent of the Italian-Atlantic branch of republicanism). But, contrary to this view, the approach here suggests that in order to account for the nature of criminal law, we should, instead of setting some values for public institutions of this kind, begin by the justification of public political power and the normative foundations for state authority in itself. This, however, does not mean that many aspects of Chiao's egalitarian view cannot, at more concrete levels, be aligned with the views advocated here.

and deserves respect even if it does not fulfil the ideal of the true republic. *Fifth*, at the same time, states that do not live up to this ideal are under the obligation to reform itself in order to come closer to the republican ideals. *Sixth*, criminal law and the use of punishment is a central part of the state construction, particularly concerned with acts that violate the basic form of the civil state, i.e., the political constitution and basic individual freedom rights. And finally, *seventh*, criminal law and punishment must, as all other parts of the legal order, conform to and work to fulfil the right to external freedom. One might reasonably question whether it is strictly necessary to look to Kant to find support for these themes and principles. For some of them, the answer is clearly no. But, a strength of Kant's political philosophy, I would hold, is the combination, which, when taken together, provides a strong basis for a sound republican theory of criminal law.

Still, a lot of work is required before we can draw such a conclusion. Here, it is significant that criminal law rests on or relates to some issues that Kant seems to have not fully developed, but which may prove to be important. In this regard, I want to emphasise the following issues: Most importantly, we must provide a better account of the *power aspect of legal orders*. Power is clearly central to Kant, but a lot of questions remain unanswered, for instance regarding how we can account for the often emphasised unique power dimension of criminal law.[494] Furthermore, but relatedly, we must provide a better account of *criminal law's distinctiveness*. As the state has several forms of power and sanctions at its disposal, and can even enforce rights in civil cases, such as evicting a tenant by the use of force, why should we think of criminal law as distinct from the other legal institutions which are at work for securing our rights? Another aspect to consider is the *reformist aspect of law*, reform of criminal law included. It seems clear that Kant considers reform, i.e., improving the legal order to move it closer to the ideal of the true republic, to be an important aim and topic for political and legal orders and even considers us obliged to it. But how can the republican conception of law, and criminal law as a part of that, account for this, and how does it correspond to the 'fixed' standards of law characteristic of Kant's metaphysical doctrine of public

494 See 3.2 above.

justice? Does this, for instance, affect our (conceptions of) the criminalisation principles and what kind of work we expect these to do?

Before we embark on the discussion of these issues, however, it should be stressed that we should not primarily think of the work to be done here as merely *applying* a certain (Kantian) political philosophy to the issue of criminal law. Rather, we should approach it as a question of how criminal law can *contribute* to (completing) the republican political philosophical starting points that we have established. As Dubber has pointed out, criminal law is a constitutive part of the state itself:

> The state is about power. Punishment is power incarnate. Therefore, a theory of the state that doesn't deal with punishment isn't a theory of the state but of a charitable organization.[495]

Implied in this is that we should try to understand criminal law's role in the construction and workings of the state. In line with this, we should devote some more attention to the notion of a 'state of nature' and the civil state as response to this.

7.3 From the state of nature to a 'monopoly of power'?

As shown, central to Kant's political philosophy is the idea that we are obliged to leave the state of nature and enter into the republic. In the state of nature, we have rights, most fundamentally, the right to external freedom. But as right holders we face several challenges. A core issue is the problem of indeterminacy: What the basic right to freedom and other acquired rights actually imply with regard to one's concrete, everyday interaction with other human beings is, for several reasons, not clear. In addition to the problem of indeterminacy, our considerations in this regard are, for instance, likely to be influenced by who we are, our experiences, and our interests in the actual matter. So, we have every reason to expect conflicting claims in this regard. Furthermore,

495 Dubber (2008) p. 94.

even if we were clear about rights and duties and what these imply, human vice is still a problem: in the state of nature, we cannot disregard the possibility for others violating our rights, meaning that we must take care to protect our rights, by use of force if necessary. This is in itself troubling and requires us to pay attention to and be prepared to defend your rights. But, also, this leaves us vulnerable as, in the state of nature, this depends on one actually having the power to do so.[496] What one has power to do is, as shown in Chapter 4, contingent on a number of premises, so most of us would be left in an uncertain position. With physical power being the default option, this means that you may, at worst, end up having your rights violated, being assaulted, robbed, raped, or even killed. As mentioned, moving into a civil state, in union with others, aims to remedy such problems.

What this implies for the construction of a constitution and, as part of that, political and legal institutions, will be discussed in 7.4. But, in order for the state to get to that level and (become enabled to) remedy the problems in the state of nature, the (aspiring) sovereign must first of all gain control of power in society. Without this, it will not be capable of protecting public justice within its domain. The state must, as often said, achieve a 'monopoly of power'. As already suggested, criminal law and punishment are very closely connected to this central feature of the state. For this reason, it is useful to start out by reflecting on this notion. As we will see, the notion of a monopoly of power is not as straightforward as it may appear to be. For instance, in line with the observations made about the concept of power in 4.6 above, there are complex relations between factual power and normativity also here.

The nature and implications of the state's monopoly of power is not really a subject on its own in Kant's political philosophy. Rather, Kant seems simply to presuppose that the state has gained (most likely by means of force) the necessary power in society.[497] Later, the state's monopoly of power gained more theoretical attention, notably from Max Weber, even if he did not provide a structured analysis of this issue.[498] Weber, whom we may therefore turn to for a moment, saw (from a sociological point of view) the 'monopoly of power'

496 See the discussion in Chapter 4 above.

497 See 5.6 above.

498 See e.g., Anter (2020) p. 228: 'Whoever wants to gain an overview of Weber's ideas has to reconstruct the relevant fragments scattered throughout his work'.

as a core characteristic of modern nation states, one that distinguishes them from, for instance, international organisations: 'The one power that is unique to sovereign nation-states, even in today's globalized world, is the power to enforce laws.'[499] Or as it has also been expressed in relation to Weber's view:

> Maintaining the monopoly of force is of fundamental importance for present-day democratic states based upon the rule of law since it guarantees that democratically legitimate decisions have a chance to be enforced. Thus, the 'rule of law' and the monopoly of violence are very closely linked to each other.[500]

Among Weber's observations in this regard, we find the following passage:

> Since the concept of the state has only in modern times reached its full development, it is best to define it in terms appropriate to the modern type of the state, but at the same time, in terms which abstract from the values of the present day, since these are particularly subject to change. The primary formal characteristics of the modern state are as follows: It possesses an administrative and legal order subject to change by legislation, to which the organized activities of the administrative staff, which are also controlled by regulations, are oriented. This system of order claims binding authority, not only of the members of the state, the citizens, most of whom have obtained membership by birth, but also to a very large extent over all action taking place in the area of its jurisdiction. It is thus a compulsory organization with a territorial basis. Furthermore, today, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it. Thus the right of the father to discipline his children is recognized – a survival of the former independent authority of the head of a household, which in the right to use force has sometimes extended to a power of life and death over children and slaves. The claim

499 Fukuyama (2004) p. 115. This is sometimes also emphasised in Nordic criminal law scholarship's discussion of the philosophy of criminal law, see e.g., Elholm in Elholm/Baumbach (2022) p. 55.

500 Anter (2020) p. 232.

> of the modern state to monopolize the use of force is as essential to it as its character of a compulsory jurisdiction and of continuous operation.[501]

Like Kant, Weber was not particularly interested in the factual origin of state monopoly of power, but starts out from a situation where monopoly has already been achieved.[502] In other words; it is not very interesting to explain how the ultimate authority came to power in a society.[503] The point is that normative political authority presupposes such a power position and when such a position is established, it must be crucial to maintain it. In fact, the state is even obliged to do so vis-à-vis its citizens: its ability to function as a protector of public justice, forcing people to leave the state of nature and keeping them from returning to it, depends on it. If a state cannot do this, at some point, the citizens can no longer be obliged to respect the state's claim to exclusive right to use power but regain instead their right to use power to counter threats to their freedom.

The idea of maintaining 'monopoly of power' requires, however, more clarification of what is implied by this kind of monopoly in the first place. A core idea seems to be that the state must *ultimately* be capable of enforcing its regulation and decisions. The monopoly of power, then, may be claimed to primarily be *a capacity* to control the use of power in society. Furthermore, seeing the monopoly of power as a matter of capacity implies, (in view of physical power being the default alternative, as discussed in 4.4) that the state must have a (sufficient) capacity for using the physical power needed. But, even if physical power is the default alternative, it is, as we have also seen, clearly not the only relevant form of power. The state also has, for instance, economic and symbolic forms of power at its disposal, the latter relating to the community's history, values, and so forth. These may even be seen as

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501 Weber (2013) p. 56.

502 Anter (2020) p. 229.

503 This, it can be added, may be an important issue with regard to emerging new political powers today, such as regional powers like the European Union. This topic is not further discussed here, but it should be mentioned that the political legitimacy of the European Union, including its development towards claiming criminal law competences, has been subject to extensive discussion also in Nordic criminal law scholarship, much of it critical to this development, see e.g., Asp (1998), Elholm (2002), Gröning (2008), Öberg (2011), Suominen (2011) and Melander (2013).

decisive for a state's monopoly of power, as a modern state can hardly rely on physical power alone, for reasons to which we will return.[504] Relatedly, even if physical force represents the default option, this does not imply a *preference* or *priority* for using such means to control society. Weber, for instance, was clearly 'not an apologist for violence'.[505] On the contrary, domination of the kind that Weber saw modern states built upon requires a legitimate basis or foundation that provides validity to it, or as Anter puts it: 'The legitimacy of the modern state, to be precise, rests primarily on the belief in the legality of its orders'.[506] For control of society, it is clear that Weber, with his interest in the modern state's bureaucracy, considered this as a particularly important aspect of the state's capacity to fulfil its aims. Factual power and normative legitimacy are indeed different notions, one factual, the other normative. But the citizens' view of the state's legitimacy provides an important source of power and hence a connection point between these.

Furthermore, while the monopoly of power is a fundamental and essential feature of the state, we should be mindful that 'monopoly of power' cannot in any meaningful way refer to a total *factual* monopoly of power, in the sense that the capacity to use power resides *exclusively* in the state organisation.[507] It is hard to imagine what that would imply in practice (if it is at all possible). The citizens will always have their fists and most often some weapons too (although more in some countries than in others), and the state will lack resources to control them all. This is also the background for many of the crimes that are committed in societies around the globe.

In view of the observations made so far in this section, one could question how apt the term 'monopoly' is in this regard. It is just as much a matter of control of power, as it is a matter of monopoly. This implies, for instance, that the state can allow its citizens a certain use of power. Weber's remark in the

504 Se also e.g., Dagger (2011) p. 60. See also Anter (2020) p. 231: 'a monopoly of violence never can be absolute. Not even a total or dictatorial state would be capable of preventing all competing sources of violence'.

505 Anter (2020) p. 229.

506 Anter (2020) p. 228.

507 See also e.g., Braithwaite (2022) p. 93: '"Monopoly" is slightly misleading for contemporary societies with so much privatised armed security, drug cartels, foreign proxy forces and UN peacekeeping.'

quote above, about the father's right to discipline his children, exemplifies this. That example also illustrates that it is not settled once and for all how the right to the use of power should be (normatively) distributed between individuals and the state. Today, as a result of the general development and specific instruments such as human rights conventions, parents' right to use power against children is more restricted than before.[508] This illustrates that not only does the 'monopoly of power' leave a certain scope of power at the hands of the citizens, but the extent of this may also shift over time. Another example of this point can be found within criminal law and the doctrine of self-defence. Clearly, over time, the degree of legitimate force allowed in defence (as a justification) has shifted. Recently, the cultural acceptance of use of force as means to solve conflicts has declined. But changes in this regard, for instance when it comes to self-defence, have also been understood as related precisely to the state's position as power holder.[509] Such changes, furthermore, are not only a matter of how the state regulates power and distributes the right to use it in society. Again, there is also a merely factual side to this. The citizens may for their part gain a greater capacity for power, for instance by forming groups and organisations that may end up challenging the state's power. Also, the state itself may gain more power, for instance by recruiting more police, but can also come to have its power reduced, for instance by cuts in the police budget, making the police less capable of controlling parts of society.

How power is distributed – factually and normatively – in society may as such be complex and subject to change, partly dependent on choices made by

508 For a further discussion in regard to Norwegian law, see e.g., Gording Stang (2011).

509 See for instance Sangero (2006) pp. 30–31 who claims that '[t]he general historical process (in a number of legal systems) that is of interest is the transition from punishment for acts that were performed as private defence — via the grant of an excuse — through the establishment of a justification. It is generally assumed that before the formation of human society concern for personal survival was predominant. Force reigned supreme. Therefore, with the unification of society, one of the first actions of the legislator was to suppress all forms of taking the law into one's own hands, including private defence. The classical means used to achieve this goal was to impose strict liability. In previous eras the recognition of defences was viewed with much apprehension out of fear that this would weaken the validity of prohibited norms. Only in later periods — with the strengthening of a central governing authority — was it possible to do away with strict liability and to recognise private defence, at first as an excuse and afterwards as a justification.'

the state itself. It may be for such reasons that Weber speaks of the monopoly of '*legitimate* physical force'.[510] This refers to an exclusive *right* to (regulate) the use of power, basically by allowing mainly state institutions or officers to use power, with a corresponding duty for citizens to refrain from using power themselves. What this shows, is that the state's right to rule somehow connects a certain level of monopoly of (factual) power to a normative legitimacy. This seems to resonate well with Kant. The difference from Weber in this regard seems primarily to be Kant's insistence on a normative foundation for the state project in terms of the innate right to external freedom – an aspect of Kantian thinking that the 'disenchanted', neo-Kantian Weber was not willing to accept.[511] I will return to this towards the end of the next chapter.

At the same time, it is clear that we cannot go too far in viewing monopoly of power as only a normative issue. A normative monopoly presupposes, as shown, a certain level of factual control of the use of power in society, for instance in terms of being capable of regulating and preventing citizens from using force against each other (violence). A state that is not capable of controlling the use of power in society cannot reasonably be seen as having a 'monopoly of power' regardless of the justification it may assert for its (claim for) authority, and may, ultimately, find its status as 'ruler' to be challenged – regardless of the soundness of the principles informing the distribution of power in society. Other's ambition to rule may very well claim to represent similar principles and hence be legitimate in that sense. When speaking, for instance, about the 'right to rule as an exclusive right', we must presuppose a factual monopoly of power and legitimate principles for exercise of this

510 See also, from a republican criminal law point of view, Thorburn (2020) p. 53 on 'the right to rule'.

511 Here, it is also worth mentioning that Weber's relation to natural law ideas is far more complex than what the typical relativist view of him allows us to see, see further Radkau (2013) p. 265.

position.[512] Again, power and principle seem to be intimately intertwined, and we must pay attention to both of these dimensions in the state project.

As such, the state's role as protector of public justice commands it to pay due attention to the presuppositions for itself being capable of fulfilling this role. The entanglement of power and principle implies that the state must secure and maintain power to the extent that it is able to control the use of power by others in line with it, as part of its enterprise of protecting public justice and the external freedom of individuals at its core. At the same time, given this aim for the state, to protect external freedom, it also follows that the state is obliged to resort to applying the lowest possible level of power (use). Power (use) can only be legitimate to the extent that it protects the basic right to external freedom and the state itself as protector of public justice. Unnecessary use of power at the hands of the state contradicts its fundamental purpose. The citizens, on their part, are obliged to leave the state of nature and subject themselves to state power, which must imply that they are (rationally) obliged to respect (legitimate) state power as a part of the endeavour to secure public justice. This duty is visible in Kant's reluctance to recognise disobedience to the state, even when it fails to fulfil its role as protector of public justice.

7.4 Principles for the republic's constitution

With the emergence of a political authority, that is, a power holder that claims normative authority and the right to rule, the focus shifts to how the political order should be structured and developed in order to fulfil the minimum requirements for a civil state. The state must set itself up by a normative structure that provides the state with its form. In practice, this will evolve over time, in tandem with the social and cultural development of the legal

512 The quotation is from Thorburn (2020) p. 48, and Thorburn advocates a similar claim, see p. 53: 'That is, states do not merely assert that they have more effective power than we do, so it would be prudent to do as we are told to avoid the coercive force of its agents. Instead, states claim that they are legitimate practical authorities – that they have put in place a normative system concerned not merely with what its subjects will do (or have or decide) but also with what they are entitled to do (or to have or to decide).'

order. Its normative structure may, however, be laid down by means of a *constitutional document* that enacts or in other ways identifies a *normative constitution* for the state.[513] I use 'constitution' (lowercase 'c') when referring to the normative principles and rights of the state in general, and 'Constitution' (uppercase 'c') when specifically referring to the constitutional document.

A Constitution usually contains somewhat different rules. Some contain general provisions regarding the basic values and purposes of the state, such as human dignity, democracy, and rule of law. Furthermore, the central state *institutions* are essential to the design of the state and therefore usually ascribed competences in the Constitution. As Kant has shown, these must, most basically be: the legislator, as the representative of the people, tasked with transforming the principles of public justice into a specific regulation that facilitates and protects human freedom and the rights of individuals, a regulation which in turn provides the premises for the work of the two other central institutions, which are the executive, and the courts.[514] It is not necessary to delve deeper into the principle of separation of powers and related normative requirements such as the independence of courts here; regardless of how this

513 Referring to the 'constitution' (lowercase 'c') is not (necessarily) intended here as a reference to what has been described as 'constitutionalism' in political and legal philosophy, see e.g., Allen (2003). To what extent the republican view advocated here aligns with 'constitutionalism', depends on the understanding one has of that term, including how it relates to adjacent terms, such as 'liberalism' (see also 5.2.2 above). Some, such as Thorburn, advocates (his conception of) republicanism, but Thorburn has also stressed the importance of (liberal) constitutionalism, see e.g., Thorburn (2013). I do not pursue this relation here, however, as the term 'constitutionalism' is not needed for my purposes.

514 See 5.6 above.

is interpreted, it is clearly a central feature of any republican account of law and also one that is generally recognised including in the Nordic countries.[515]

From a criminal law point of view, all the three institutions and their inner separation are highly relevant. This is suggested by the wording of the Norwegian Constitution Section 96, first paragraph, stating that '[n]o one may be sentenced except according to law, or be punished except after a court judgment'. Law, i.e., the legislator, provides the legal basis for a criminal conviction, but requires a judgement by the court, which, in turn, mandates the administration of punishment by the executive. In Continental and Nordic criminal law, this legality principle in criminal matters, *nulla poena sine lege*, is central to the constitutional protection of the individual from the state.[516] It is however recognised also for other parts of the law, such as administrative law, testifying to the broader or more general relevance of the principle of separation of powers.

At the same time, forming the state requires further institutional work on a more detailed institutional structure in terms of, for instance, higher and lower courts, and, as we will return to, institutions specific to criminal law, such as police and prosecutors providing the basis for the court case,

515 See further for instance Holmøyvik (2012) on the principle of separation of powers and the Norwegian Constitution from 1814. Holmøyvik points out a broader and more subtle reception of this principle in Norwegian law than merely a direct import of ideas from Montesquieu, who often is consider the father of this principle: 'A study of the domestic constitutional theory and practice in the last half of the 18th century shows that key elements of the doctrine such as a functional separation of executive and judicial branch was applied even before 1814, and the doctrine itself was accepted as a key constitutional principle in the Kantian natural law theory of the prominent scholar Johan Fredrik Wilhelm Schlegel in the late 1790's.' (p. 7, from the English summary). This reconnects us to the historical outline of Nordic criminal law science in 2.3 above.

516 The literature is extensive, see e.g., Krey (1983). Regarding, for instance, Finland, see Frände (1990) and Melander (2017) pp. 63–66. See also Antilla (1986) p. 187 on Nordic law more broadly: 'From the international point of view, the Nordic countries can undoubtedly be considered legalistic countries which are "bound by the law"', considering Finland as the most legalistic of the Nordic countries. It follows from what is said here that we should not only view the principle of legality in criminal law as an individual right for the individual, but a core expression of the institutional political structure of the state.

and correctional services for carrying out the sentence.[517] In the following discussion, this institutional dimension of the republican theory will not be further elaborated, since the focus is on the principles of criminal law and the legislation to implement them.[518]

In any case, the competences of all these state institutions, in criminal law and in other areas, are ultimately limited by the state being a political structure for securing the right to external freedom. Hence, a constitution cannot provide state institutions competence to violate this right. In line with this, most constitutions also contain a catalogue of *individual rights*, as positivised dimensions of the basic right to external freedom. Such catalogues often include rights such as the right to property and the freedom of speech.[519] Furthermore, many Constitutional rights are specifically directed at, or at least particularly relevant for, criminal law. Examples include the prohibition of the use of torture as means of investigation and draconic and inhumane forms of punishment.[520] The intrusive nature of penal power and the inherent risk for, and many historical examples of, misuse of such power, testify to the importance of this. The point was well captured by the Norwegian criminal law scholar Andenæs:

> My predecessor as professor in criminal law, Jon Skeie, claimed that when one studies the public criminal law in a historical perspective, one could be tempted to say that the most and worst violations have been performed by

517 How this institutional design is more specifically set up, depends on whether the criminal procedure follows the accusatorial or inquisitorial model, a subject that will not be pursued here.

518 See, however, 8.3.4 below.

519 In recent decades, human right conventions such as the European Convention of Human Rights, add another, supranational level to the legal implementation of human rights. Such international human rights interact in various ways with human rights, or the absence of such, in national constitutions, see discussions on, for instance, Denmark in Baumbach (2014) and Norway in Aall (2022). However, supranational human rights documents and conventions do not *per se* affect the principled remarks here on the relation between constitutional law and criminal law, given that these supranational human rights are part of the people's self-constitution.

520 More could be added, see e.g., Hirsch (2008), discussing whether there should be constitutional constraints against grossly proportional punishments. For a more general view on constitutions and criminal law, see, for instance, Jacobsen (2017a).

> public authorities in the name of the law. When reading this as a student, I considered it to be a gross exaggeration. Today I believe he was right.[521]

Constitutions vary with regard to the degree to which they contain rights relevant to criminal law.[522] Regardless of that, generally, such rights should be seen as having a dual function when it comes to criminal law. On the one hand, such rights may require the state to put in place criminal legislation for the protection of such rights, as illustrated by the prohibition of murder and other acts violating the individual's right to life.[523] On the other hand, such individual rights set important limits for state penal power.

This calls for a differentiation between two views for understanding the relation between the Constitution and criminal law. One view, which is probably most intuitive, is to think of the Constitution as setting certain (more or less extensive) external (legal) limits to the state's penal power; the state, in other words, has a right to criminalise and punish crimes to the extent that it does not infringe Constitutional rights. There are however several problems

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521 Andenæs (1996) pp. 9–10.

522 Canada, for instance, is often referred to as a legal order with extensive constitutional regulation of criminal law. Brudner (2011) p. 867 claims that '[o]f all common-law legal systems with written constitutions, Canada's has perhaps gone furthest in raising unwritten principles of penal justice to the status of binding constitutional norms'. In the Nordics, there has been a similar constitutionalisation of criminal law in Finland in particular, see Melander (2017) p. 57: 'The constitutionalization of Finnish criminal law began in the mid-1990s, when the provisions on fundamental rights in the Finnish Constitution were reformed. Before the reform, criminal law had quite little to do with constitutional law and fundamental rights. Criminal law was seen as almost independent from constitutional law, with only a few exceptions … However, after the fundamental rights reform in 1995, Finnish criminal law constitutionalized in quite a short period of time.' Regarding the process of a new criminal code in Norway and the (lacking) role of constitutional perspectives in it, see Jacobsen (2017b).

523 For a historical perspective on the right to life in the Norwegian Constitution Sect. 93 and criminal regulation to protect it, see Jacobsen (2021a). Currently, this is often discussed in terms of the state's duty to secure the rights of individuals, also termed the positive obligations for the state, see e.g. Stoyanova (2023). This finds a concrete outcome in the practice of the European Court of Human Rights relating to criminal law and criminal procedure, see e.g., Ashworth (2014). See also, for a Nordic perspective on this development, Träskman (2010).

relating to that view, including a failure to account for state penal power in the first place. If the Constitution is (expressing) the normative source of the legal order, then this must also be the basis for penal power and, hence, it cannot be seen as (only) an external limit for the criminal law. This leads us to the other view, the one advocated here, which sees the criminal law an as intrinsic part of the self-constitutionalising of the republican state, one which plays a distinct role, alongside the Constitution, in working out and making concrete the system of rights that are at the heart of the republican state.

To see why we should advocate the latter point of view, it is useful to probe further into the role of the legislator to concretise the form of the state, within the framework defined by this set of constitutional rights, which is the topic of the next section. Before moving onto this issue, however, it is worth stressing that as we move away from the state of nature into the civil state, a specific *legal* perspective becomes important to our discussion. Constitutions and other forms of regulations developed within the civil state are by nature legal phenomena, suggesting that legal forms and knowledge become important in developing the basic republican principles into a concrete legal order. Later on, in 9.5 below, I will elaborate on this and discuss the relevance of other knowledge perspectives as well.

7.5 The legislator's responsibilities

The state's overarching institutional structure, consisting of the legislator, the executive, and the court, assigns the legislator the task of providing the more specific regulation required for the state to fulfil its purpose, ultimately to facilitate the individuals enjoyment of their basic right to external freedom. By its decisions, the legislator makes public justice concrete and implements this in society; if needed, by use of force against individuals. This requires different forms of regulation: Rightful human activity must be facilitated, including what Kant terms commutative justice, that is, providing a market for commerce in ways that respect each individual's claim to external freedom. Such market regulations must also be reformed to constantly respond to social change and new social situations and to continuously improve society. The state must also regulate and support its own activities. A system of taxation, for instance, is required to provide the means for the state to fulfil its

functions and responsibilities, relating to, for instance, courts, education, and basic welfare systems for the poor. Issues like this reconnect us to the question about what form of state – the nightwatchman state, the authoritarian state, or the welfare state – conforms best to the Kant's political philosophy, which we go further into at a later stage of the analysis.[524] At this point, this question has no bearing on the nature of the republican criminal law.

Through such forms of regulations, citizens, on their part, receive guidance on how they may enter into valid contracts, as well as access to public institutions, facilities and structures – such as public roads – required for exercising their right to external freedom.[525] But citizens are also informed about how the state has interpreted the demands of public justice, and, thereby, what is required of them within the civil state: Abide by the rules in force: respect contracts, pay taxes, and so forth, or engage in public discourse and elections to improve the regulations. Legislation of this kind, we should stress, can basically be considered from two points of view. From one point of view, such regulation, backed up by sanctions, is the most important way for the state to *exercise* its powers. From the other point of view, this is the way for the state to *restrict* itself to rule by (formal) legal rules, a core aspect of any account of the 'rule of law'. While some accounts of the 'rule of law' are more or less restricted to this, the importance of this way of governing however, cannot be properly explained without reference to the underlying requirements of public justice and the basic right to external freedom at its core. This suggests that 'material' accounts of the rule of law are more well-argued than strictly formal accounts.[526]

But we have not yet managed to say anything about the distinct role of criminal law in this process of making the republic concrete by exercising as well as limiting power through legislation. Here, the argument will be that when the legislator is to proceed with its undertaking to concretise public justice into a set of legal regulations, one of its most pressing tasks is to establish the criminal law: as I will elaborate in 7.7, criminal law is most aptly seen as an essential complement to the Constitution, since it provides the normative

524 See in particular 9.4 below.

525 See Ripstein (2009) pp. 232–266.

526 For a discussion of formal and material accounts of 'rule of law', see Jacobsen (2009a) pp. 131–283.

baseline of the republic. Before proceeding to that, it may be mentioned here that we may find inspiration for ascribing criminal law with a foundational role in the legal order, one closely connected to its very constitution, in Rousseau's *The Social Contract* from 1762 (which also carries an obvious importance also for Kant).[527]

Rousseau's analysis is organised along a similar normative structure as the one followed so far in this chapter. Book I is about Rousseau's view of the social contract. Book II is about the sovereign, the people, and rights, ending with Chapter XII on the division of the laws, before Rousseau proceeds to Book III on different forms of government. However, Chapter XII, ending Book II, is the one of interest to us.

It starts out by Rousseau claiming that '[i]f the whole is to be set in order, and the commonwealth put into the best possible shape, there are various relations to be considered'. More precisely, four relations are identified. The first relation is 'the action of the complete body upon itself, the relation of the whole to the whole, of the Sovereign to the State', also described by 'the name of political laws', but also 'fundamental laws, not without reason if they are wise'. This then, would include for instance rules relating to the overarching form of the state and distribution of power between the state institutions. The second relation is 'that of the members one to another, or to the body as a whole'. In somewhat vague terms, Rousseau states that this relation 'should be in the first respect as unimportant, and in the second as important as possible'. This it is explained in the following way:

> Each citizen would then be perfectly independent of all the rest, and at the same time very dependent on the city; which is brought about always by the same means, as the strength of the State can alone secure the liberty of its members. From this second relation arise civil laws.

With this, Rousseau introduces the civil laws. Then, he goes on to the third relation, which is of particular importance to us. This is 'between the individual and the law, a relation of disobedience to its penalty', which gives rise

527 On Rousseau's influence on Kant, see e.g., Ameriks (2012). Rousseau's analysis is also briefly referred to in Thorburn (2022) p. 115, whose viewpoints we will connect to at certain points below.

to criminal laws. These, Rousseau stresses, 'are less a particular class of law than the sanction behind all the rest'. Finally, there is the fourth, which he describes as the 'most important of all', which is:

> not graven on tablets of marble or brass, but on the hearts of the citizens. This forms the real constitution of the State, takes on every day new powers, when other laws decay or die out, restores them or takes their place, keeps a people in the ways in which it was meant to go, and insensibly replaces authority by the force of habit. I am speaking of morality, of custom, above all of public opinion; a power unknown to political thinkers, on which none the less success in everything else depends. With this the great legislator concerns himself in secret, though he seems to confine himself to particular regulations; for these are only the arc of the arch, while manners and morals, slower to arise, form in the end its immovable keystone.

Rousseau ends this section, and thereby also Book II, by limiting his own subject to the first mentioned relation, the 'political laws', and thereby abstains from discussing the third relation of interest to us here; criminal law. Rousseau had ideas about criminal law as well, but these we will not pursue.[528] The important observation for us is the fact that criminal law is clearly seen as one of the most basic political and legal institutions, treated as a relation between the individual and the law, on level with, but also separate from, basic constitutional issues and civil laws. What it suggests is, simply, that criminal law has its own distinct role to play in the civil state. To see why, we must reintroduce the notion of 'state of nature' and consider its role when the civil state is established.

528 See Renzikowski (2012) for a critical appraisal, but also Brettschneider (2011) for a more positive, rights-oriented reading. The latter emphasises that also for Rousseau, criminal law and punishment must be viewed from the public point of view: Rousseau 'situates punishment within the wider context of political matters pertaining to social justice in political theory' (p. 74).

7.6 The 'state of nature' – within the civil state?

If we recognise that the state achieves 'monopoly of power' on a territory and also constitutes itself in accordance with the starting point mentioned in the previous section, this establishes the central preconditions for the political community leaving the state of nature in favour of a civil state. Given that these requirements are met, can we then leave the 'state of nature' as a no longer relevant perspective for our reasoning on politics and law?

To begin with, we should not think of the 'state of nature' as a mere historical fact. Kant rather thinks of it as an 'idea of reason' at work in the construction of his political philosophy.[529] As an idea of reason, the state of nature is not restricted to one point in time and space. Thereby, it cannot be one we can 'leave behind' at the moment of the establishment of the state, for several reasons. One is that we can imagine the dissolution of the state; some states fail.[530] A useful way to coin this event may be in terms of a 'macro-return' to a state of nature-like condition. This is a quite drastic situation, which implies a breakdown of basic state functions, including the police, making it a less practical case for most modern Western states, at least. Still, the idea maintains a role with regard to us recognising and respecting the (reasons for) the role and authority of the state we live in. Kant's distinction between the state of nature and the civil state seems then constantly relevant to us *within* the civil state.

There may also be other ways that the 'state of nature' can become relevant within modern states. We have already seen indications of this, for instance in Kant's discussion on the consequences of crimes, responding to his own question 'what does it mean to say, "If you steal from someone, you steal from yourself"?'[531] Kant's answer is that '[w]hoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property'.[532] Insecurity is, as we have seen, the central characteristic of the state of nature. Even more interesting, perhaps, is to note that the state of nature appears also in Kant's reflections on the death penalty. Here, as shown, he addresses a mother's murder of a child and a soldier murdering a fellow combatant in a duel. Kant's examples

529 See 5.5.

530 See e.g., Fukuyama (2004).

531 See complete quote in 8.5 above.

532 See complete quote in 8.5 above.

clearly presuppose that there is a state. Still, Kant stresses that 'in these two cases people find themselves in the state of nature'.[533]

Kant's use of these latter two examples may not appear very convincing. Regarding the first example, that a 'child that comes into the world apart from marriage is born outside the law' easily strikes a modern reader as rather ridiculous and even offensive. For many, the notion of duels in order to protect one's honour belongs to an abandoned stage of human culture. But could we, for our part, think of situations where it would be apt to talk of individuals finding themselves in a 'state of nature' within a modern nation state? I think we can. Think for instance of a spouse, living under a reign of terror, being subject to sexual and physical violence and control and restraints concerning, for instance, visiting public spaces, while the legal order has not criminalised acts within the 'household'. Here, the pre-state right to freedom is not properly translated into legal rules that clarify the rights of the spouse, making her right to external freedom insecure. Or, on a slightly larger scale, think of a residential area controlled by gangs and thugs. Even if threats and violence towards the inhabitants in the area are criminal offences, the police might not (at the time) have the capacity to intervene. Here, it may be clear from legislation what rights those living in the area have, but they have no guarantee for their rights to be protected, hence, they are insecure in that way. In the former example, the state may legislate, and in the latter, the police may get more resources to be able to intervene at some point and *restore* order in the area, but all of this is of little help to the individual finding themself in this predicament. Situations such as these do not mean that the individual does not have rights, as a basic right to external freedom always applies. But this basic right is not *secured for these individuals*, an observation which connects us closely to what we have observed as a core problem in the state of nature.

Then, from the perspective of external freedom, we may say that the individuals in these situations find themselves, *for their part* in a state-of-nature-like situation: they find themselves beyond the reach of state and its promise

533 Full quote above in 6.6.

of providing public justice to *all* its citizens.[534] For the individual, doubtlessly, this is a precarious situation, even if there are state structures in place that may possibly come to assistance. It is worth mentioning that Kant is interpreted by some as seeing *every* crime as resulting in a return to a state of nature. [535] Without taking a stand on this interpretation, it is at least clear that views like these demonstrate the relevance of the notion of the 'state of nature' within the state context.

A state that has claimed a monopoly of power has a positive duty to protect the individuals and must deal with situations such as the ones exemplified here.[536] These examples also show that while our basic right to external freedom resides at the core of our normative system, this can play out in a number of concrete ways and situations. Hence, protection of our right to external freedom requires concretisation as well as effectuation. This, obviously, connects closely to the role of criminal law in the civil state.

534 The aspect of criminal law relating to the reform of the civil state and its criminal law, to be further discussed below in Chapter 9, involves processes of reinterpretation and renewed understanding of social phenomena, which are reflected in the rules of criminal law. The recent awareness of and focus on tackling domestic violence is one example of this. From Swedish criminal law, for instance, see Andersson (2016). See also in 8.2 on criminalisation in this regard.

535 See, for instance, Merle (2010) p. 326: 'Because of the crime there is by definition a state of nature between the criminal and the rest of the community.'

536 This, as mentioned above (footnote), finds a concrete outcome in what are called positive obligations of the state.

7.7 Criminal law's baseline function and its three layers

A basic premise for the state is its legitimacy to, if needed, force the citizens to conform to *its interpretation* of public justice.[537] While punishment is clearly one (serious) means in that regard, it is not the only way for the state to use its capacity to force state subjects to conform to its regulations. Rather, the use of force to make them comply with legal norms and protected interests is a more general feature or characteristic of the state, applied in several settings: The state has several means available, including legal sanctions, to secure public justice. Such sanctions can also have features similar to punishment, which certainly, is not the only way one can end up in a state institution or being forced to pay money. Certainly, imprisonment, the 'classical' (even if historically, a rather modern) form of punishment is fairly unique as a legal sanction. But criminal law today includes many forms of punishment, some of which are hard to distinguish from legal reactions outside the criminal law.[538] Some legal interventions, such as forced psychiatric treatment, can sometimes appear to be even more intrusive than punishment. As such, punishment is not unique in consisting of the use of force. These observations suggest that focusing on the (physical) character of punishment is not the way to grasp criminal law's distinctiveness.

Rather, criminal law is best explained by reference to its broader meaning or function, which, in turn, provides us with starting points to explain the specific nature of punishment as a legal sanction. As already indicated, I would suggest that we should think of criminal law as having a *baseline function* in

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537 At this point, we face a challenging issue relating to the nature of citizenship. Whereas some are obviously citizens, and hence members of the community as well as subjects to the criminal law, there are also more challenging questions relating to the extension of criminal law in terms of e.g., extraterritorial jurisdiction as well as the contemporary integration of criminal law and immigration law, see the critical appraisal of criminal law and citizenship in Franko (2023), and further in 10.4 below. While these challenges must be recognised, they cannot be pursued here. The implications of the principled starting points developed for such debates must be left to another occasion. For this reason, I mainly use the term 'state subject' as a more flexible reference including the various ways one can become affected by the state's power.

538 See, for instance, 9.5 below on administrative reactions, such as a fine, not quite unlike the similar form of punishment.

the state. After all, while there may be wrongs of many kinds in modern legal systems, one usually does not find wrongs that are classified by law as *more serious* than those regulated by criminal law. This may appear as a trivial point, but there may be more bite to it than one may assume at first glance.

As already mentioned, the Constitution articulates the state's basic values and institutional political structure as well as basic rights for the individuals, which all contribute to concretise the state formation.[539] Generally, such Constitutions are formed at an abstract level, and outline the *overarching* form of the civil state, which contribute to demarcate it from the state of nature. It does, however, not do so completely. Moving into the civil state, a need for a 'negative' civil constitution quickly emerges, one that points out the acts that are categorically prohibited within the civil state – acts that breach the very 'social contract' that the state is founded on – and give effect to these prohibitions. The Constitution's 'positive' characterisation of the state would in a sense be 'open-ended', unless we made clear also what the civil state *is not*: What good is there in the Constitution proclaiming its citizens' right to freedom and the state using this right to legitimate itself, if the state does not at the same time guarantee it for its citizens in the face of manifest violations of it?

In line with this, we should understand criminal law by reference to the work it does providing the state project with its 'negative' normative baseline. Notably, it has a distinct role in clarifying and securing the minimum respect that each of us are entitled to as we enter into a civil state with others. Basically, it identifies, reacts to, and protects us against acts that do not recognise each individual as members of the civil state. Or, in the words of Thorburn, 'criminal law's concern is with someone's effort to undermine the whole system of equal freedom itself'.[540] A legal order without such a baseline would appear as incomplete and, in a sense, open-ended; while its principles would still be

539 See 7.4 above.

540 Thorburn (2013) p. 100. Views like this seems common to republican criminal law theorists, see e.g., Dagger (2011) p. 48: 'Crime certainly harms or threatens the persons and property of private individuals, but it also tears at the sentiments that make a sense of common life, under law, possible.' For a Nordic view, similar to this, see Elhom/Baumbach (2022) p. 32, claiming that criminal law defines the border between civilisation and barbarism. Holmgren (2021) pp. 41–42 also recognises the particular nature of criminal law but describes it as a special area of law standing 'next to' other areas of public law.

valid, it would formally allow (certain) acts that manifestly contradict its own purpose. This situation would create uncertainty about its fulfilment of its duty as protector of public justice. A state that does not fulfil this task cannot in any meaningful way be said to be a protector of public justice, a protector of the peace, a political authority, or anything of the like, the absence of which would be equal to staying in the state of nature.[541]

For the state, then, aspiring to represent the shift from the state of nature to the civil state, the task of completing and upholding the state's form with a view to the possibility for violations of external freedom, is essential. The aspiration to rule (legitimately) necessarily implies a duty to do so, and this duty will be stronger the more serious the violation of external freedom at stake is.[542] In this sense, we can indeed say that *criminal law* is a categorial political imperative. It follows from this that there is good reason to accept Duff's claim that criminal law is 'an important element in a polity's structures of governance', a common stance for republican criminal law theorists.[543] As Duff also states:

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541 In recent literature, Thorburn has stressed this perspective on criminal law, and considers the criminal law to be a central aspect of state authority in itself, see e.g., Thorburn (2020) p. 49: 'The availability of criminal punishment for violations of the state's right to rule is a necessary part of that claim of practical authority.' While I share this apt starting point, however, there are some differences in our views, which also will be clearer below. To begin with, Thorburn relates mainly to Aquinas, see e.g., Thorburn (2017) p. 17, and is not primarily concerned with a Kantian trajectory, as I am. Furthermore, he seems to focus, even if not exclusively, on justifying criminal punishment, which I see as only one of three functions for criminal law. Also, as I will suggest later in this section, Thorburn's point of view may put too much emphasis on the (formal) right to rule aspect of crimes compared to the violations of the ('pre-state') individual right to external freedom that the state is to protect through its right to rule. For that reason, I would not adopt Thorburn's use of parental authority as an analogy here.

542 There is also a geographical aspect to what has been said here, in the sense that rules concerning criminal jurisdiction and the state's competence vis-à-vis other states in that regard, are also of importance in this regard. This subject will not be pursued here. For Nordic perspectives on jurisdiction, see e.g., Wong (2004) and Asp (2017).

543 Duff (2018a) p. 5. See also Duff's analogy to professional ethics, and even more powerful, the 'Founding Parents' view' (p. 92). The view of criminal law as intimately connected to Constitutional law can also be found in Nordic criminal law science, see e.g., Tapani/Tolvanen (2016) pp. 16–17.

> There is… a close relationship between the 'subsistence' of a polity and the effective criminalization of (the denial of 'impunity' for) certain kinds of wrongs: but that relationship is internal, not causal or consequential, and the threat to subsistence is an implication of the failure to criminalize what we should criminalize, rather than an independently identifiable ground for criminalization.[544]

Furthermore, as we will return to, acts of the kind relevant to the criminal law, with their detrimental impact on the individual's right to external freedom and the civil state as its guarantee, warrants a particular kind of blame. However in addition, since the state is legitimised to use power to force us into the civil state, nowhere in the state construction is the state as justified in making use of (the extent of) power as it is in handling those rules that we must respect in order to avoid returning to the state of nature, and if needed, force some of it citizens back from it.

As the state thereby applies its most serious means of force in terms of criminalisation and punishment, it also demonstrates its role and capacity to guarantee (core aspects of) the rights of individuals, which is decisive for its own authority.[545] This in turn, is decisive for its fulfilment of its societal function. A state that proves incapable of delivering the adequate protection of its citizens is likely to experience an increase in social conflicts, including 'private' responses to violations (which, Kant seems to suggest, one would have the right to), or, at a minimum, public insecurity. Only by this kind of fusion of the normative baseline for the civil state and the use of force to uphold it, can the civil state constitute that kind of normative-factual power that state power, as we have seen, ultimately is. This, then, is also the underlying message of criminal law: *Do not violate the ground rules of the civil state, and if you do,*

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544 Duff (2018a) p. 146.

545 There is, of course, an external side to this, relating to warfare and the military, but the discussion here does not go into that issue, which concerns the relation *between states*. This does not mean that the criminal law perspective is completely irrelevant in this context. In addition to the fact that many states have separate criminal regulations for military service (refusal to obey orders, for instance), international criminal law regulates war crimes (see Article 8 of the Rome Statute). And at an institutional level, the military and the police may in some settings also assist each other, see further e.g., Auglend (2018).

you will be forced back into it. Criminal law, and punishment as a distinctive legal sanction, 'upholds the supremacy of law in time and space', to borrow Ripstein's apt phrasing.[546] In this regard, we must also keep in mind that while the state's authority can rely on different sources, including the individuals' perception of the state as legitimate and fair, ultimately, the state's authority is connected to a monopoly of power, and, hence, a capacity to use force (as the default alternative) to make us comply with its demands.

Criminal law, on this account, first and foremost plays a role in protecting the individual's right to freedom: As shown, this is the key to the normative system upon which the civil state is founded. In line with this, we should see individual freedom as the primary premise informing all aspects of criminal law. The view of criminal law offered here belongs, in other words, to what is referred to as 'freedom theories' of criminal law.[547] The recognition of state power, including its criminal law and use of punishment to protect the civil state and its normative baseline, is thus *not* in any way an unlimited recognition of state power – one that sets the protection of state power as its overarching purpose. That would amount to some kind of authoritarian legal theory and view of criminal law, one that cannot be normatively justified. Instead, the freedom principle is internal to the state project itself, and hence limits it from within. As aptly coined by Pawlik, while 'die Institution der Strafrechtspflege unverzichtbar für den Bestand einer freiheitlichen Lebensform ist', the criminal law is 'selbst Bestandteil dieser Lebensform' and, consequently, must itself 'freiheitskonform ausgestaltet sein'.[548]

To properly account for the combination of the freedom principle and the role of state power in criminal law, it is necessary to clarify what I will call the three 'layers' of the baseline conception of criminal law advocated here.[549] To begin with, social conflicts typically involve two individuals (at least), the

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546 Ripstein (2009) p. 318.

547 See Vogt (2021) with further references. In German literature, the term is used by e.g., Pawlik, as mentioned in 6.7 above.

548 Pawlik (2012) p. 27,

549 Part of what I say here may resemble the distinction found in Kant between formal and material wrongs. As I will return to shortly, the layers presented here are indeed relatable to this distinction, which I do accept. I do, however, not find it sufficiently precise for the complex considerations involved in criminal law, at different levels, and I therefore approach it through these three layers.

(alleged) offender and its victim, each with their own right to external freedom. This we can call the *layer of individuals* involved in the social interaction that criminal law primarily regulates. Secondly, violations of the freedom principle in such interactions are of a more general relevance to the public at large, since violence, for instance, creates insecurity at a broader level. Crimes may cause (actual) public fear, but, as we will return to, all crimes involve a denial of, or failure to respect, the basic right to external freedom, and thereby, ultimately, deny security for all. This we can call the *public layer*. But on top of that, rights violations in terms such as violence, as well as the feuds that it may result in, also challenge the state's claim for authority as protector of public justice, with its background in our duty to move into a civil state. As put by Thorburn, '[t]he offender does not merely fail to conform to the legal rule, he usurps the state's role in setting the terms under which he may interact with others, thereby challenging the state's claim to be the sole authority on the matter.'[550] This we can call the *authority layer* of criminal law.

It may, admittedly, be particularly challenging to distinguish between the first two layers: the individual and the public layer of criminal law. This difficulty stems from the fact that they are, from one point of view, one and the same. An individual has a right to freedom (the individual perspective) and, by broadening the perspective to include all individuals, that is, the subjects of that state, we get to the public layer. The reason why it is still useful to differentiate between the individual and the public sphere, is simply that each and every one of us are distinct right holders and hence distinct members of the 'kingdom of ends', who can be differently situated or positioned in relation to, for instance, a violation of the right to external freedom.[551] Clearly,

550 Thorburn (2017) p. 9. See also e.g., Thorburn (2022) p. 115 about criminal wrongs as 'wrongs against the state's exclusive authority'.

551 This, it may be added, implies a departure from a core premise for Feuerbach, i.e., his sharp distinction between the *homo noumenon* and the *homo phenomenon*, relating law only to the latter as an object in a causal world. I read Kant differently here, for instance in his theory of action. It suggests a more complex 'blend' of these two perspectives on the (same) human being, one that cannot be fixed as it involves a non-causal element; human freedom. If this is correct, this means that while there may still be valuable insight in it, the broad (historical) appraisal of Feuerbach's theory of punishment in Nordic criminal law scholarship (see 2.3. above) should be reconsidered.

if A assaults B, B is differently positioned towards this violation than is C, who for her part reads about it in the newspaper and becomes reluctant to visit public places because of it. In other words, this distinction pays heed to the fact that we are differently positioned in relation to crimes, some directly violated, others more indirectly so.

The distinction between the public layer and the authority layer is more obvious, even if these two are closely connected as well. It follows from the fact that public implications of violence are not dependent on the shift to a civil state (a violent act can cause general distrust and more uncertainty in the state of nature as well), while the authority aspect is.[552] While the public layer springs directly from the right of all individuals to external freedom, the authority layer springs from our move into a civil state to remedy the problems in the state of nature relating to lack of security (at different levels) for this right.

The latter two layers, the public layer and the authority layer show in different ways why failure to respect one individual and their right to external freedom, for instance by killing someone or stealing from that person, should be considered *not only* a wrong to this individual. Violating one individual has additional implications, and these should also be accounted for in our concept of crime and the blame that should be conveyed for such acts. We should, however, stress that this does not mean that a crime is first and foremost to be considered a 'collective' wrong, neither to the public nor to the

552 The fact that the nature and identity of the community changes when brought into a state context is a different matter.

authorities, nor to a combination of the two.[553] It is clearly not. It is *primarily* a wrong towards individuals who has left the state of nature and entered (or even been forced into) the civil state where their innate right to external freedom is guaranteed. Kant, Ripstein observes, invites us to see the concept of crime as complex in this way:

> So a crime is wrongful both against its victim and against the public: it is inconsistent with the rights that private persons have against each other; *and* it is inconsistent with the right of the citizens, considered as a collective body, to uphold their respective freedom by giving themselves laws together. Every crime will, by its nature, 'endanger the commonwealth,' because the commonwealth itself is nothing more than the possibility of the citizens giving themselves laws together.[554]

But on top of this, however, we are, as suggested, helped by distinguishing between the public layer and the authoritative layer, as these imply somewhat different perspectives of relevance to our reasoning on criminal law. The public give 'themselves laws together' in the form of the state, as the authoritative

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553 For my part then, I would not follow Thorburn (2020) p. 49 in saying that 'true crimes are best understood as wrongs against the state's right to rule'. Similarly, while Thorburn (p. 57) argues that the 'nature of the wrong is simply that the criminal accused has attempted to usurp the state's role as sole lawmaker in the jurisdiction', I would restrict myself to saying that this is one aspect or layer of the crime, which similarly to the other layers, springs from the individual's right to external freedom. This is important in order to avoid the conception of criminal law turning into what for instance Jareborg (2000b) p. 434 describes as the 'primitive' criminal law ideology: 'Whatever the reasons for considering an act or omission to be wrong, punishment was the reward of *disobedience* (or insubordination or defiance or rebellion). The offence was seen as directed against an *individual* in a position of power or authority, let us call him the *ruler* (in practice this individual often also was legislator). When state punishment was introduced this conception of crime as disobedience to a ruler was taken over. This is especially clear in the case of the peace legislation of the Germanic rulers: the essence of the offence was that the prince's peace was broken. When the ruler stepped in as a guarantor of peace, a breach of the peace automatically implied disobedience (infidelitas). The nature of the offence changed. It was no longer a private matter but an offence against the state power embodied in the ruler.'

554 Ripstein (2009) p. 313.

institution for deciding on and upholding the rights of the individuals, through its legitimate claim to monopoly of power.[555]

The three layers of the civil state now unpacked can be arranged in the following way:

Individual's right to freedom	}	Public justice	}	Authority, force by default

While it is helpful to distinguish between these layers, we should stress that they cannot be clearly demarcated. Also, their relation can be described in different ways, but most fundamentally, we are talking about a form of successive or derivative relation, where the public layer builds onto and denotes a more general view on the individual's right to freedom, while authority, in the next step, is the means as well as the precondition for securing individual rights and public justice and can hence be unpacked from the first layer. It is useful also to stress that this threefold distinction sets this conception of criminal law apart from an 'ethical' conception of criminal law, which would focus on the individual, and possibly also the public layer, but could not account for the authoritative nature of criminal law.[556] Rather, our approach here demonstrates the importance of criminal law as a *public* matter, as a matter for the state. As noted, Kant views punishment as necessarily connected to public authority, which is the state. Given the central role of criminal law in the constitution

555 In Nordic criminal law scholarship there are certain viewpoints and conceptualisations that to some extent can be related to this analysis. Holmgren (2021) offers a distinction between different forms of harm (called b-harm and f-harm) that allows for a broader analysis of criminal law. However, Holmgren, whose approach is developed mainly in a descriptive analysis of the Swedish law of sentencing, relates the latter (at some points, at least) to a prospective point of view and need for prevention, see e.g., p. 137 in Holmgren's analysis. This seems to mix what is separated here as the three layers of criminal law and what will be described as its three functions, see Chapter 8 below.

556 This has also been one of the most important objections by republican theories of criminal law against moral retributivism and similar positions. Failure to properly develop this political dimension is also a weakness in the account of the aims of criminal law in Jacobsen (2009a).

of the state, this provides a strong warning against, for instance, forms of privatisation of the administration of punishment.[557]

So far, then, we have unpacked criminal law's role as a constitutive part of the state project, one relating to the civil state's normative baseline, moulding the concrete form of the state. In doing so, as shown, criminal law constitutes three different layers: the individual layer, the public layer, and the state authority, which must all be accounted for in order for the republican conception of criminal law to be developed. In the next chapter, we will look closer at other specific functions that may be ascribed to this conception of criminal law.

557 See e.g., Harel (2014). This is not the same as saying that there cannot be 'private' elements in the organisation of the criminal justice system. Establishing whether, how, and to what extent this could be justified, requires a broader discussion, taking into account the many ways this could happen. The issue includes not only concerns relating to private prisons, but also, for instance, the police's relation to private security companies and watchmen as well as issues relating to restorative justice arrangements within the system of criminal sanctions.