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8

The three functions of the baseline conception of criminal law

8.1 The three core functions and their inner relation

So far, I have argued that criminal law should be seen as providing a normative baseline in the civil state. Furthermore, I have argued that criminal law has three *layers* to it, pertaining to individual, public, and authority perspectives on criminal law, which must all be heeded when we now proceed to the more specific functions of criminal law. The baseline view of criminal law, as I will argue in the following, can be organised along three core *functions*: 1) the *declaratory*, 2) the *retributive,* and 3) the *preventive* functions of criminal law.[558] The first, the *declaratory* function clarifies which acts can be considered as fundamental violations of the right to freedom as protected by the civil state; the second, the *retributive*, is concerned with criminal law as responding to actual violations; and the third, *preventive* function, addresses

558 That freedom theories of criminal law may serve more than one function is also claimed by Vogt (2021) p. 5. Conceptualising these as these three functions corresponds to how the aims of criminal law are described in Gröning/Husabø/Jacobsen (2023) pp. 42–54.

criminal law's aim to prevent such acts from occurring in the future.[559] Each of these functions will be developed further in this chapter, the declaratory function in 8.2, the retributive function in 8.3, and the preventive function in 8.4 below.

To begin with, however, it is helpful to consider, at a general level, how these functions relate to each other and, in particular, why we should consider number 2, the retributive function as prior to number 3, the preventive function. This is important as it allows us to clarify the specific character of this conception of criminal law in view of the distinction between 'absolute' and 'relative' conceptions of criminal law, or, if one prefers, between deontological and utilitarian conceptions, which, as already mentioned, represents one of the central debates in the philosophy of criminal law and includes the interpretation of Kant's philosophy of criminal law.[560]

The declaratory function should be considered as prior to the others because it serves an aim of its own: to determine the (negative) form of the republic with regard to the various relevant types of acts. Responses to violations of such declarations as well as the aim of preventing such violations in the future necessarily presuppose that such declarations are in place. The declaratory function, we should stress, is not only an intermediate step for those functions, but an important function in and of itself. As we have seen,

559 The first (and most distinct) term, 'the declaratory function', is used also in Duff (2018a) p. 22. The term 'preventive function', for its part, may be said to be more unclear than the others. The concept of prevention of crime is many-faceted, as illustrated by the fact that different areas of law have prevention of crime as one important purpose (criminal law and police law being the two most central). The many-faceted nature of prevention is also seen in contemporary discussions on, for instance what is called the preventive turn in criminal law, also discussed in Nordic criminal law, see e.g., Melander (2023). There is not enough space here for us to dig into the concept of prevention. Instead, the discussion will concentrate on prevention in the context of criminal law, with general prevention or deterrence as a key notion. By starting out from this, general starting points about the relevance of prevention to the justification of criminal law may be developed, including relevant features of prevention, such as individual prevention, while not going into a more complex analysis of the concept.

560 On the interpretations of Kant in this regard, see 6.3 above. This distinction is also applied in Nordic criminal law scholarship's discussion of the justification of punishment, see e.g., Tapani/Tolvanen (2016) p. 23, who at the same time points to the fact that the 'most interesting' new ideas contain elements of both.

a core problem in the state of nature is the lack of clarification of the implications of the right to freedom, and by declaring certain acts as wrongs, the state provides a firm response to this uncertainty at the baseline level of the civil state. By making such declarations (and, as we will return to, if needed, using power to enforce them), the state performs its role as authority for public justice; it is the state's criminal code that decides what are to be considered as 'social sins'.[561] This declaration, in turn, in different ways affects how we should more precisely understand the retributive function of criminal law, something we will return to below in 8.2.

The relation between the second (the retributive) and the third (the preventive) function is more difficult to account for. To begin with, both the retributive and the preventive function should be recognised as crucial functions of the criminal law. This view seems also to be held by Kant.[562] Similarly, we have seen that for instance, in German philosophy of criminal law, various forms of mixed theories have been influential, even if these may be challenged as incoherent at a deeper level.[563] But also criminal law philosophy's constant shifts back and forth between retributivism and preventive theories indicate that both play a role in explaining criminal law. At the same time, as already suggested, the retributive and preventive functions cannot be simply and haphazardly bundled together.[564] Rather, their relevance must be explained with reference to a common aim: that of public justice. For the state as a protector of public justice, both actual and possible violations of the right to freedom are relevant problems that it should tackle. Ultimately, one may even say about retribution and deterrence that 'each of them requires the other', and that a

561 The expression 'social sins' is taken from Jareborg (2004) p. 534. The expression 'a list of sins' was also used, for instance, in the process of reforming the criminal code of Finland, as stated by Anttila/Törnudd (1992) p. 19.

562 See 6.3 above and also for instance Wood (2010) p. 114, who, while considering Kant a retributivist, also stresses that 'Kant is not opposed to legislators or judges also making use of the institution of punishment to achieve the ends of deterring crime, morally improving the offender, and so forth'. 'Morally improving' in this regard, should not be understood as ethical improvement. Given Kant's concept of morality as autonomous self-legislation, there are clearly inherent restrictions with regard to how individual ethical progress can be achieved through use of punishment.

563 See 6.7 above.

564 See 6.7 above.

'Kantian account must analyze punishment as a fundamental aspect of legality, and show how each of deterrence and retribution is partially constitutive of a system of equal freedom under law'.[565] For these reasons, we should recognise both the retributive and the preventive function of criminal law.

Regarding their more specific structural relation, things get more difficult. On the one hand, in a temporal perspective, possible crimes are (logically) prior to actual crimes, which might suggest that the preventive function should be prioritised. By the term 'possible crime', I mean nothing more than the possibility of a crime being committed.[566] Certainly, from the point of view of public justice, it is, all things being equal, better that crimes do not occur than that they do occur but are properly responded to by the state. At the same time, however, one can, from the point of view of public justice, also say that an actual crime is a more serious problem than a possible crime. Adding to this, retributive responses to crimes are obviously a central part of how the criminal law achieves (or at least aims to achieve) its deterrent effects. So, these two functions appear to be intertwined.

There are, as we have seen, different views on the relation between the retributive and the preventive function and, that there are differing interpretations of how Kant perceived it. Wood, for instance, emphasises, in view of Kant's lectures, deterrence as the main reason for punishment, while Kant's strong retributive claims are seen as (normative) requirements for achieving

565 Ripstein (2009) p. 301. Ripstein also claims (p. 307) that the 'retrospective application appears conceptually prior to the prospective, because it determines the content of the threat that can be made; the prospective application appears conceptually prior because retrospective application does nothing more than uphold the law's entitlement to guide conduct externally'. With regard to the first point here, however, Ripstein may appear not to differ between the declaratory and the retributive function; the content of the threat is made primarily by the criminalisation. Others, such as Wood mentioned below, have interpreted Kant somewhat differently.

566 This, then, includes the mere general possibility that a crime may be committed in society as well as situations where it is more likely that a crime will be committed by one specific individual, for instance where someone has concrete plans about committing a specific crime. At what point a possible crime turns into an (actual) crime relates to what is considered a crime, and how the related concepts of criminal preparations and attempts are understood (and, in positive law, criminalised), but that is not of importance here.

that aim.[567] This view warrants a closer look, not only because similar views are found among other prominent Kant-scholars, such as Byrd, but also because it seems to be closely related to one of the most influential views about the criminal law in the Nordic countries, laid out in particular by Jareborg – comparable to HLA Hart's mixed theory of criminal law.[568] In Jareborg's view, deterrence is the overarching aim of the system, while the retributive principle lies at a 'lower' level regarding distribution of punishment in specific cases. From the point of view of the baseline approach advocated here, I would still claim that there are reasons to consider these functions as more intertwined than Jareborg suggests: They should not mainly be viewed as related to different levels of the criminal justice system, but rather understood in terms of the roles they play in the overarching aim of protecting the subjects' right to external freedom.

From this perspective, we should reverse the reasoning and consider the retributive function prior to the preventive function, a view which also provides the structure for the following discussion.[569] There are several reasons for this. As we will return to, we should think of the state as having a stronger normative obligation to address actual crimes than to prevent future crimes in

567 Wood (2010) p. 115.

568 See Jareborg (1992) pp. 136–137 and Hart (1968) pp. 3–13 on justifying aims and principles of distribution. Jareborg describes his approach as a way to develop Hart's 'significant improvement'. For a closer analysis of different conceptions of this kind, mainly in Swedish and Anglo-American criminal law theory, see Holmgren (2021) pp. 58–64.

569 This implies that the account of criminal law in this book is closely related to retributive accounts of criminal law, see e.g., Duus-Otterström (2007), advocating the view that '*retributivism should serve as the basis of the penal regime*' (p. 15). If one narrows the perspective down to what we may call the punitive aspect of criminal law, then this fits well with the viewpoints advocated here. However, as already suggested, there is more to criminal law than this, and we should be open also to preventive considerations influencing criminal law in different ways.

general, in particular with regard to the victim of the crime.[570] As most criminal law orders reflect, an actual violation of a right is more serious than the threat to perform the same violation. The latter is also a more undetermined task, which, in turn, in criminal law finds itself limited by the principles of just retribution: basically the requirement of guilt for criminal responsibility, the principles of equality/proportionality as benchmark for the punishment, and more generally, the individual right to freedom.[571] Thereby, the preventive function in criminal law is framed by not only by the declaratory function – that is, the regulation with its identification of wrongs and fair warning of punishment – but also on the retribution of actual crimes. This, so to speak, leaves a smaller space for independent considerations about how criminal law can work to prevent crimes, for instance, through general deterrence or individual preventive considerations, which, at the same time, fend off often-heard objections to utilitarian conceptions of criminal law.

For these reasons, we should, as mentioned, consider the retributive function as prior to the preventive. It is worth adding that one should not consider this point of view to 'devaluate' the importance of providing future security for the subjects of the state. On the contrary, as I will return to in 8.4 below, what is said so far can instead be viewed as underlining the importance of public justice and the right to freedom at the heart of it – the reason why we should also strive to prevent violations of this right for the future as well. A legal order that does not consider itself obliged to respond to actual crimes seems to have weaker reasons to prevent such crimes as well, and *vice versa*. As such, there are good reasons for Ripstein's claim that these two rationales are 'partially constitutive of a system of equal freedom under law'.[572] The character of, as well as the relation between, these three functions ascribed to criminal law will be further clarified as we now turn to each of them.

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570 Obviously, in some cases there is an immediate, specific risk for a crime being committed. Then, one might say, the duty for the state to intervene to avert this crime will be (at least) just as strong as for responding to actual crimes. Here, however, we connect not only to the relation between criminal law and police law, but also to the fact that acts implying such risk may themselves be criminal acts, for instance as preparatory acts or attempts. Due to these complexities, I will not probe further into this.

571 Regarding criminal responsibility and its responses, see further 8.3 below.

572 Ripstein (2009) p. 227.

8.2 The declaratory function: On criminalisation

A central task for the civil state is to provide clarification of the implications of the individual's basic right to freedom. The general right to external freedom is abstract, and a core problem in the state of nature is, as we have seen, precisely uncertainty about one's (and other's) rights. Authoritative clarification of the bounds of freedom is necessary for the state's subjects to have security for their rights in society, including the right to free action within their own freedom sphere, meaning the available range of free actions for a socially situated individual at any given point in time.[573] However, as already touched upon, within a civil state legislation is required for a number of spheres of society and at different levels of them. With growth and increasing complexity in society, the extent of this legislation increases as well.

This raises a question about the scope of criminal law as one part of this broad set of regulations that must be put in place. Rousseau for instance, as seen in 7.5, seems to think of punishment as a means to retribute acts of 'disobedience' in general. But, for reasons pointed out above, this cannot be the republican answer: It would make the entire legal system a matter for criminal law and punishment, which is hardly compatible with the aim of external freedom for the states' subjects. The baseline character of criminal law advocated in 7.7 above, suggests a narrower scope for criminal law. Only where we are talking about core violations of the right to external freedom, the very normative basis for the civil state, is the state justified as well as obliged to label the act as a crime and hence make it subject to punishment.

As a result of this baseline starting point, criminal law should be seen as serving its declaratory function in two ways, compared to other forms

573 The content of the individual's freedom sphere is not static, but rather dynamic and affected by *inter alia* 1) the individual's own action; I can arrange my practical matters so that my available range of free actions are either extended or increased, 2) the actions of others, and 3) changes in the factual environment I am situated within. An example of the first is that if I burn down my house, I can no longer enter into it. An example of the second would be a situation when I am heading for a free seat at the bus, but someone else takes the seat it before I get to it. An example of the third is flowers popping up in my garden in the spring, making it possible for me to 'pick flowers'. This connects closely to the concept of action, which we will return to below.

of legislation. First, whereas much of the other forms of legislation concern (only) one specific area of society, such as taxation, contracts, or family life, criminal law *cross-cuts* in a unique way, and more so perhaps than any other area of law. Or, as Rousseau aptly points out as well: criminal law is 'less a particular class of law'.[574] It is the task of the legislator to settle within each area of society the normative baseline of the civil state. In fact, more or less all areas of society are subject to this kind of 'baseline coding', including religion (hate speech, for instance), sexuality (sexual abuse and rape), and politics (corruption, misuse of office). Areas of society such as traffic, healthcare, sports, and many more, could be added to the list. Each of these areas entails challenging demarcation issues. For instance, which violations of the law of contract are to be regarded as a crime and not merely result in contractual consequences, such as compensation or termination of contract? In family life, however, the questions will be somewhat different. How serious must verbal abuse of spouse and children be to qualify as part of the normative baseline and hence criminalised as, for instance, domestic violence?

This baseline coding of areas of society gives rise to a *criminal code*, with different sections for different forms of violations – crimes against property, violent crimes, invasions of privacy and so forth. But to some extent it also takes place in terms of separate sections in administrative codes, identifying the violations of that code that are to be considered as crimes. In these instances, the nature of criminal law as a baseline coding cutting across social fields, like traffic or healthcare, is particularly visible.[575] Furthermore, the state's obligation to identify the normative baseline – that is, to identify what are considered as core violations of the right to external freedom and to set out proper responses to these – has implications for the *form* in which this is done, pointing us once more to the principle of legality in criminal law mentioned in 7.4 above. Given the high normative relevance for the state construction of the acts belonging to the baseline, the consequences for individuals who violate this baseline, and, related, the importance of the principle of separation of powers in criminal matters, criminalisation must be done in clear

574 See 7.5 above.

575 As a consequence of this, the distinction of crimes in terms of *mala in se* and *mala per prohibita* is not considered relevant for the following analysis. I will return to it below in 9.5 (footnote).

and accessible ways.[576] A state project that aims to provide security for the individual's right to external freedom, must in particular provide certainty when it comes to its normative baseline and the state authority invoked by violations of it. Furthermore, (only) the democratically elected legislators are mandated to decide on the content of the normative baseline.

While the baseline reference gives us a starting point for criminalisation, more guiding principles are needed for which acts that are to be considered violations of the civil state's normative baseline, connecting us to the extensive discussion on criminalisation principles. For some time now, whether and to what extent we can develop normative guidelines for criminalisation have been much debated. The Anglo-American discussion has to a great extent revolved around the harm principle, often seen as having originated with John Stuart Mill's famous phrasing in *On Liberty*.[577] There is a longstanding and extensive debate on this principle, its justifiability as well as capacity to guide legislators and (better) alternatives.[578] In the German discussion, the core notions for the discussion on criminalisation have been the *Rechtsgut* concept as well as the already mentioned *ultima ratio* principle.[579] The Anglo-American harm principle and the German notions have also found their way into the Nordic discussion.[580] For instance, the harm principle has made its mark on Norwegian criminal law as it was acknowledged by the legislator as the guiding principle for the current criminal code of 2005.[581] The *Rechtsgut* concept, for its part, has acquired a position particularly in Finnish criminal law, even if having 'drifted away from its traditional roots in German criminal

576 See 7.4 above. For, from a legality perspective, critical remarks on the standards of contemporary criminal legislation in Norway, see e.g., Gröning/Jacobsen (2021).

577 See Mill (1859) p. 68.

578 For important contributions to this discussion, see Feinberg's four volume study (Feinberg 1987a, 1987b, 1989, 1990), Husak (2008) and Duff (2018a).

579 See e.g., Hefendehl/Hirsch/Wohlers (2003). There are connections and similarities between the German and the Anglo-American discussion. Where, for instance, the German discussion often emphasises '*ultima ratio*', Anglo-American scholars sometimes emphasise a relatable 'last resort' point of view, see e.g., Chiao (2019) p. x. Whether, how, and to what extent the German and the Anglo-American approach overlap cannot be pursued further here, but see e.g., Peršak (2007).

580 A key Nordic work is Lernestedt (2003).

581 See Frøberg (2010).

law literature'.[582] Developing as well as applying specific criminalisation principles have, however, proven difficult.[583] This has spawned critical views on such principles. Dubber, for instance, concludes:

> [W]e can see that the *Rechtsgut* resembles the harm principle of Anglo-American criminal law more than one might have expected. Both are said to carry critical potential by tracing a line around the state's penal power. And yet both turn out to do the exact opposite, by serving as a ready-made rationale by label for the affirmation, and even the extension, of that power. In the end, both amount to no more than convenient housekeeping tools for inquiries into the legislative intent or doctrinal analysis.[584]

Despite such critique, many continue – in view of contemporary problems relating to extensive and poorly formulated criminal offences – to emphasise the importance of criminalisation principles.[585] However, this seems also to be good reasons for lowering our ambitions in this regard. Duff, for instance, advocates in this way what he calls a 'thin master principle':

> we have reason to criminalize a type of conduct if, and only if, it constitutes a public wrong, and a type of conduct constitutes a public wrong if, and

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582 See, for instance, Melander (2017) p. 54 and pp. 68–70, quotation from p. 70. For a Swedish example, see Asp (2017) p. 39, for Norway, see e.g., Gröning/Husabø/Jacobsen (2023) p. 43. Holmgren, in his study of the Swedish law of sentencing, also makes use of the term, but sees it as a reference to 'different principles of criminalisation' (see pp. 208–210) and also connects it to prospective proportionality considerations (see pp. 221–225).

583 Critical perspectives on the harm principle can also be found in Nordic literature, see e.g., Lernestedt (2003) and, regarding the Norwegian legislator's adoption of it, Frøberg (2010).

584 Dubber (2018) p. 49. For a sceptical view of the *Rechtsgut* concept, see also e.g., Jareborg (2005) pp. 524–525, who sees 'the doctrines concerning *Rechtsgüter* as a blind alley; something must be wrong when almost 200 years of intensive intellectual activity seem to have resulted in more confusion than clarity'.

585 See e.g., Husak (2008) on 'overcriminalisation'. In Nordic literature, the importance of criminalisation principles has, for instance, been emphasised by Sakari Melander in Melander (2017) p. 53: 'There is, thus, an inevitable need for defining criteria that limit the scope of criminalized behaviour.'

> only if, it violates the polity's public order. So, I am not going to argue that no master principle can be plausible. I will argue, however, that only a thin master principle will be plausible, and that therefore master principles cannot offer us much substantive guidance in our deliberations about criminalization: for only thick master principles can offer such guidance.[586]

The premises laid out so far suggest that this is a useful take. The combination of the basic right to external freedom as the normative reference point for the civil state, and criminal law's distinct baseline role in relation to that, as already suggested, provides us, with a general normative principle for criminalisation: Violations that strike at the heart of the right to external freedom and its protection by the civil state fundamentally fail to respect public justice and should therefore be targeted by the criminal law.

This 'master principle' can also be made more concrete. Here, the three layers of criminal law pointed out above in 7.7 are important, providing us with three categories for criminalisation. First, there are direct violations of an individual's right to external freedom, which include acts such as murder, severe bodily harm, violations of the individual's right to property, and so forth. Second, there are acts that are relevant for criminalisation since they, while not directly violating an individual, still significantly infringe upon the right to freedom for us all in terms of public nuisances such as, for instance, serious instances of misuse of public spaces, public disorder, and so forth. Third, the state organisation and its institutions provide the fundamental framework and guarantee for the individual right to external freedom, so serious violations of this (institutional) framework should also be subject to criminalisation.[587] This would include the criminalisation of acts such as conspiracy and treason, threatening judges, and election fraud. The importance of the latter kind of wrongs and their criminalisation should not be underestimated, as we are talking about a decisive precondition for individuals to safely exercise their

586 Duff (2018a) p. 262.

587 The term 'basic collective interests', used, for instance, by Jareborg (1992) p. 197, is apt in this regard.

right to freedom.[588] Developing these starting points to precisely clarify which types of acts should be criminalised is however beyond the scope of this book, and, for various reason, not something that can be clarified once and for all.[589]

An implication of what is said so far is that the main issue to be considered in criminalisation is whether the act type in question belongs to the normative baseline of the civil state – not whether, for instance, punishment as sanction is an efficient means to solving social problems or whether there are other means available for doing so.[590] If an act were seen as violating the normative baseline of the civil state, then criminalisation would be warranted, and the guiding principles for its inclusion in the criminal law should be fair labelling regarding the description of the criminalised act and proportionality considerations regarding its seriousness within the system of offences.[591]

This view, which resonates with a central viewpoint in for instance Jareborg's defensive criminal law and other core interpretations of Nordic criminal law, does not fully disqualify considerations over effectiveness and options for tackling the social problems by other means.[592] But there is an important difference between whether criminalisation of an act type is justified as a part of the normative baseline for the civil state, and, for instance, the kinds

588 Some types of acts are clearly relevant to more than one of these principles, and specific offences may end up as complex combinations of considerations relating to more than one of these, as exemplified by violence towards a public officer. Furthermore, whether one should see this as two or three principles for criminalisation can be debated. Particularly the second category is open to discussion here: On the one hand, one may see this as a subgroup of the first category, as one possible form of direct violations of the individual's right to external freedom, on the other, one may consider public spaces for instance, as part of the institutional structure of civil society. I do, however, think we are best served by avoiding the latter view, as, for instance, public spaces are a more 'natural' part of our lives than is, for instance, the parliament and, also, critical infrastructure for the public debate and politics (in the broad sense). At the same time, it is evident that these offences differ from direct violations of individuals, if we consider for instance, that consent from an individual is irrelevant in this regard and, from a procedural point of view, there is no specific victim.

589 See for instance 9.2 below on maintenance reforms of criminal law.

590 See also further below for comments on the '*ultima ratio*' principle.

591 On 'fair labelling', see, for instance, Chalmers/Leverick (2008). On proportionality, see further 8.3.3 below.

592 See 2.2–2.4 above about such viewpoints in Nordic criminal law scholarship.

of pragmatic tools available for resolving a certain social problem. These two perspectives are not mutually exclusive, but the view of the criminal law is the former, barring it from being drawn into a broader pragmatic consideration of various forms of social means, including other forms of legal regulations, sanctions, and incentives as well.

In this way, the baseline view of criminal law provides the criminalisation process with a normative direction: The combination of the underlying principle of right and criminal law's distinct role in relation to it calls on the legislator to *justify* its criminalisation decisions by reference to this. And, more substantively, the baseline view implies that the criminal law should be and remain *restricted*. Given its baseline function, it simply cannot be too broad and contain trivial acts that are considered normal or, at least, not considered a major social 'sin'. A state that wants to include too much in its criminal law will find it difficult to justify this in view of the ideal of the true republic and will easily appear as far too authoritative. At the same time, this baseline consideration becomes stabilised by its inherent anthropological reference, relating to the nature of human beings, their powers, and their vulnerability. As members of the phenomenal realm, individual's (ability to enjoy their right to) external freedom depends on staying alive, not being physically harmed, not being forced into sexual activities with others, not having our property taken away from us or destroyed, and so forth. Such anthropological premises explain the strong position and 'negative value' of the core crimes against the individuals in criminal law, compared to other forms of unwanted behaviour.[593]

This baseline model means, for instance, that criminal law has – and should have – a primary orientation towards 'classical' crimes, rather than what has sometimes been branded 'modern crimes' relating to the economy in particular, in terms of insider trading, bankruptcy fraud, and pollution. Many such acts clearly have serious negative consequences for society and individuals as well and may therefore be relevant to the criminal law. However, while acts of this kind may also be relevant to the criminal law, such crimes would, from the point of view of the right to external freedom, not replace the 'traditional'

593 This starting point can be said to be connect to the underlying premises of, for instance, Jareborg and Hirsch's 'living standard analysis' for gauging criminal harm, see Hirsch/Jareborg (1991) and further in 8.3.3 about sentencing. At this stage, it suffices to point to the connection at an anthropological level.

crimes against individuals, such as violence, rape, and theft, as the core of the system of criminal law.

This claim may be illustrated by the well-known report about criminality and criminal law from the Norwegian government in 1978, where precisely such a shift was necessary.[594] This is not a pure example for us here, as it to a large extent concerns shifts in levels of punishment and the focus of police and prosecutors, but it still works as an example. There are good reasons for being sceptical of a proposal of this kind, which indeed did not gain traction, neither in politics nor in theory. A policy shift of this kind may make sense from the point of view of social utility. But from the normative baseline perspective advocated here, it would unbalance the normative baseline system in regard to its reference point, the right of individuals to external freedom. This, it should be stressed, does not mean that 'modern crimes' cannot at all qualify as crimes, or that they should be downplayed by the legal order and tackled by different means and legal regulation. The point is only that a shift of focus from 'classical crimes' to 'modern crimes' as the core of criminal law cannot be reconciled with the baseline point of view advocated here, and that the more one moves away from the classical crimes, the greater becomes the justification challenge as to why this should be included in the normative baseline of the civil state. Put simply: criminal law gravitates towards protecting the external freedom of the individual against the most detrimental violations of it.

The master principle of baseline violations of external freedom and its three subdimensions (direct violations of individuals, the public, and central functions of and institutions in the state organisation) however, are not capable of delivering clear cut-off points for criminalisation. For different reasons, that would simply be to ask too much. Issues relating to language – the many characteristics and facts that are relevant to normative evaluation of acts as well as the normative system that encompasses criminalisation, the latter including general criteria for criminal responsibility as well as the procedural implications of the criminalisation but also criminal law's relation to other

594 See Stortingsmelding Nr. 104 (1977–78). This is, however, only one aspect of the report, which had several aspects to it and is considered by Lappi-Seppälä (2020) p. 210 as one of four important documents published in 1976–1978 concerning 'Principles for Nordic penal reform'. For an appraisal of the Norwegian report, compared to later relatable documents, see e.g., Giertsen (1992).

areas of law – all contribute to making criminalisation complex. Premises such as these hamper the attempt for decisive, clear-cut, principled answers to the question of criminalisation. Most importantly in this regard, however, is the need for *application* of principles like the one mentioned. This implies a more open reflective process where several premises are of relevance, including the character of the social setting within which the principles are to be applied, and where different solutions may offer themselves as more or less justified and coherent with the principle of right.[595] As such, it is the task of the legislator, as the institutionalisation of public reason, to finally settle how we as a political community should understand and make concrete the normative baseline of *our* concrete civil state.[596] Ultimately, then, it is a task for *us* as a political society to decide how 'liberal' or 'extensive' our criminal law should be, and how, for instance, protection against verbal abuse can be secured while showing due concern for the agent's right to freedom of expression.

As society continuously develops, this is also a dynamic enterprise, which calls for the state to constantly revise its offences.[597] As Hegel aptly pointed out, a criminal code belongs to its time and the civic condition for it.[598] When new social practices and ways of acting become possible, new ways of violating the external freedom of others appear. The emergence of Internet and the practice of digital commerce made possible new forms of fraud. Changes in criminal law may also stem from a normative reappraisal and new knowledge that facilitate this reappraisal. An example of this is the change in view of physical violence against children as mentioned above in 7.3. This could be seen as a result of more knowledge of the harmful consequences of violence towards children combined with greater recognition of the child as a participant in the civil state on its own right. Other acts lose their relevance as violations

595 As suggested above in 5.10, the nature of application of principles to a concrete matter is an important but not fully appreciated dimension of Kant's philosophy, one that also the philosophy of criminal law would benefit from engaging with more closely.

596 See also 7.5 above.

597 This reformist dimension is further elaborated in 9.2 under 'maintenance reforms'.

598 Hegel (1821) § 218: 'Ein Strafkodex gehört darum vornehmlich seiner Zeit und dem Zustand der bürgerlichen Gesellschaft in ihr an.'

of external freedom, either because it is no longer possible or less harmful to perform the given act type, or because the type of act is re-evaluated.

What has been said so far about the indeterminate nature of the criminalisation master principle and the essential role of the legislator in applying it to concrete cases, is *not* to suggest that criminalisation *theory* is irrelevant. Analysis of normative problems, conceptual distinctions for nuanced and well-justified solutions to them, models and normative standards for criminalisation processes and decisions, and critique of legislation that does not stand up to such normative tests are all important for criminal law to be successful in fulfilling its overarching normative aim.[599] Criminalisation theory may be particularly important when it comes to understanding and finding ways of tackling particularly challenging issues, such as clarifying the implications of the principle of right for specific and normatively complex forms of human interaction, such as the purchase of sexual services.[600] Another more general example is (extensive) criminalisation of omissions, requiring individuals not only to respect, but also to care for others' external freedom, for instance in terms of intervening in and stopping abuse performed by a third person. Furthermore, criminalisation of preparatory acts, for instance in the field of terrorism offences, carry challenging issues.[601] And perhaps even more complicated are issues that somehow do not 'fit into' or at least challenge the principle of right in itself, animal mistreatment being one of the most difficult examples. Such issues pose genuine challenges for the baseline approach, which must be worked into the normative system that must be built on the basis of the principle of right. What guidance for criminalisation we will end up with depends on the character of the specific subject and the quality of the analysis, and is, hence, not something that we can judge upfront.

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599 See, for instance, perspectives on sexual offences and consent in that setting in Wertheimer (2003) and Green (2020). For Nordic examples from the same context, Asp (2010) and Jacobsen (2019). See also, for a more general 'constitutional' perspective on criminalisation, see Cameron (2017).

600 This normative complexity also plays out in politics and legislation, see e.g., Skilbrei/Holmström (2013) on the so-called 'Nordic model' in the law of purchase of sex.

601 See e.g., Asp (2005) and Jacobsen (2009a), and, also, broader perspective on criminal law's development in this regard, such as Husabø's concept of 'pre-active criminal law', see Husabø (2003).

Before moving on to another of criminal law's core functions, we may ask how these starting points regarding criminalisation relate to the standards for criminalisation as introduced above. The above remarks, I would hold, point out the underlying meaning of the somewhat vague *ultima ratio*-principle, which is often emphasised in German and Nordic criminal law scholarship.[602] It should not primarily be considered as a recipe for individual criminalisation, because acts should be criminalised to the extent that they represent serious violations of the right to external freedom. Rather, '*ultima ratio*' should be taken as a reminder of criminal law serving the role of providing the *baseline* for the civil state rather than functioning as an instrument for resolving various social problems. Criminal law is, as Thorburn aptly phrases it, '*ultima ratio* in the deeper sense that it is a necessary last resort (or backstop) to the whole project of living together with others under law.'[603] In this way, one may say, the '*ultima ratio*' idea does indeed encapsulate the important insight in Nordic criminal law, consistent also with the republican conception of this book; the importance of turning not to criminal law, but to other social means for solving societal conflicts and challenges.[604] The point is, however, that this does not necessarily bar criminalisation. Rather, it means that we have to consider each issue with reference to the act type's relevance to the principle of external freedom, and decide on criminalisation on that basis.

As for comparison to the harm principle and the *Rechtsgut* theory, much of course depends on how these are interpreted in the first place. What has been said can be read as one interpretation and concretisation of these principles. However, I would argue the approach here is better suited to account for the viewpoints that are involved in criminalisation considerations than these alternatives. The harm principle, for instance, may easily appear as one-sided. The alternative suggested here has the advantage that it takes *all* individuals' right to freedom into account. That is, it not only looks for a matter of harm (or risk of such harm) or a protected interest, but also, in particular, considers the importance of the act from the point of view of the claim to external

602 See further e.g., Greve (2004) pp. 40–41, and more in depth, Jareborg (2005).
603 Thorburn (2013) p. 101.
604 See further in 9.3 below.

freedom by the one performing it.[605] Sometimes, there are aspects of harm that, considered in isolation, may suggest criminalisation, but which should still not be criminalised when we include the perspective of the agent and its rights, such as the freedom of speech and 'freedom of the pen'. Discussions on, for instance, hate speech are illustrative of that.[606]

8.3 The retributive function: Criminal responsibility and punishment

8.3.1 Violations of public justice and the state's duty to respond

Having defined its normative baseline and given its overall role of securing and guaranteeing external freedom, the state is, as I will argue in the following, obliged to respond to violations of these declarations in terms of acts that the state has confirmed violate the normative baseline of the civil state. Ideally, of course, the state should prevent such violations from taking place in the first place, and to some extent, the state is obliged to do so as well. When, for instance, a person is attacked in the presence of the police, clearly the police, as a central state power, has a duty to intervene.[607] As we will return to in 8.4, the preventive effects of criminal law are also valuable. But there are quite a few limitations, on different levels, to the state's capacity to control social life in this way. Most importantly, the individual's right to external freedom significantly limits the space for this kind of control. Any state concerned with ensuring external freedom for its subjects will have to significantly limit itself in controlling their acts, leaving us with a significant risk of violations of the right to freedom. When appropriating the role of protector of public

605 This perspective is further developed and applied to the Norwegian criminal law in Gröning/Husabø/Jacobsen (2023), and I refer to this analysis to support this claim.

606 See on Norwegian criminal law on this issue, Wessel-Aas/Fladmoe/Nadim (2016) and Spurkland/Kierulf/Hansen (2023).

607 Here, we connect to a broader issue relating to the police as part of the executive branch, and the aims, principles, and legal competences of the police, which this analysis does not pursue. See, however, e.g., Heivoll (2017), who also considers the role of the police in the perspective of state power, and Nilsen (2023), who discusses Norwegian police law in regard to preventing crimes.

justice, the state should not seek to protect against crimes in totalitarian ways. Rather, its role is to facilitate the subjects' free and rational use of their powers to exercise the individual right to freedom, a right which necessarily limits the state's endeavours and means. In addition, there are also obvious factual limitations in terms of restricted resources and means.

These different (normative and factual) limitations are important as they serve as reminders that while the state should declare what rights and duties follow from the principle of right and maintain public justice in view of violations of it, the responsibility for providing public justice in society primarily lies with the individuals as rational agents themselves. These individuals, as rational agents, are already in the state of nature under the moral obligation to respect others' equal and rightful claims to external freedom. The entry into the civil state does not exchange or replace this obligation for something else. This is important as it, *inter alia*, again suggests that crimes are not *primarily* a matter of violations of the state itself but of a moral obligation that we have to each other as members of a political community.[608] However, in addition and related to their duty to move into the civil state to give effect to and security for this right: when having entered the civil state, the state subjects are also obliged to respect the state and, in particular, its declarations about the normative baseline for civil society.

The claim that the members of the civil state are rationally obliged to respect other individuals and their right to freedom as well as the civil state as means to secure this, is not the same as claiming that they will do so. Rather, violations of the individual right to external freedom are likely to occur. Human history has already provided us with far too many examples of this. Such violations, of course, could occur also in the state of nature, and then, in the absence of a state, perhaps more often so. But in the context of the civil state, they do even greater harm, in particular when the violations are intentional. Within the civil state, such violations of the right to external freedom harm individuals who not only have a right to external freedom but who also has renounced the right to seek justice for himself for the benefit of the state's monopoly of power, as part of the latter appropriating the role of

608 Keep here in mind Kant's distinction between morality, ethics, and law, see 5.4 above.

protector of public justice for all individuals.[609] The violation of an individual thereby also violates the civil state and, hence, the safety of all that have subjected themselves to it. The agent performing the violation, for his part, acts on a maxim that amounts to a possibility for everyone, when one considers it to be in one's interest, to disrespect the right of others to external freedom, but also fails to respect the rational command of entering into and subjecting oneself to the civil state to secure this right for all. And, when this is done by displaying capacity as well as willingness to use force, in cases of violence for instance, the violation manifestly challenges the state, its authority, and monopoly of power. A violation within the civil state, then, harms all the three layers of public justice presented in 7.7.

Importantly, however, the violation does not undermine the validity of the norm itself, even if it may have implications, for instance, for the extent to which others choose to respect it. This difference between the normative and the factual effect of crimes is emphasised by readers of Kant. Ripstein, for instance, states:

> Normatively, the law survives any wrong against it. In the world of space and time, however, the wrong has an effect, and the only way to restore that supremacy of law is to restore its effectiveness, so that the violation is without legal effect.[610]

The preservation of the civil state is also a duty for the state, which must then, to borrow the terms of Hegel, negate the negation of the norm.[611] As seen in the German discussion, reasoning of this kind could follow two tracks, one deontological and one more consequentialist, the latter closely related to the concept of positive general prevention, which has been important in Nordic

609 The right to self-defence is an important exception in this regard, but it is typically limited to use force to avert an attack against oneself. Violent acts in its aftermath, either due to the provocation or even revenge by the victim of the attack, should not be considered rightful, but (at most) an excuse. For a discussion of provocation in Swedish criminal law, see e.g., Rasmussen (2023).

610 Ripstein (2009) p. 315.

611 Regarding crime and punishment, see Hegel (1821) § 101.

criminal law scholarship as well.[612] Following the latter track would, however, result in the retributive function of criminal law collapsing into the preventive function to be addressed in the next section. Norm-confirmation vis-à-vis the public is indeed an important task for the criminal law, but the state holds still more fundamental duties. The state is assigned with the role of guarantor and protector of public justice *vis-à-vis* each individual right-holder in the state, who for their part has put their security in the hands of the state and its monopoly of power. Simply put, the crime implies that the offender brings themself and their victim into a 'state of nature' which makes the state obliged to bring them back into the condition of the civil state. To the victim, this implies that the state is obliged to respond to the wrong committed to them, confirming that it was a wrong against the individual. The offender, having deviated from the baseline, should be blamed for having committed it. And by doing so, the state should, towards both of them as well as towards the public at large, also reconfirm its willingness and capacity to act as protector of public justice.

From this, then, follows a *prima facie* duty for the state to respond to crimes.[613] This duty is also stronger the more serious the crime in question is, that is, the higher its relevance to the right of external freedom and the

612 On German philosophy of criminal law, see 6.7. See the next section regarding Nordic criminal law.

613 For a related view, emphasising the state authority point of view, see Thorburn (2020), see e.g., p 48: 'When we think of the state's right to rule as an exclusive right to make law within the jurisdiction in this way, it becomes clear that some sort of remedy must be available to vindicate that right in the face of its violation. What is required is a legal remedy that can vindicate the state's claim to be the exclusive holder of the right to rule in the jurisdiction. Properly understood, I argue, criminal punishment is that remedy.'

civil state as a required means for its protection.[614] There may, given the state's limited character, be important modifications of this duty. For core violations towards individuals, such as murder and rape, however, the duty remains strong.

To further unpack the content of this duty to respond to violations of the criminal law, we must consider two more issues in particular. First, we must clarify what it is, more specifically, that is to be reacted to, and second, how the state can more specifically fulfil this duty. The first of these leads us further into the principles of *criminal responsibility* (8.3.2), the second to the *principles of punishment* (8.3.3). Initially, at least, there may appear to be certain differences between these subjects. For instance, the doctrine of criminal responsibility does not to the same degree seem to be *dependent* on the republican theory advocated compared to the conception of punishment. Nor is 'Nordic criminal law' discussed very much in regard to the principles of criminal responsibility as it is to the understanding and, in particular, use of punishment.[615] Notwithstanding, both of these will be discussed. In addition to these two exercises, a few remarks will be offered on the implications of the present republican account developed for criminal procedure – showing how the republican account of criminal law also implies the need for a

614 This suggests that in choosing between a legality principle and the opportunity principle as a starting point for (the extent of) the duty of to prosecute crimes, the former has merits. This being a *prima facie* duty, however, there can be important exceptions to it, which reduce the distance between these alternatives (see also e.g., Thorburn (2020) p. 50). This is reflected in the approaches in the Nordics, see e.g., Lappi-Seppälä (2016) p. 36: 'The Nordic countries fall into two groups concerning prosecutors' discretionary powers. Finland and Sweden follow the principle of legality. The prosecutor is obliged to pursue charges if there is probable cause. In Denmark and Norway, prosecution is governed by the opportunity principle. This grants the prosecutor wider discretion. However, in practice, the differences are almost nonexistent, as the strict requirements of the legality principle are softened by extensive rules of nonprosecution in both Finland and Sweden.' For an in-depth Norwegian perspective, see Kjelby (2013).

615 There are some 'Nordic' references in the literature also in the discussion of criminal responsibility. However, then, it is mostly used as more of a reference to a set of jurisdictions that for historical, cultural, or interactional reasons are interesting to compare, see for instance Matikkala (2006), not as a claim that there is a specific 'Nordic' view of criminal responsibility.

well-functioning criminal justice system for the state to fulfil its retributive responsibility (8.3.4).

8.3.2 Criminal responsibility as presupposition and reference point

Concerning criminal responsibility, much of what has been said above in 8.2 regarding the identification of the crime is of relevance. The offences, as defined by the legislator, identify what act types one can become criminally responsible for performing. If an act type is not criminalised by the legislator, one cannot be criminally responsible for committing it. If, for instance, the legislator fails to criminalise a relevant act type, it would still contradict the principles of public justice and one would have strong rational reasons for not committing that kind of act. However, as the state has not brought the act type into its own baseline, it cannot hold an individual criminally responsible for the act according to the principle of legality in criminal law.

The state's baseline declarations are generally provided in abstract terms, for instance as a prohibition of 'harming the body or health of another person'. But this is done on the grounds of a general conception of or principles for criminal responsibility, identifying what act tokens that are to be viewed as violations of these offences and hence warrant criminal responsibility and punishment. Doctrines of criminal responsibility aim to clarify what kind of *individual wrongdoing* constitutes a violation of the offence and warrants criminal responsibility, in turn making the individual eligible for punishment. Again, we encounter a longstanding discussion in the philosophy of criminal law, where different approaches are represented: Anglo-American philosophy of criminal law for a long time relied on the basic categories of *actus reus* and *mens rea*. Issues relating to, for instance, the place of defences within this categorisation, however, led to a more general discussion on the principles of criminal responsibility.[616] In recent years, increased interaction with the German discussion has been part of that development.[617] The latter discussion saw a significant development towards the end of the 19th century

616 See e.g., Duff (2009).

617 For some works facilitating this interaction, see e.g., Eser/Fletcher/Cornils (1987) and Dubber/Hörnle (2014).

with Liszt's seminal textbook on criminal law. This would become the classical point of view, initiating a series of 'schools' or approaches in German criminal law scholarship.[618] Later in Germany, neo-Kantian, finalist, and teleological schools have all made their mark on the German development of the doctrine of criminal responsibility.[619] In this process, several significant observations have been made, including the transfer of the fault element (*mens rea* in the strict sense) from the requirement of guilt to the (primary) requirement of breach of an offence (the *Tatbestand* requirement).

The overarching categorisation found in German criminal law today has much to commend it, and it has also influenced Nordic doctrines of criminal responsibility.[620] That is to say, the German doctrine has always influenced the Nordic countries, but in somewhat different ways. The German discussion has particularly influenced Finnish doctrines of criminal responsibility.[621] But in a broader historical perspective, German doctrine has more generally been a central reference point for Nordic discussions in this regard. One clear example of this is the influence of Liszt's ground-breaking textbook and other works from Germany on the foundational Norwegian work by Hagerup.[622] However, for a long time, the Norwegian doctrine of criminal responsibility did not develop much.[623] In Denmark, the traditionalist dualist doctrine has also remained dominant.[624] Less influence is seen in the prevailing alternative in Swedish criminal law.[625] However, regardless of conceptualisation, it is clear

618 The first edition of this work appeared in 1881 as *Das deutsche Reichsstrafrecht*. Liszt changed its title of the second edition to *Lehrbuch des deutschen Strafrechts*. The work appeared in a total of 26 editions, some of these published posthumously. Liszt, alongside Ernst Beling, is a key representative of the 'classical system of crime' in German criminal law science, see e.g., Roxin/Greco (2022) p. 293.

619 See e.g., the overview in Roxin/Greco (2022) pp. 293–306.

620 A system relatable to the contemporary dominant tripartite solution can be found in Gröning/Husabø/Jacobsen (2023), which I refer to for further concretisation and elaboration of the viewpoints advocated below in this section. See here also Jacobsen (2012).

621 See e.g., Frände (2012).

622 See Hagerup (1911).

623 See, e.g., my critique in Jacobsen (2011a).

624 See e.g., Greve (2004).

625 See Asp/Ulväng/Jareborg (2013)

that the Nordic solutions all are intimately related to concepts originating in German criminal law, notably the principle of guilt.

Importantly, many of the contributions to this development consider the doctrine of criminal responsibility as closely related to the general philosophy of criminal law. This is also the approach here. We should see the doctrine of criminal responsibility as a means to identify the acts that violate the normative baseline of the civil state, as laid down by the legislator. Furthermore, the subjects of law that are not only obliged by the law, but, as rational agents, can also considered as co-creators of the civil state itself, and hence, deserve 'deep' responsibility for having violated the norm. This means that this kind of responsibility is not merely responsibility for not having respected norms laid down by an 'external' sovereign: Through moral self-legislation, rational agents are themselves legislating the principle of right, valid also in the state of nature. Within the democratically founded civil state they are also co-legislators in the political order established. As such, the right to external freedom and its manifestation in the civil state that they are rationally obliged to form, is for rational agents their own rule. Rational agents stand in a strong relationship to the normative baseline of the civil state, and hence deserve that particular kind of blame that punishment, as we will return to in 8.3.4, is concerned with.

Criminal responsibility, on this account, aims to identify violations of the baseline by rational agents that stand in this constitutive relation to the civil state itself. This gives rise to the mentioned *principle of guilt* as the overarching principle for the doctrine of criminal responsibility, which in turn gives rise to a set of more specific (categories of) criteria for such responsibility. As already pointed to, the principle of guilt is broadly recognised in Nordic criminal law.[626] On the account offered here, it should be understood as a failure to recognise and act in accordance with basic political principles, ultimately the right to external freedom, and the more serious the violation of external freedom, the more guilt one can be ascribed.

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626 See e.g., Jareborg/Zila (2020) p. 69. In some parts of the Nordics, the principle has been understood in a more limited sense, as requiring intent or, at least negligence for criminal responsibility. This is however a far more narrow conception of the principle of guilt, which is more aptly understood as referring to the broader set of requirements that must be fulfilled for criminal responsibility to be confirmed, see Gröning/Husabø/Jacobsen (2023) p. 119.

Expanding on this, the core categories of the doctrine of criminal responsibility can now briefly be explained and connected to the republican conception of criminal law advocated in this book.[627] To begin with, the criminal offences are directed towards acts, and not simply instances of negative causal impact that an individual may have on others. At the basis of the entire doctrine of criminal responsibility lies an *act requirement*, which is already implied in the wording of the offences. These are formed as *act descriptions*. Essentially, this refers to the basic nature of the right to external freedom and the norms it gives rise to, as primarily addressing the relation between free individuals, that is, individuals with a rational competence to act freely, and how they by acting may affect the freedom of the other. In this way, human (external) action is the central reference for the baseline system of norms in the civil state.

Furthermore, within this paradigm of human (rational) agency, acts that violate the baseline normative framework are properly designated as *wrongs* relevant to the criminal law, that is, a crime. The central expression of what are to be considered as wrongs in this regard is found in the legislator's declarations about this, that is, the statutory offences within the criminal law. However, as already touched upon, the wordings of such offences are formed as fairly general act descriptions. Not all acts that are covered by the wording of the offence are properly considered as wrongs from a material point of view, that is, as baseline violations of the civil state. This requires a more detailed examination and interpretation of the statutory offence with a view to applying it to such specific act types. This includes interpreting the offence in view of other more general requirements for an act to be considered a wrong of the relevant kind. Among these are not only considerations relating to, for instance, consent, but as mentioned, also requirements concerning the

627 Analysing its foundational aspects would, however, go beyond the ambition of this specific book, and connects us to Aristotle's doctrine of responsibility and its reception in natural law theory in Europe several hundred years later, the works of Pufendorf in particular, see e.g., Jacobsen (2011b), but also to the imputation theory found in the works of philosophers like Kant, see regarding the latter, for instance Hruschka (1986), where also Kant plays a role. This also connects intimately to for instance the philosophical discussion on the concept of action, see also above in 5.5. In line with this, theories of action have played a significant role in Germany, in the Anglo-American context as well as in the Nordic discussion. A ground-breaking contribution to the latter is Jareborg (1969).

agent's intent and understanding of the act committed, which is decisive for the character of the wrong committed.[628] In addition, in some cases, what initially amounts to an offence can sometimes still be *justified*, in the way the right to protect oneself against an assault, for instance, can justify the use of violence of a kind normally prohibited. Justifications, or more precisely, the absence of justifications, can be considered an additional category to the category relating to an offence.[629] Together, these allow for the conclusion that a wrongful act of the kind criminalised by the offence has been committed.

Given that such an offence has been committed, we have an actual baseline violation that raises questions concerning the agent's responsibility for this violation. As already explained, this requires something more than having performed a certain act, for instance a murder. Criminal law is paradigmatically directed towards the interaction between rational agents, who, as already suggested, given their distinct position as co-legislators for public justice, qualify for a 'deep' form of blame for committing such wrongful acts. The general recognition of human beings as that kind of persons means that responsibility is, *per se*, the default alternative in criminal law.[630] But there are also important exceptions to this starting point. Not every agent that acts wrongly is to be blamed for their actions. Some agents (that is, individuals capable of acting) can be *excused* for their wrongdoing. This can be because the specific agent did not possess the required rational capacities due to (young) age or other reasons for criminal incapacity.[631] There may also be contextual reasons for not blaming them for the wrongful act they committed, such as mistakes of law due to failure by the state to communicate its norms properly.

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628 The meaning of intent, for instance, is in itself a debated issue in the philosophy of criminal law. For a recent Nordic contribution, see Holter (2020).

629 It comes with certain challenges to provide a proper term for the category relating to a violation of the statutory offence. Bohlander (2009) p. 29, outlining German criminal law and the category of *Tatbestand* in English, sticks to the German term.

630 As such, we may at this point even speak about a 'presumption of guilt' for a wrongful act, see Hamdorf (2022) p. 37 in regard to the German Constitution and 'the image of a human being responsible for himself or herself, capable of determining his or her actions and able to decide in favour of right or wrong by virtue of his or her freedom of will'. This aligns very well with Kantian viewpoints, see for instance 5.5 above.

631 See e.g., Gröning (2022) concerning Norway's criminal insanity rules.

In addition to these basic categories of criminal responsibility, a fourth category is also required, concerning cases where all the preconditions are in place for blaming the specific individual for their agency but where there are other reasons for not holding the individual criminally responsible. This applies, for instance, in cases where the police force significantly exceeds its normative competences by itself initiating the crime. Here, there is no reason to excuse the individual, who, after all, have freely chosen to commit the relevant kind of crime (temptations, for instance, are not generally an excuse in criminal law). Still, there may be reasons for not *holding* the individual criminally responsible, for instance to prevent the police from misusing its competences in this way. The aim of preventing such acts from the state, may thus give rise to an *external,* that is, not guilt oriented, limitation to holding the individual criminal responsible for their baseline violation. In this way, external limitations to holding someone criminally responsible is to be distinguished from justification as well as excuses.

As suggested, all these categories may be subjected to further elaboration and discussion regarding which specific rules they should contain.[632] The republican theory developed so far has implications for the more precise understanding of and further construction of several aspects of the doctrine of criminal responsibility. In order to illustrate this, it is useful to turn to the required rational capacity for criminal responsibility, more specifically, the age requirement. This allows us to go a bit deeper into the nature of the responsibility ascribed to an individual who breaches the criminal law and also provides us with a bridge to the subject of the next section, that is the nature of punishment.

Children can already at quite a young age be said to be capable of acting. A ten-year-old, for instance, can act in skilled and meaningful ways. Furthermore, if the child uses this capacity to kill another child, this implies the child performed a wrongful act as identified by the murder offence. Still, it is generally recognised that children below a certain age do not deserve to be held accountable, that is, blamed for their wrongful acts. However, children's developmental process allows for new levels of responsibility as it progresses

632 The literature also testifies to this. Recent contributions to the Nordic discussion in this regard concern, for instance, complicity, see Svensson (2016), and mistake of law, see Martinsson (2016).

towards adulthood: As the child develops competence to understand the wrongfulness of acts as well as a certain ability to subject its own actions to the standards of reason, the child can be held responsible at some level. But crimes, as we have seen, are more complex and have several layers to them, including the general public layer and also the layer of authority that follows from the duty we have to move into the civil state and subject ourselves to the state. If this is accepted, criminal responsibility and punishment does not only presuppose a basic normative capacity and the ability to direct one's agency according to the specific norms this gives rise to, but also a sufficient ability to reason in order to understand the rational basis of the civil state and the damage one does to this in violating the state's normative baseline. Put differently, criminal responsibility, the guilt it implies, and the blame it conveys, are not something children may acquire an understanding of at an early age. Guilt and blame in criminal law should be seen as containing a more complex normative message only suitable for a rational agent.[633] This observation indicates that having basic ethical norms relating to care and concern for others, and certain moral capacities, such as conscience, is not sufficient. For deserving the distinct kind of rational moral blame that criminal law aims to distribute, a higher level of maturity is required. On these grounds, it is well-reasoned that Nordic criminal law orders all set the age limit no lower than 15 years of age.[634]

Before we, in light of what has been said, move over to discuss punishment, the doctrine of criminal responsibility provides us with another subject that helps us clarify the nature of republican criminal law: reactions against 'legal persons'. As already mentioned, the baseline of the civil state

633 See for relatable viewpoints, Thorburn (2022) p. 116, referring to a German court decision, stressing that criminally responsibility requires 'a state of development which enables the young person to recognise that his act is not compatible with the orderly and peaceful coexistence of people and therefore cannot be tolerated by the legal order'. Thorburn stresses that thereby 'it is not enough simply to engage in intelligible moral reasoning about one's conduct; one must, further, understand the significance of one's conduct for the stability of the social order within one's jurisdiction', before further elaborating his own view of criminal wrongdoing.

634 See further Gröning (2014a). Research may indicate that it should be even higher, see, for instance, Corrado/Mathesius (2014). This is, however, not a subject that we can pursue further here.

concerns the relation between individuals, the foundational members of the republic. Companies and other forms of legal entities are for their part also a very important part of modern social life, with decisive and sometimes also detrimental effects on human life, the environment, and the institutions we value, such as democracy.[635] Hence, there are a number of good reasons for thoroughly regulating the activities of such legal persons and sanctioning these for their non-compliance. This is a central task for the legislator in the civil state. Despite this, there is a foundational distinction to be drawn between the rational agents that exist in the state of nature with their rights and legal persons, the latter ultimately being social constructions and hence *products of* (what we do within) the civil state. These entities then, have neither the rational capacity, nor the right to external freedom, nor the deep responsibilities that we ascribe to rational agents in terms of their capacity. What we do is our responsibility, and this responsibility includes also what that happens in society in the name of corporations. Individuals can be held accountable for their actions in corporate settings, meaning that criminal law may have a role to play in this context as well. But the particular responsibility of human beings in society is one that should not be blurred by 'punishing' corporations on equal terms with individuals. Such entities should therefore preferably be regulated and sanctioned by a distinct form of corporate sanction properly adjusted to the nature of such legal entities to control corporations and their immense impact on human life.[636] In the end, this is administrative law, not criminal law. The development in many legal orders, the Nordics included, may seem to head in the direction of recognising corporate criminal liability and punishment.[637] But there are also developments in a different direction, that is, towards more administrative requirements and sanctions directed

635 See also above in 8.2 on so-called modern crimes.

636 See further, Jacobsen (2009b). There is an important institutional aspect of this subject, which I do not go into here.

637 Here, the Nordic countries do differ somewhat in regard to the solution of this issue. The most pragmatic Nordic legal orders, Norway and Denmark, have both recognised corporate punishment, but also Finland recognises this solution, in Chapter 9 of the Finnish criminal code. Sweden has been more reluctant and has developed a sort of corporation fine, which is not a form of punishment. For a contribution to the Nordic literature on this subject, one recognising corporate criminal responsibility, see Høivik (2012).

at corporations. In the end, regardless of whether it is called punishment or not, it is clear that 'punishment' against a corporation will in its *meaning* be different from the criminal responsibility and punishment of individuals.

8.3.3 The proper response: Punishment

Punishment is the reaction to crime, that is, violations of the normative baseline of the civil state, which the rational agent is responsible for having committed and hence deserves a distinct form of public blame.[638] In this, punishment differs from sanctions applied to violations of other kinds of (non-criminal) regulations, as well as sanctions included in criminal law, but serving other purposes than providing blame for transgressions of the normative baseline of the civil state, such as confiscation of proceeds or interventions against non-responsible offenders.[639] To provide a fuller account of punishment as part of the republican conception of criminal law, four aspects need to be elaborated upon. The first is what *meaning and justification* punishment has within this conception. The second concerns what *forms* of punishment should be applied. The third concerns how the *amount* of punishment delivered to the individual should be measured. The fourth concerns how punishment should be *administered*. The first three of these are quite closely related, so the following remarks will not distinguish strictly between them. The fourth aspect regarding the administration of punishment will be briefly addressed at the end of this section.[640]

To begin with, the *meaning* of punishment follows from what has been said above; it is, most basically, a reaction conveying a distinct kind of blame to a

638 In a similar, but still somewhat different view, see e.g., Anttila (1976) p. 178: '*the essential task of punishment is to function as public disapproval* – it demonstrates to the members of society what behaviour is antisocial and thus to be avoided'.

639 On confiscation, see e.g., Boucht (2017).

640 In the Nordic literature, the latter issue has been subject to less attention, probably due to its place in the intersection between criminal law and administrative law. See, however, the principled approach in Gröning (2013). Regarding the meaning, forms, and amount of punishment, there is more literature, some of which we will relate to later on in this section. Worth mentioning here at the outset, however, is it that most attention to this subject has been provided by criminological perspectives, see e.g., Ugelvik (2014). See also, contributions e.g., in Fredwall/Heivoll (2022).

rational agent for transgressing the baseline of the civil state that one is obliged to take part in, ultimately a violation of the right of individuals to external freedom. Punishment, then, is a reactive response, aiming to address someone's failure to recognise and act in accordance with the principles of public justice. This response must relate to and react to the crime that has been committed. In Kant's philosophy, we saw that while *ius talionis* played a central role in his view of punishment, Kant seems to allow the punishment to be 'socially adapted'. This is important. Punishment should, first and foremost, be seen as a communicative devise, communicating the societal response to the violation – blame for transgressing public justice.[641] This has further implications for the *form* and *amount* of punishment for wrongdoing.

The overarching principle for punishment, for the legislator's choice of sanction for the offence type as well for the sentencing in specific cases, is the principle of proportionality.[642] This allows for criminal law, and punishment as its main sanction, to demonstrate the seriousness of the offence type, the relevant violation of it and the level of responsibility ascribed to the agent, and it treats individuals equally in that regard, that is, as rational individuals. The principle is generally acknowledged in the Nordic countries, even if they differ in the extent to which it places restraints on their criminal justice systems.[643] Sweden, after a reform of the criminal code in 1989, is in principle the state most committed to proportionality as the overarching normative standard for sentencing.[644] However in Norway as well, the principle of proportionality is

641 See here also Vogt (2021) pp. 343–345 on the 'expressive' function of punishment.

642 The importance of the proportionality principle is often stressed within retributive accounts of criminal law, see e.g., Duus Otterström (2021). On its importance in Nordic criminal law, see e.g., Lappi-Seppälä (2016) p. 52. For broader perspectives on proportionality in criminal justice and crime control, see e.g., Billis/Knust/Rui (2022).

643 For a more detailed analysis on sentencing in the Nordic countries, see e.g., Lappi-Seppälä (2016) as well as Lappi-Seppälä (2020).

644 Works of Jareborg, in collaboration with Andrew von Hirsch, have been important in this regard, see, for instance, Hirsch/Jareborg (1987), Jareborg/Hirsch (1991), and Hirsch (2001). See also Jareborg/Zila (2020) pp. 67–75. For more recent contributions to the Swedish discussion, see e.g., Holmgren (2021).

the most important consideration in criminal sanctioning and sentencing, albeit as part of a more complex (pragmatic) sentencing ideology.[645]

The proportionality point of view has also been subject to challenges, for instance from Jesper Ryberg.[646] Ryberg's target may appear to primarily be strict retributive accounts and their dependence on the proportionality principle.[647] Some important aspects of the republican political account suggested in this book may possibly make it less vulnerable to this kind of critique. At least, it should be stressed that the centrality of the principle of proportionality does not suggest that it is considered capable of delivering fixed standards for punishment. Rather, it is a central task for the legislator to continuously provide its interpretation of the right to external freedom and the principle of public justice, and thus *construct* the normative baseline of the republic and the level of blame deserved for transgressing of it. Regarding the level of punishment applied, the proportionality principle should first and foremost be seen as putting in place a framework for the punishment that is to be delivered. Fixing the exact and proportional amount of punishment can be quite difficult, leaving it to the discretion of the legislator, and in concrete cases, the court, to settle the appropriate punishment within the complex normative framework of principles, rules, and decisions that criminal law establish and provide the premises for their judgements within it.[648] As a political and legal institution, criminal law, it can be added, does not promise sentencing levels and decisions delivering perfect justice. Rather, it is, to some extent should be, characterised by what Lernestedt and Matravers aptly characterise as a certain degree of 'shallowness'.[649]

However, the foundational premise of the right to external freedom and the crime's implication in relation to that, still provide us with important

645 While the Nordic countries differ with regard to their (commitment to a) principled approach to the subject, it has, at the same time, been questioned to what extent this results in outcome differences in practice, see e.g., Stenborre (2003).

646 See e.g., Ryberg (2020), discussing challenges relating to delimitation of criminal harm, how harm and culpability can be combined and the fact that certain crimes may affect their victims very differently. See also e.g., Ryberg (2021).

647 See e.g., Ryberg (2021) p. 71 ('full-fledged proportionalist penal scheme').

648 See in this regard also Ulväng (2009) pp. 197–203.

649 Lernestedt/Mattravers (2022) p. 3.

references and starting points for making these kinds of considerations.[650] As a general rule, purely communicative punishments in terms of, for instance, a verbal reprimand would usually not be sufficient. Such a response to, for instance, a gross sexual assault or for that sake, a terrorist attack on election day, would fail to respond properly to the harm to all the three levels of the crime described above in 7.7. Whereas the offender and the victim of a violent crime may reconcile by means of a sincere moral dialogue and the offender, acknowledging the violation, repents and even reforms himself, the state has a more complex task in responding to violations of the baseline of the civil state.[651] The state is obliged to fulfil its role as protector of public justice, including, as shown, to force the offender back into the civil state, and cannot make the consequences of the crime fully dependent on the choices and moral behaviour of the offender after the crime has been committed. In view of this, we have good reasons for thinking of punishment as, paradigmatically, *hard treatment,* that is, a display of the rightful power of the state. Punishment for physical assaults and other violent acts can here be a helpful example. Such crimes are most often considered as serious crimes, for good reasons. Typically, they have severe implications for the victim, as they usually cause pain and harm, and, perhaps, leave the victim unable to move freely in the future. Often, violent crimes also cause emotional distress and anxiety for the

650 To a certain extent, this approach can be related to key ideas in what is called the 'neo-classical' theory of sentencing of Hirsch and Jareborg, and its 'living-standard' analysis as a way to identify the seriousness of the crime as the central reference point for sentencing. As mentioned above, this has been influential in particular in Swedish criminal law. See Hirsch/Jareborg (1991) e.g., p. 7: 'The guiding idea that we have come to find most natural is one concerned with the quality of a person's life. The most important interests are those central to personal well-being; and, accordingly, the most grievous harms are those which drastically diminish one's standard of well-being.' This leads the authors to the following levels of living standard; subsistence, minimal well-being, adequate well-being, and enhanced well-being (p. 17). The first category includes 'preservation of one's major physical and cognitive functions, and preservation of a minimal capacities' (p. 18). The authors also add what they call 'generic-interest dimensions', with 'physical integrity' as one of these (p. 19). Several of these starting points could also be presented as levels of violations of external freedom. A more detailed comparison cannot be provided here.

651 See for a view of the three 'R's' as central to criminal law, repentance, reconciliation, and reform, Duff (2003).

victim long after the crime, and public insecurity as well. So, considered from the perspective of the right to external freedom, these are very serious acts which also demonstrate a willingness to (unjustifiable) use of power. Thereby, they also challenge the state's monopoly of power and fulfilment of its role as protector of public justice. Punishment, as a communicative response to this violation, should cancel out this violation, in all its aspects.

What has now been said, it should be stressed, is not a justification for the use of hard treatment of any kind and to any extent desired by the state, nor does it imply that the punishment has to be at a similar 'physical' level as the crime. Proportionality between crime and punishment as the key principle for punishment should not be understood as requiring an eye for an eye or a rape for a rape – which would in any case be repulsive. Rather, the underlying scheme of rights should be understood to be at work also in reasoning about punishment, implying a continuous normative drive or obligation towards modesty and low repression in criminal law and punishment. Here, it is useful to introduce a distinction between two different approaches to punishment, and, on a broader level, to criminal law, which we may denote as the *exclusionary* and the *inclusionary* approach to criminal law.[652]

The exclusionary approach finds its expression in historical forms of punishment, such as becoming expelled from the community, where the offender is placed on the outside of the state and law, that is, 'outlawed'. The death penalty, much discussed and defended by Kant, as seen above, is another example. The exclusionary view considers the crime as a kind of breach of contract that makes one no longer worthy of being a part of the republic. The principled challenges to this view are obvious.[653] From an inclusionary point of view, punishment should rather convey public blame to someone who, despite failure to recognise the rational demands of public justice, remains a member of the 'kingdom of ends', that is, an agent with rational capacities, who cannot

652 While these terms are not always used, viewpoints of this kind are often emphasised in Nordic criminal law science, see e.g., Jareborg/Zila (2020) pp. 93–95.

653 See e.g., Bois-Pedain (2017) p. 225, claiming that '[a] generally non-reintegrative, exclusion-based vision of criminal justice is, however, *not* one by which our criminal justice system can claim to implement the basic commitments on which our political constitution is founded'.

be treated as merely an object.[654] From this point of view, punishment should not (permanently) exclude the offender, but rather be a means to (ultimately) force the offender back into the civil state.

This inclusionary view is more coherent with the innate right to external freedom and suggests, for different reasons, a commitment to restraint in the choice of sanction towards the individual: *First*, as a person capable of public justice, the offender should be reproached as a rational agent, not as a thing, and hence addressed in a way that as far as possible respects their dignity. An important feature in this regard is, however, that the individual, even if a person with rational abilities, is also fallible with regard to the standards of reason, which leads us back to Kant's anthropology and philosophy of history: As *homo phenomena*, we are (also) members of a causal world, where we are not only subject to a number of individual flaws of different kinds, from desires to inclinations, which call on restraint and a certain level of tolerance of who we actually are and our individual processes of development towards morality. We are also influenced by the communities we live in, with their level of development. *Second*, as the state is obliged to secure the highest level of external freedom, it should not use punishment to a higher extent than what is needed to fulfil the retributive function of criminal law. Here, it is worth recalling that the meaning of the punishment, as a communicative act, is the decisive point, not its physical character in itself. Hence, if different alternatives fill the same function with regard to communicating the (level of) wrongfulness of the act committed, the state should, *prima facie*, opt for the lowest possible use of power. *Thirdly*, even if, for instance, the offender has committed a physical assault, the authority of the state is at an advantage when it is to respond to it. The meaning of a communication does not only relate to the content of it, but also to the one who conveys it. The more normative authority the state has over the offender and others, the less it needs to rely on the default option, physical strength, to communicate its disapproval of the

654 See also e.g., Duff (2018a) p. 141: 'I will argue that a decent polity will maintain an inclusionary, rather than an exclusionary, attitude towards those who commit even the most serious crimes – that it will address them, prosecute them, and convict and punish them, not as people who have forfeited their civil standing, but as citizens who are being held to account by their fellow citizens'. See also e.g., Duff (2010a) p. 301.

act and maintain its own authority. For a state that has very strong normative authority, milder forms of punishment should be expected. The fact that the Norwegian state still finds it sufficient to operate with 21 years as the general maximum penalty, even for murder, can be seen as an expression of this. A more general expression of the emphasis on less repression in the Nordics can be found in the words of Anttila:

> I repeat: *we need punishments, defined as public and authoritative denunciation by state bodies of individual cases of wilful harmful behaviour.* Even a mild reproach may suffice to express this denunciation. Most punishments are and should be more lenient than incarceration in a prison.[655]

There is, as already suggested, a dynamic aspect to this duty as well. The state is obliged to progress towards a social culture where the state has normative authority so that it enjoys the highest possible respect and recognition for its laws, not upholding them by (fear of) its capacity for physical power, so it thereby can rely on the lowest level of force to uphold them. By fostering a political and legal culture where the state is, and is acknowledged as, a legitimate public institution with rightful rules and treatment of individuals, the state can foster a community built on mutual recognition, respect, and trust, which provides conditions also for dealing with crime without turning to excessive use of force. Here, then, we connect to another important feature of the Nordic societies and criminal law: the importance of mutual trust between individuals as well as between the state and the individuals.[656] The state's gen-

655 Anttila (1978) p. 113.

656 On trust and Nordic criminal law, see e.g., Lappi-Seppälä's claim that '[t]he Scandinavian penal model, for example, has its roots in a consensus and corporatist political culture, high levels of social trust and political legitimacy, and a strong welfare state' (2008, p. 314, see also, for instance, pp. 361–365). As Lappi-Seppälä also discusses, this is the opposite of another central issue in contemporary philosophy of criminal law, fear: 'Trust, fears, and punitive demands are interrelated. Social trust (promoted by the welfare state) sustains tolerance and produces lower levels of fear, resulting in less punitive policies.' (p. 378). See also Nuotio (2007) e.g., p. 158: 'the positive image of the state and the legitimacy its activities generally enjoy is a huge resource for the functioning of criminal justice'. For broader perspectives on the importance of trust for the criminal justice system, see e.g., Tyler (2011). See also, from a republican point of view, Braithwaite (2022), for instance pp. xvi-xvii.

eral duty to reform itself to facilitate this kind of social development follows from the obvious fact that a society capable of protecting public justice with lesser use of power will to a higher degree approximate the 'true republic' of free and equal human beings: There is less force and more external freedom.[657]

As noted above, we will return to this issue in Chapter 9, where we will go further into the state's duty to reform and how this connects to the debates about different state models and their compatibility to republicanism. We end here by pointing out the fact that the previous observations connect us to one of the most distinct features of Nordic criminal law, its emphasis on low-repression, humane, and modest alternatives of punishment.[658] At the same time, we should keep in mind that such ambitions are not exclusive to Nordic criminal law, but rather a more general feature of a proper republican conception of criminal law. Duff captures this very well:

> Penal moderation – as to severity and mode of punishment, and as to the tones in which punishment addresses those who are punished – is thus integral to a republican criminal law. That moderation is not imposed as an extrinsic constraint on our pursuit of the proper aims of criminal law. Rather, it is an intrinsic dimension of a republican conception of crime and of those who commit crimes: the aims of republican criminal law cannot be served by harshly oppressive or exclusionary punishments. [659]

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657 The possibility for restorative justice elements as, at least as a part of the system of punishment, which to some extent can be found in Nordic criminal justice systems, can, thus, not be rejected, see further, for instance, Gröning/Jacobsen (2012). Restorative justice has made its mark for instance on the criminal reactions toward youth offenders, see e.g., Fornes (2021). Vogt (2016) argues for the relevance of restorative justice ideas to Kantian and Hegelian conceptions of criminal law.

658 See e.g., Fornes (2021) p. 117 on the humane penal tradition in Norway, not least in regard to children, and p. 173, emphasising an inclusionary focus in Norwegian criminal law.

659 Duff (2010a) pp. 302–303.

8.3.4 A brief note on criminal procedure and the criminal justice system

A related topic, less discussed in the philosophy of criminal law, but still highly important, is the issue of criminal procedure; the process through which criminal responsibility is confirmed and punishment adjudicated.[660] An elaborate discussion of the philosophy of criminal procedure would go beyond the scope of this book. Still, it is worth noting that the retributive function as outlined here, clearly ascribes important roles to the courts in terms of judging on individual cases and to the executive branch in the administration of punishment where someone is sentenced to punishment. Their competence in this regard follows immediately from the civil state's obligation to respond to crimes. Generally, this theory, its retributive aspect in particular, requires the creation of a criminal justice system, which may also include other institutions, such as a prosecutor's office. Furthermore, more concrete implications of the republican theory for criminal procedure have already been noted, for instance, with concern to the choice between a legality principle and a principle of opportunity.[661] Also, the republican theory has important implications for criminal procedure not least with regard to the safety of and respect for the accused, and the many constitutional and human rights issues relating to the presumption of innocence and the right to a fair trial. On a historical level, this connects us closely to the history of republicanism and to central figures particularly in the Italian-Atlantic tradition, notably Montesquieu, where the importance of the criminal procedure is highlighted.[662] In this book, however, we stick to the principles of *criminal law*. Reconnecting to this, it can be stressed that in this republican account, criminal procedure and the criminal justice system more broadly should be understood and designed as inherent parts of fulfilling the retributive function of criminal law, not as means to serve the preventive function.

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660 Important contributions to a philosophy of criminal procedural law are Duff et al. (2004, 2006, 2007). The philosophy of criminal procedure has not, to my knowledge, been much theorised in Nordic criminal law science, at least not at a general level. Many important contributions, however, address specific procedural issues, from in particular historical and doctrinal perspectives, see e.g., Kjelby (2013).

661 See footnote in 8.3.1.

662 See 5.2.1 above.

8.4 The preventive function: Protecting rights from violations

The third function ascribed to criminal law is the preventive function. Given the fact that the most basic aim of the republic is to secure the rights of the individual to external freedom, it would, indeed, be strange to think that criminal law, as part of the political constitution, is not at all supposed to serve any such aims.[663] Indeed, also in this account of a republican criminal law, we should see the aim of preventing crime as intimately connected to the very state project and the role of criminal law in it. Putting its full authority behind the basic principles of public justice, constitutive of the state project itself, the aim is clearly to make the state's subjects recognise, or at least comply with, criminal law's baseline rules for the civil state. To provide public justice, that is, a society where each individual has their right to external freedom respected, is the ultimate aim of the state project. Making the subjects respect the normative baseline is a fundamental step in that direction. Hence, in a broad sense, a preventive function can be said to be inherent in the very state project. The state serves the role of protecting the external freedom of the individuals and providing public justice, which necessarily implies a recognition of preventive crime as one relevant and important aim for the criminal law. To protect external freedom for the future is always a legitimate consideration for the state. The state has a broad set of means available for achieving that aim, including public education, welfare systems, and police prevention, which facilitate respect for the normative baseline of criminal law. This, then, invites us to ask what specific role criminal law plays in preventing crime, or, in other words, what specific role prevention has for the justification and design of criminal law. In the following, I first address what we may call general prevention, which does not target specific individuals, before addressing individual prevention, which does.

When aiming to achieve general prevention, it follows from what has been said so far in this chapter that the state will be limited by the two previous functions, the declaratory and the retributive functions of criminal law.[664] It would, for instance, not be legitimate to criminalise act types which are

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663 See also, e.g., Yankah (2012) p. 260: 'a theory that accords no value whatsoever to the deterrent effects of criminal law surely strikes our intuitions as peculiar'.

664 See 8.1 above.

irrelevant to the normative baseline, even if it would be beneficial to do so for some preventive reason. Or we may imagine a legislator who wants to bring down the number of a certain type of crimes and therefore increases the punishment for that crime to a much higher level than the crime warrants within the system of wrongs in the criminal law. That would bring incoherence into the baseline, signalling that this kind of crime is viewed as more serious than it would be from the point of view of external freedom. The individual who, in turn, is punished according to this standard, would for his part be treated more harshly than what the crime would normally require. In effect then, he would be treated merely as a means to an end. The state, obliged to protect public justice, cannot legitimately do so, despite its good intentions.

To this moral objection, there are also more prudential reasons not to deviate from the principled scheme offered by the right to external freedom. It is generally, empirically difficult to decide on the effects of specific solutions opted within the criminal justice system. Empirical knowledge about general deterrence does not offer much more guidance than pointing out the importance of the risk of being detected and sanctioned, while the character and level of sanction is less important.[665] The lack of empirical basis for making decisions about the criminal law precisely suggests that in general, our best bet is a normatively legitimate criminal law. It is, one might believe, quite possible that for instance non-proportional punishments may have negative consequences for the (perceived) legitimacy of the criminal law, weakening its effect in society. Sticking to principled solutions may thus be a wise move, also with a view to preventing future crimes.

The fact that the preventive function is limited by the declaratory and the retributive function is, however, not the same as to assign preventive considerations a completely 'passive' role in the design of criminal law. On several issues, preventive considerations may be considered when deciding on issues where these primary functions do not offer clear-cut answers. For instance, we may imagine that the legislator is considering whether community service or imprisonment is the proper punishment for a certain form of crime, say robbery, both alternatives being considered consistent with the overall system of punishment (which, as we have already seen in 8.3.3, does not provide us

665 See e.g., Hirsch et al. (1999).

with strict, detailed standards in this regard). If a legislator, being aware of a significant rise in the type of crime, considers it necessary to react to that and therefore considers the use of community service to send too mild a signal, it would be warranted to opt for imprisonment as punishment. This would be consistent with the state's overall aim of providing security for rights, and hence it would be in the interest of all holders of this right. Decisions and priorities like this should then be seen as belonging to the discretion of the legislator. Furthermore, preventive considerations may also be relevant for issues concerning the extent of criminalisation, for instance, relating to the extent of criminalisation of preparatory acts as well as considerations within the criminal justice system, including priorities within the police and prosecution agencies. The state's different tasks in maintaining the civil state and its normative baseline include retrospective as well as prospective considerations. But the right to external freedom, including the normative system as well as the respect for the individual it gives rise to, significantly restricts the space for exclusive prospective considerations.

A related question is whether there are limits to the specific ways in which the state can legitimately (aim to) make its subject (in general) comply with the normative baseline. This question reconnects us to the discussion on Feuerbach's criminal law philosophy, which places strong emphasis on this issue in terms of the criminal offence and its threat of punishment serving a deterrent effect.[666] Hegel, as noted, reacted to this, comparing it to raising a stick to a dog. Expanding on Hegel's critique, theories of positive general prevention emerged. In the Nordic countries, the theory developed in particular in the latter half of the 20th century as part of a realistic, positivistic, and/or pragmatic orientation within criminal law scholarship, by authors within the so-called Uppsala-school as well as the Norwegian criminal law scholar Andenæs.[667] While differing in their emphasis with regard to issues such as whether the influence was best conceived in terms of upholding or, possibly, strengthening the moral considerations of individuals, or merely creating habits among them, they shared the view that the influence of criminal law was not properly thought of as (primarily) threat-based deterrence. This viewpoint

666 See 6.7 above.

667 See also 2.3 above. See e.g., Andenæs (1974) and (1989). Andenæs's achievements in the area are discussed in, for instance, Jacobsen (2004).

has been influential in Nordic criminal law scholarship and applied in different contexts, including corporate criminal responsibility.[668] How does the republican account of criminal law advocated here relate to this discussion?

This positivistic general prevention theory indeed has several merits and encapsulates central aspects of the preventive function ascribed to the criminal law within the republican account developed in this book. When choosing between the deterrence theory of Feuerbach and the theory of general prevention, it can be said, as a starting point, that it is preferable, given the state addressing individuals as rational agents, for the state to achieve prevention through a form of normative communication where the individual recognises and applies the normative baseline of the state, compared to individuals acting only out of fear of being punished for their acts.[669]

Two issues that distinguish this republican approach from, for instance, Andenæs' theory of general prevention must, however, be stressed. First, we should also here stress that the preventive function is limited by the declaratory and the retributive functions. Andenæs never developed such an underlying normative framework for the preventive aspect of criminal law.[670] The republican account developed, then, provides us with a normative framework more apt for what kind of norms and values the criminal law should (help) implement in society. This relates closely to the second issue to be raised. The theories of positive general prevention in the Nordics were closely related to non-cognitivist theories – as illustrated by the contributions from the Uppsala school, formed by the ideas of the philosopher Hägerström.[671] These theories, generally, sprung from a rejection of the individual's rational normative

668 See e.g., Nuotio (2007) pp. 163–165. In regard to corporate criminal responsibility; Korkka-Knuts (2022). 'Positive Generalprävention' has, as mentioned in 6.7, also been discussed in German literature. See e.g., Schünemann/von Hirsch/Jareborg (1996) for an exchange of Nordic, German, and Anglo-American perspectives.

669 See for a similar view, Nuotio (2008) pp. 498–499, see also e.g., Jareborg/Zila (2020) p. 77.

670 For critical appraisals of Andenæs and the view of criminal law and scholarship that he was the most prominent representative of, see further, for instance, Jacobsen (2010) and Jacobsen (2022a).

671 See also 2.3 above. For a critical encounter with Hägerström's ideas, see e.g., Cassirer (1939). This non-cognitivist point of view, it can be added, also provides the starting point for Ross's viewpoints regarding criminal law. See further e.g., Nuotio (1999).

competence. The result of that is that their emphasis on positive general prevention easily turns into a problematic form of 'normative manipulation' of the (normatively incompetent) state subjects, in order to make them comply with the state's commands. Starting out from a full-blown Kantian point of view, however, where the principles of the state conform to principles accessible to individuals as rational capacities, provides an even better basis for advocating positive general prevention.[672] This suggests that the criminal law's ability to *co-work* with the individuals and their rational capacity for justice – their capacity for *practical reason* – is, ultimately, its greatest strength.[673] The republican account offered here, then, allows for an account of positive general prevention which is more collaborative and connected to the premises for and aims of the state project itself.

This view, considering positive general prevention to be more preferable than deterrence, does not, however, imply that threat-like effects of criminal law are illegitimate.[674] If criminal law has a deterrent effect and for that reason only prevents violations that would otherwise occur, this should, from the point of view of securing external freedom, be seen as beneficial. It would preferable that the individuals freely recognised and respected the rights of others, but if they do not, it is better that they are 'psychologically forced' to do so (to borrow Feuerbach's phrasing) than committing crimes. In the public realm, contrary to the moral realm, the motivation for (not) performing an act is not essential. One individual's (right to) external freedom does not extend to transgressing the similar right of another, and if the state through its criminal law norms forces an individual to abstain from that kind of (wrongful) act, no wrong is done to the agent. Rather, the entire political philosophy that we started out from is very much founded on a right to use force in the civil state. A general deterrent effect of criminal law can be understood as one way for the state to force individuals to stay in the civil state.

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672 I say 'full-blown', because non-cognitivists like Hägerström were often influenced by Kant, but recognised only Kant's view of theoretical reason, while rejecting Kant's view of practical reason – which, in turn, was one core issue in, for instance, Cassirer's critique of it, see Cassirer (1939).

673 On rule following and practical reason, see e.g., Rodriguez-Blanco (2017).

674 For what may appear as a somewhat more reserved view of general deterrence, see Nuotio (2008) pp. 498–499. However, Nuotio does not seem to reject it out-of-hand.

The next question is whether the future oriented considerations can also include individual perspectives. Rehabilitation, for instance, is an often-emphasised feature of Nordic criminal law, reflecting how criminal law here is considered as intimately linked to the welfare state.[675] A central example of this is found in the area of youth criminal justice, where the criminal sanctions not only take into account the fact that children (above the age limit for criminal responsibility) are less to blame for their crimes, but also the importance, for society as well as for the child itself, to facilitate their future.[676] Rehabilitation considerations must, however, have a limited role in the criminal law at large. Rehabilitation considerations presuppose that a crime is committed, and punishment should, as already clarified, primarily serve retributive functions that limit the space for such prospective considerations. But the criminal law is a complex system, and, for instance, within the punishment set by the court, rehabilitative considerations can play an important role in the administration of punishment, including education, work training, and treatment for mental health issues and addiction.[677] The state, within the limits set by the proportionality principle, should utilise this opportunity to improve the convict's capacities and social situation. Successful rehabilitation enables more security for the public and promotes external freedom. To this end, forms of community service with a constructive content can, for instance, also be employed. Even that kind of reaction can be burdensome and, hence, fulfil the retributive function of punishment.[678]

675 As pointed out by Lappi-Seppäla (2020) pp. 216–217, there has been a certain revival of rehabilitation considerations in Nordic criminal law in recent decades: 'The usefulness of rehabilitative practices is seen today in a much more positive light than in the 1970's.' As here also illustrated, the ambitions in this regard are more modest today. It is beyond the scope of this book to address conceptual aspects and forms of rehabilitation. It should be added that the importance of a welfare state for a sound criminal law is emphasised beyond the Nordic context, see e.g., Chiao (2019) p. xiii. See also Bois-Pedain (2017), advocating the importance of reintegration in sentencing.

676 More on Nordic criminal law and youth justice, see e.g., Lappi-Seppälä (2011). For an in-depth analysis of Norwegian law in this regard, see Fornes (2021).

677 On education in prison, see e.g., Gröning (2014b).

678 On community sanctions in the Nordic context, see e.g., Lappi-Seppälä (2019).

We should, however, stress the constraints here. First of all, as already touched upon, rehabilitation considerations cannot override the retributive aspect of punishment but is limited by the latter, proportionality considerations in particular. Second, there is the obvious risk for paternalistic and intrusive rehabilitative arrangements, which is the reason why such alternatives (at least) should be consent-based.[679] But even consent-based alternatives come with the risk of unequal treatment in the criminal justice system. Third, and relatedly, such individually-designed solutions typically entail a particular risk of violations of the separation of powers. Measures must be in place to ensure that the courts apply general rules and are not given extensive discretion with regard to which individuals are offered such alternative forms of punishment. Prospective and individualised reactions come with normative challenges, calling for them to be properly framed and restricted when turned into a form of punishment.

One of the experiences from the so-called rehabilitation epoch of Nordic criminal law was precisely problems of these kinds, leading to a shift away from this viewpoint.[680] As such, also in a welfare state context as the Nordics, there are clearly inherent normative limits to the use of criminal law for improving the offender and his or her lifestyle and ways of acting. The republican account offered here can account for many of the problems that came with the rehabilitation ideology and the criticism that emerged in the Nordics (as well). This includes its failure to respect the offender as a person in terms of paternalism, disproportional reactions, and extensive discretion in the criminal justice system, problems which also refer back to the general republican focus on preventing power abuse and *domination* of individuals in the state.[681] In this way, the republican point of view also provides us with a helpful normative framework for rehabilitative aims and means in criminal law.

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679 As the argument is of a principled kind, there is no need to probe into the (related) prohibition of forced labour seen in many constitutions and human rights documents.

680 This is, for instance, a recurring theme in Anttila's works, see e.g., Anttila (1986) p. 194 for an overview of the reaction to the rehabilitation ideology in the Nordics.

681 See 5.2.1 above.

Another question is whether there could also be a role for individual incapacitation in criminal law.[682] Many forms of punishment, such as imprisonment, will obviously serve as incapacitation, without this being an aim in and of itself. The question gets more difficult when it becomes a matter of prolonging the incapacitation, for instance when the offender is considered dangerous even after the proportional sentence is served. The conflict with the proportionality principle is evident, and, similarly to the observation regarding general prevention in the previous section, it cannot be justified. Therefore, incapacitation for such reasons should not be considered a relevant aim and guideline for punishment in its own right.[683] This, of course, does not eliminate the problem. There may be situations where the risk of someone committing serious crimes is very significant, forcing one to prioritise between the right to freedom for potential victims and the rights of the convicted to return to society after having served the proportional sentence. While obliged to respect all individuals, here the state is faced with the difficult choice between abstaining from intervening and intervening to protect possible victims, but then violating the principle of proportionality as well as the presumption of innocence.

As a starting point, we, in community with others, must accept a certain degree of risk, and the state's role as protector should, for the benefit of the freedom of all, be limited. But, if the risk related to a certain person is considered significant and relates to serious violations to other persons and their right to freedom, it seems in line with the state's role as protector of public justice to intervene. Criminal law's role must thus be restricted to cases where the risk is related to prior crimes, and then, the most appropriate solution

682 Here, we connect to a much broader discussion regarding 'preventive justice', see e.g., Ashworth/Zedner (2018), which we cannot pursue here.

683 The Norwegian preventive detention, *forvaring*, cannot be recognised from the point of view of this republican theory: It is designed as a punishment, but the criteria for applying it and its duration are both related to prospective risk-based considerations. It has been subject to critique, see e.g., Gröning/Husabø/Jacobsen (2023) pp. 625, critique which was introduced already at the end of the 19th century, when 'indeterminate sentences' was discussed. The discussions in the Norwegian criminalist union illustrate this, see e.g., Peder Kjerschow's view in Hagerup (1895) pp. 137–139. For a more recent and broader Nordic outlook, see e.g., Lappi-Seppälä (2016) pp. 46–49.

would still be to restrict the punishment to a proportional reaction to the crime committed while allowing for additional incapacitation in the name of preventive detention. It is, however, clear that the scope for such preventive measures must be very restricted and related to a number of legal safeguard mechanisms limiting the measure.[684]

684 The more particular issues here, including the role of criminal law when, for instance, the crime is committed by someone who is not criminally responsible, for instance due to insanity, must be left aside here. The Nordic countries differ somewhat in this regard, see, for instance, the analysis by Kamber (2013).