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Reforming the civil state and its criminal law

9.1 Aim and outline

The republican philosophy of law that we started out from provides *minimum criteria* for the civil state. To be recognised as a civil state, the state must have in place the institutions, rules, and means required to fulfil its role of providing public justice, in which, as we have seen, criminal law provides a central baseline for the protection of external freedom.[685] Chapter 8 set out the related basic structure of *criminal law* in the republican state. Some forms of 'criminal law' would not fulfil these minimum criteria. A regime where, for instance, all power is concentrated in one body which arbitrarily 'punishes' its subjects in degrading ways in order to install a general feeling of insecurity and fearful obedience in the population would not qualify as republican and would be illegitimate. When these minimum criteria are met, however, the state subjects must submit to the state's authority and respect the legal order even

685 See 7.4 above.

if it does not fully live up to the standards of public justice.[686] For instance, a state that does not have the resources to completely fulfil its obligation to investigate, prosecute, and punish individuals who commit certain types of serious crimes, is still legitimate and should be obeyed by its subjects. This is, after all, the case in most contemporary legal orders, where, for instance, serious economic crimes are often not dealt with for reasons such as lack of capacity in the criminal justice system.

However, while meriting obedience, the civil state must have higher ambitions than merely (at one point in time) meeting the minimum criteria. It is obliged to constantly respond to social changes relevant to its overarching aim of providing public justice as well as to improve itself in its capacity to fulfil the promise of its own justifying principles. Put differently, a state should not only keep itself up to date with the evolution of society but must even reform itself to better approximate the ideal of the 'true republic'. The criminal law can thus be seen as a constant process of (re)application of the principles of republican criminal law, in view not only of the development of society but also the development of the republican state itself.

A reform dimension can thereby be said to be inherent in the principles and structure outlined in the previous two chapters. This reform dimension accounts for the dynamic aspect of the republican criminal law and, as part of that, the inherent and ongoing need for (re)application of the principled structure in changing social settings. For this reason, among others, the reform dimension of the republican criminal law is elaborated on in this chapter.

Addressing the overarching issue of reform of criminal law is a complex enterprise.[687] In line with the previous discussions in this book, this chapter

686 Situations like this, where the state is legitimate, but performs just above the minimum requirements can easily result in a difficult choice for the citizens relating to whether they should accept the rules and problematic outcomes or violate the rules to achieve a result that better conforms to what one believes public justice requires. Should such civil disobedience be accepted? Kant was negative towards that, for good reasons. A core problem in the state of nature is, as seen in 5.5, precisely that different individuals make their own judgements about what public justice requires. This, however, does not have to mean that civil disobedience should in every regard be treated as any kind of crime. For a discussion of this point, see e.g., Brownlee (2007), and, from the point of view of Nordic criminal law, see Nuotio (2007) p. 166.

687 On the concept of legal reform, see Jacobsen (2022b) pp. 124–139.

will limit itself to highlighting some important aspects of the reformist dimension of republican criminal law of the kind already suggested. Starting out from the principles developed in the previous chapter, the initial claim is that this republican account requires the legislator to apply two different reform perspectives. One of them concerns the ever-present need for maintenance of the civil state and the criminal law as its baseline (9.2). The other focuses on the continuous need for approximation of 'the true republic' in a long-term perspective (9.3). The latter of these two perspectives connects us to the ongoing discussions about state models and whether a libertarian state, an authoritarian state, or a welfare state is the best way to approximate the true republic. This discussion will provide us with a helpful opportunity to consider how the republican theory of criminal law coheres with a core characteristic of Nordic criminal law and its situation in and relation to the Nordic welfare states. A central claim in this regard will be that the republican approach is not only compatible with the development of a welfare state, but even encourages its development (within limits) as an important stepping stone towards the 'true republic' (9.4). This in turn, connects us to the contemporary discussions on how this development affects the criminal law, that is, how its role is affected by the so-called administrative state, with which the welfare state is so intimately connected (9.5). The chapter ends with some observations on how the reformist dimension of the republican criminal law that is addressed in this chapter shows the relevance not only of normative philosophy, but also of legal, empirical, and critical perspectives on criminal law (9.6).

9.2 The short-term perspective: Maintenance reform of criminal law

The dynamic aspect of criminal law may sometimes call on us to change, and often expand, the criminal law. Larger reform projects – for instance in terms of enacting an entirely new criminal code or thoroughly revising such a code – however, are not frequent in modern legal orders and undoubtedly a difficult task. In Norway, the current criminal code of 2005 replaced the code of 1902 which had been in force for more than 100 years. The process began in 1978. More or less at the same time, Finland's criminal code of 1889 was subject to a major reform process – initiated in the 1970's and completed

in 2004.[688] Such reforms are exceptions. What we normally see are maintenance reforms. Characteristic of maintenance reforms is that a specific social problem relevant to the baseline emerges or is recognised, requiring piecemeal changes of the criminal law to properly address it. More recently, for instance, Finland has reformed the law of sexual offences, while currently Norway is in the same process, due to reforms in other countries and international conventions in the area, among other reasons.[689] Another more specific but related example is the steps taken by many criminal law orders towards criminalisation of conversion therapy practices to protect those who are subject to it, the seriousness of which has become more recognised as a result of greater acceptance of different sexual orientations and a stronger focus on LGBT rights.[690]

The need to reform criminal law may refer to all of the three layers of criminal law: the individual's right to external freedom, public justice, and authority. The conversion therapy example relates in particular to the first layer. When such 'therapy' includes the use of coercion or threats, for instance, this violates the right to external freedom of individuals, but it also concerns more general public views and opinions about (the right to) sexuality. While the different layers are closely intertwined and cannot be sharply distinguished (as explained in 7.7), there are also examples of reforms where public protection as well as state authority play a greater role. Terrorism is one example. Acts of terror typically harm individuals and cause general public insecurity as well, but they also aim to challenge state authority by applying violence as a means to achieve political aims. That as well may require legal reforms to adapt the legislation to meet new developments, exemplified by the recent decades-long terrorism challenges, which also affected Nordic countries.[691]

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688 See Frände (2012) p. 12.

689 On Norway in this regard, see e.g., Jacobsen/Skilbrei (2020), and the recent public report NOU 2022: 22. Regarding Finland, see e.g., Alaattinoğlu/Kainulainen/Niemi (2020).

690 On developments in the Nordic countries in this regard, see Verdoner (2022). For more current issues, see e.g., Nuotio (2023a) on 'memory criminal law', and Tammenlehto (2023) on trademark and copyright infringements.

691 See e.g., Husabø (2018).

This example, however, also illustrates a core problem of such reforms. Western states went far in their so-called 'war on terror', with criminal law as one central means, but in so doing failed to respect sound principles for criminalisation and violated basic human rights principles in practice. As a result, the criminal law moved away from public justice, rather than towards it.[692] Such lessons, and a more general critical view of crime policy and criminal law, provide much of the background for the often-seen critical view in Nordic criminal law science on legislative initiatives and changes to criminal law, in particular with regard to how these initiatives and changes have played out in recent decades.[693]

There is, indeed, much to be criticised in the politics and practice of criminal law reform. This must, however, not be confused with a general rejection of (the need for) making changes to criminal law. Instead, what is primarily important here is to recognise the legislator's role and duty to continuously maintain, renew, and reform the criminal law, even if that may sometimes mean 'more' or even bad criminal law. The legislative machinery must, in view of the social development, continuously work to keep the criminal law updated and adapted to the social context. Nordic law is no different in this regard – quite the contrary: 'A particular dynamism and legal reformism has been significant for the Nordic mind'.[694] But secondly, the importance of the republican principles and structure of criminal law as reference point and normative limits for maintenance reforms should also be stressed.

Ultimately, however, the task of interpreting and developing the baseline of the republic belongs to the legislator, as representative of the will of the people.

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692 See e.g., Jung (2007) and Cancio Meliá (2011) p. 108: 'some Anglo-American scholars and most continental European legal theorists strongly criticize how fighting terrorism can and often does lead to an unjustifiably harsh and unfair criminal law'. A central discussion in this regard is the debate on the so-called 'enemy criminal law', particularly related to the works of the German criminal law philosopher Jakobs (see 6.7 above), e.g., Jakobs (1985). Relating to the development in and effects on Nordic criminal law in this regard, e.g., Husabø/Bruce (2009) on multilevel legislation, Anderson/Høgestøl/Lie (2018) on foreign fighters, and, more generally, on terrorism, reform, and harmonisation, Nuotio (2006).

693 See in this regard, e.g., Träskman/Kyvsgaard (2002).

694 Nuotio (2007) p. 158, see also p. 159, describing Nordic criminal law as 'dynamic in the sense that the content of law needs to be modernised and rethought constantly'.

Public discourse and politics will therefore have an immense impact on the development of criminal law on a broader scale. For instance, one implication of this is that while knowledge input from a principled point of view has a lot to offer the legislator's reform processes, finding the proper balance between the democratic will and these knowledge perspectives is not easy.[695] Adding to this, the limited capacity of the legislator to initiate and carry out law reforms means that perfection (whatever that is in this regard) cannot be expected from the criminal law.

Nor should maintenance reforms be expected to be very progressive or radical. If the criminal law constitutes society's normative baseline, it needs to be developed in tandem with not only the complex system of principles embedded in criminal law, but with society and its presiding culture and normative views as well, a viewpoint that can be seen in Nordic criminal law scholarship.[696] Maintenance reforms are thereby limited by the legal context within which they take place. In order to fit into the criminal law and functions that it is to perform in a given social context, reform of criminal offences, for instance, must relate to existing structures and criminalisation, so that the general criteria for criminal responsibility and the standards of punishment are applied throughout the criminal code.[697] A consequence of this is that maintenance reforms in criminal law may appear to be somewhat 'conservative', or at least not always open to more radical reforms that sometimes are needed to make more progress towards fulfilling the promise of public justice. This, however, is where the long-term perspective comes in, as an additional reform track to be observed by the legislator.

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695 See e.g., Nuotio (2007) on the importance of experts for the development of Nordic criminal law. On the development from an expert-based to a 'politicised' criminal law, and why we, for democratic reasons, should not reject that development offhand, see Jacobsen (2015).

696 An early example of this is Hagerup, see e.g., Hagerup (1907) p. 13, stressing on a general level the need for law to be in close contact with the ethical sentiments in society.

697 On criteria for criminal responsibility, see above in 8.3.2, on punishment, see 8.3.3.

9.3 The long-term perspective: Approximating 'the true republic'

While continuously maintaining the criminal law (adapting it to the social context within which it applies and paying heed to how the normative baseline of the civil society must be constructed in relation to it), the legislator is also obliged to care for the broader development of the republic and its capacity to fulfil the ideal of the true republic. Considering that humans are 'destined by his reason to live in a society with human beings, and in it to *cultivate* himself, to *civilize* himself, and to *moralize* himself by means of the arts and sciences', Kant certainly envisioned a long-term process of moral, cultural, and legal reform.[698] The Age of Enlightenment was, indeed, an important, but also an early step in this regard. To have the courage to think for oneself and acquire an understanding of reason's principles for the civil state is in itself challenging. Implementing these principles into human culture and social life is no easier.

This broader development of the civil state cannot be expected to be a linear movement of progress. Kant himself witnessed some of the setbacks that can be expected from such a complex, long-term historical process, including the violence relating to the French revolution and the conservative development of the Prussian state after Frederick II passed away in 1786.[699] Since then, progress has been made on many levels, for instance with regard to democracy and human rights. Still, our societies today are also trailing behind compared to the true republic; they are (still) ripe with injustice in terms of violence, power abuse, lack of access to justice, poverty, and other structural forms of injustice.[700] In line with this observation, much of the traditional critique against

698 Kant (1798/1800) 7: 324.

699 On Kant and the French revolution, see Maliks (2022).

700 On an even broader scale, there are also more general, worrisome development in terms of, for instance, populism and authoritarianism in politics. These developments, which also spill into criminal law, may result in more fundamental setbacks for the rule of law, see further for instance Lacey (2019). I will return to this in the final chapter of the book.

criminal law and contemporary criminal justice systems is warranted.[701] This applies also to Nordic criminal law, despite it being described as 'exceptional'. As I will return to in the next chapter, even today there are worrying signs of setbacks in the Nordics. Such shortcomings and setbacks do not make the criminal law and the state of which it is part invalid or illegitimate. They do however, put great normative demands on the state – ultimately, on us – to stay on track and strive towards a better approximation of the standards of public justice, including the facilitation for a development that, in the long run, will bring us closer to the true republic.

This long-term reformist dimension of the republican account has important implications for the criminal law. For instance, punishment should be more fairly distributed among all those who violate the criminal law and to the extent possible, the use of lengthy prison sentences – in many ways, the very negation of external freedom – should be limited.[702] More constructive reactions where offenders are allowed to take responsibility for their crimes in a way that promotes reintegration and prevention of future crimes may, on a general level, be better suited to promote external freedom (of potential victims as well as the offender) compared to more classical forms of 'hard treatment'. The administration of punishment should also work towards a higher level of external freedom for the individuals in this regard by developing better rehabilitation alternatives as part of the punishment. Criminalisation and punishment for violations of many administrative offences are, as I will return to in the next section, simply too harsh a reaction to minor wrongs with little, if any, impact on the state's ability to protect public justice.

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701 On injustice in contemporary criminal law, see e.g., Vogt (2018) pp. 164 ff. Which objections and how critical they are, depend on the character of the criminal justice system in question. In the United States, for example, mass incarceration is a core problem, a central target for e.g., Chiao (2019). Mass incarceration is not (to the same extent, at least) a problem in contemporary Nordic criminal law, but see 8.4 below.

702 Similar claims can be found in the Nordic literature, see e.g., Anttila (1978) p. 115: 'It is the duty of society constantly to seek new alternatives to imprisonment, and the use of prisons should be minimized.'

This, I would venture, is where the *principle of humanity*, often highlighted in Nordic criminal law science, shows its relevance to criminal law.[703] From a Kantian point of view, it can be understood as a reference to the inherent rational capacity of each individual and the respect it therefore warrants. Not only does this oblige the state to abstain from demeaning treatment of individuals and not, for instance, use excessive force. It also obliges the state to continuously improve its treatment of individuals, each of them a member of the kingdom of ends.

A challenge, though, is that this kind of development in criminal law to a considerable degree require broader developments.[704] Developing more constructive reactions, for instance, relies not only on institutional arrangements for such alternatives, including their funding and education of competent personnel, but also on political and social trust in such solutions as satisfying the retributive function of criminal law. Improving the administration of punishment, for its part, requires (more) resources and competence in the prison administration. Facilitating decriminalisation of minor regulatory offences would allow us to reduce the scope of the criminal law but would also require the development of alternative sanction systems and their rules and institutions, as we will return to in the next section. On a more general level, progress in such regards is ultimately an issue for politics and the public at large to decide. This, too, has its presuppositions or, at least, conditions that favour such developments, including a sufficiently low level of conflicts and crimes in society, allowing for a focus on improving the standards of criminal justice. In the end, providing the complete security for rights in terms of the absence of violations of rights committed by our fellow individuals, is not an endeavour that any state organisation would be able to achieve, due to reasons for instance relating to individual freedom of choice (or 'free will', see 4.7 above) and the state's power monopoly not being a complete factual monopoly, which leave much power in the hands of its individuals, as discussed

703 The principle of humanity has been much discussed in for instance Swedish criminal law scholarship, see e.g., Ulväng (2005) pp. 102–123 on the principle of humanity with regard to sentencing in Swedish criminal law, and also more generally on this principle, Ulväng (2008), Jareborg/Zila (2020) pp. 93–99 emphasising respect, compassion, and tolerance, and also Holmgren (2021) pp. 202–208.

704 On this subject, see also Lappi-Seppäla (2020) p. 228.

in 7.3 above. This, then, as already suggested, hinges on the level of development of the civil state's subjects, what Rousseau called 'the real constitution', concerning the development the state can facilitate but not force through.[705] Ultimately, this development depends on how we, as the source of political power in society, reform ourselves. Here, it is worth recalling the fact that Kant viewed our ethical duties, to ourselves as well as to others, as requiring more of us than what the state through law can require of us.[706]

While not all can be controlled, the state can still certainly do a lot to facilitate such moral development. Much of the change needed in order to make the state more successful in guaranteeing public justice relates then to issues such as social integration, social equality, education, and facilitating trust among the individuals and towards the state itself. The main tools for promoting such social qualities are however not found within the criminal law but instead concern other legal areas. In the words of Träskman, *criminal law* policy should (only) be a limited part of society's *crime policy*.[707] Striving to solve too many of the problems relating to crime and criminal injustice by means of the criminal law may rather lead to it striving to fulfil functions that the criminal law is neither designed to nor able to fulfil. This argument is supported by the experiences from the rehabilitative epoch.[708] The state, and the individuals in it, should instead foster a view of the state as a rational project among collaborating rational individuals, and at the heart of it, a culture of respect for each individual's right to external freedom, one that promotes mutual respect, basic equality and trust. The tools for the state include strengthening the rule of law and human rights, improving welfare

705 See 7.4 above on Rousseau's fourth relation.

706 On this distinction between law and ethics, see 5.4 above.

707 Träskman (2013) p. 335. This aspect of the Nordic criminal law ideology is well described by Burman (2007) p. 90: 'Criminal law has traditionally had a relatively low-key role in the Nordic welfare states … One important factor behind this is how the purpose, justification and limits of criminal law have been conceptualized in the defensive model of criminal law policy. *Criminal law* policy is constructed as a much narrower concept than *criminal* policy. Criminal policy encompasses all discussions and decisions that concern criminality in any sector of society. Almost all policies, for example educational, traffic and social policies, are regarded as having a criminal policy aspect …'.

708 See 8.4 above.

functions such as social security and education, and general cultural development, including a regulated public sphere for sound public discourse.

This, we should stress, is not merely an optional means for the state. Rather, as said, the state, being obliged to reduce its reliance on physical power and 'hard treatment', is thereby also obliged to promote forms of governance more in line with the standards of practical reason and the true republic of externally free, enlightened, and responsible persons. This, I would hold, is the very essence of the reformist dimension of Kant's republican political philosophy. Similar reformist viewpoints can also be seen in other proponents of republican criminal law, such as Thorburn:

> States have the right to rule and the associated right to punish those who violate that right, but good government involves ordering a society so that criminal wrongdoing is infrequent and the resort to punishment in response is even more seldom … To have a system of criminal punishment in place is a necessary condition for the state's right to rule, but each time we punish, and especially when we punish harshly, we have failed a little as society.[709]

Here, then, we reconnect also to our analysis of the concept of power.[710] While reforming itself, the state, as a protector of public justice, is, as we have seen, also obliged to maintain its position as a political authority in society. But, by realising the complex, 'amorphous' character of power and the alternatives to its default form, physical violence, this power position can be maintained by 'softer' forms of power relating to normative authority and respect, more attractive from the point of view of external freedom and the true republic as its ideal form. The criminal law, with its unique and serious power characteristics, can and should also develop in this direction. A state that relies on normative power is also likely to have its citizens on its side, creating a community of respect and collaboration. Perhaps this was also what Kant had in mind when in his reflections on public justice, he considered how '[t]he power of the state grows'. The first point Kant mentions, listed before an increase in its ability to

709 Thorburn (2020) p. 50 and p. 63.
710 See Chapter 4 above.

wage war for instance, was 'through inner improvement of its well-being'.[711] This is, however, *not* to suggest, for instance, that 'ex post punishment and ex ante investment in social welfare are *substitute* goods', as Chiao suggests.[712] The former maintains its importance also in a society of free, equal, and capable persons, but here the state is less reliant on hard treatment to fulfil its role as a protector of public justice.

The relevance of what has been said with regard to the Nordic perspective should be evident. Nordic countries are fairly well-functioning in terms of social integration, trust, and equality, which demonstrates an ability to rely on a less repressive criminal law compared to many other countries while the level of crime and social problems have remained relatively low. In the words of Nuotio: 'Low repression has not proved to be a weak strategy, as long as the social setting remains peaceful and supportive.'[713] The historical background and causes for this Nordic experience are difficult to discern, and are closely related to geographical, demographical, and cultural aspects that one cannot easily control.[714] Still, lessons can be learned about how we can improve as a society and the role of the (our!) state in this regard.[715]

An implication of the argument so far in this chapter is that we should think of reform of criminal law as dual-tracked. It is the responsibility of the legislator to reform criminal law in the short-term perspective, to continuously do maintenance work on criminal law, to keep it in order as a system for protection of the normative baseline. But it is also the long-term responsibility of the state to develop itself towards the ideals of public justice and external freedom. The latter requires the state not only to enable society to develop itself in ways that are consistent with this responsibility, but also to take this long-term perspective into account in reforming criminal law to ensure that these do not deviate from the long-term goal. The discussions pertaining to

711 Kant (2016) 19: 599.

712 Chiao (2019) p. 32.

713 Nuotio (2007) p. 160

714 See in this regard, Fukuyama (2018).

715 See also Nuotio (2007) p. 160: 'The social experimentation typical of the Nordic legal mentality has taught many lessons, perhaps the most important being that efficient crime prevention needs a very broad approach.' This also connects us to the importance of criminology and sociology to be discussed in 9.5 below.

the welfare state and 'administrative criminal law' provide us with a good entry to discuss how this can more concretely play out, which brings us to the next section. Addressing this allows us to flesh out the general starting points about the civil state elaborated above in Chapters 7 and 8 at a crucial point for 'Nordic criminal law'. Can the Nordic welfare states with their extensive administrative regulations be seen as concretisation of the republican political philosophy– even from a Kantian point of view? I think it can.

9.4 Republicanism and the welfare state

In the previous section, I claimed that to better approximate the ideals of the true republic and fulfil the promise of public justice, the state must progress towards allowing for and promoting developments in society promoting social integration, collaboration, and respect for public justice. Obviously, this connects to a discussion that goes well beyond the criminal law, relating to what state models are legitimate and even preferable from a Kantian point of view. Here, it is relevant that it has been questioned whether Kantian republicanism allows this kind of more ambitious state to evolve, or whether we are rather about to shift into a third form of republicanism, for instance the one advocated by Yankah in his discussion of Ripstein's Kantian freedom theory.[716] Ripstein, not unlike the view suggested here, incorporates modern state functions, such as health services, into the freedom-centred state. While Yankah sees this as attractive in itself, it makes him suspicious of what he considers as 'ironically imperial ambitions' for freedom, suggesting that we must look elsewhere to account for the resources we need here:[717]

> Ripstein faces a tall task, caught between making freedom much too imperial in what it describes or requiring one to give up on much of what we consider natural and justified province of the modern state. … A government justified solely by the preservation of Kantian freedom

716 See also 5.2.1 above.

717 Yankah (2012), quote from p. 262. Yankah, for some reason, does not use the term 'republican' for Kant's political philosophy, but reserves this for the Anglo-American branch and his favoured Athenian version of it.

> would be radically thinner than the modern state … Ultimately, what an exclusively liberal Kantian view cannot provide is the civic resources to explain not only the primary value of freedom but the civic bonds which justify much of what we find important in the modern state. It is only by bringing our civic virtues to the fore that we can complement the liberty of Kantian freedom with the necessary richness of civic bonds.[718]

For Yankah, then, the option is what he calls Aristotelian 'Athenian' republicanism.[719] However, as suggested by the previous section, there may be more to a Kantian freedom concept than what Yankah suggests from his reading of Ripstein. While this is not the place for a broader discussion of Ripstein's and Yankah's views, the challenge raised by the latter strikes at the heart of the project of establishing the Kantian foundations of Nordic criminal law – with its intimate connections to the Nordic welfare states. This section therefore briefly considers Kant's political philosophy in view of different state models, whereas the next section will address the implications for criminal law of this discussion.

Given that the role of the state is to secure the individual's right to external freedom and that the state has a right and an obligation as well as a need to use power for this purpose, we may imagine four ideal typical states: *the nightwatchman state*, minimising all its functions, including those related to the criminal justice system and its use of penal power;[720] the *authoritarian state*, using excessive resources, force, and incarceration to secure public justice (which could also be labelled *despotism*); the *welfare state*, combining a lower level of the use of force with social integration through public regulation and structures that facilitate for individual well-being; and, finally, the *paternalist state*, which extensively regulates, controls, and directs its subjects towards

718 Yankah (2012) pp. 265 and 267.

719 Yankah (2012) p. 267.

720 Despite the scepticism of the state, these minimalist accounts have a hard time letting go of the criminal law in itself, see e.g., Duus-Otterström (2007) p. 8: 'even ultra-minimalist theorists about the state retain the right to punish as the core function of the overarching political authority in society'.

what the state considers to be good lives for them. These are, from what I can see, the available ideal types.[721]

Two of them can fairly easily be discerned as models for a republican state: the authoritarian state and the paternalist state. There are certain similarities between these two alternatives: Both imply extensive state control over individuals, even if they differ in how this is done. Whereas the first makes use of extensive force against the individuals as means of control, the latter applies seemingly well-meaning, but still controlling means allowing less space for the individuals to enjoy their individual freedom rights. Kant did not favour authoritarian states and their excessive use of control and force, and similarly, he rejected paternalist states, 'the most despotic of all (since it treats citizens as children)'.[722]

We are, then, left with the first and the third alternative, the nightwatchman state and the welfare state. The first alternative may show great respect for the freedom of the individuals in the state in one regard, such as widening the scope of permitted actions and individual property (by abstaining from taxing, for instance). In line with this, many have interpreted Kant to favour this alternative, which would clearly challenge its compatibility with the contemporary Nordic legal orders.[723] The welfare state surely 'trades off' some aspects relating to the rights of the individuals, through taxation, for instance, to provide them with better protection and realisation of other fundamental aspects of our freedom, for instance equality and protection against dominion by others. Both these alternatives, then, in the face of seemingly conflicting claims regarding rights, involve prioritisation to promote certain aspects or dimensions of external freedom.

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721 In analysis of Kant's political philosophy, a different fourfold distinction is between anarchy, barbarism, despotism and republicanism, see e.g., Varden (2022). On this account, three of these are 'non-republican conditions', as Varden terms them (p. 2020). My purpose here is different, using the classification to account for state models for us to consider as realisations of basic republican principles. Various overlapping distinctions can be found in Nordic criminal law scholarship, see e.g., Ulväng (2008), discussing the principle of humanity in regard to the rule of law, the social state and the (preventionist) political state.

722 Kant (1797–1798) 6:317.

723 See e.g., Kaufmann (1999) p. 1, using Wilhelm von Humboldt and Friedrich Hayek as examples of this limited state.

However, the welfare state is, from a Kantian point of view, preferable, for two reasons in particular.[724] First, the nightwatchman state implies prioritising some aspects of freedom, such as the right to property, at the expense of others. Here, the welfare state seems more capable of realising basic aspects of different dimensions of the right to freedom, including the right for each not to be dependent on another individual, but rather offers social security as a minimum level. Kant does indeed stress, alongside the right to freedom, the importance of equality and independence for public justice.[725] Second, if we understand Kant's political philosophy as a framework for our process as a society of approximating public justice and ultimately, a moral society, the nightwatchman state seems to be less capable of contributing to this process than what the welfare state does. The nightwatchman state does not, so to speak, involve itself with this at all, but relies fully on individual moral progress. But the state can certainly enable individuals to progress in this regard, for instance through offering education and social security.

Advocating the welfare state alternative, it may be added, does not allow the state to usurp human freedom for state control, which would be to return to the already rejected state models of authoritarianism or paternalism. Clearly, there are inherent limits to how and to what extent the state may promote the aim of human freedom and public justice, barring totalitarian, paternalistic state models. Providing democratic education and facilitating political and moral progress is one thing, forcing citizens to become 'free' and 'civic minded' is another, one that cannot be aligned with the individual's right to external freedom and the basic distinction between ethics and law.[726] What kind (or extent) of a welfare state that may be justifiable is not something that can be discussed here. But we may conclude that there seems to be no clear principled conflict between Kant's republicanism and the idea of a welfare state in itself. It may also be added that it is not far-fetched to suggest that societies which reduce inequality in terms of redistribution of wealth for

724 This is also argued by e.g., Kaufmann (1999), which I refer to for an in-depth analysis of Kant and the welfare state.

725 See in particular, Kant (1797–1798) 6: 314 ff. Importantly, to Kant this does not mean that everyone is entitled to the same but requires at least that anyone can 'work his way up', see 6: 315.

726 See 5.4 above.

instance, are more likely to foster such civil bonds among persons as Yankah wants to accommodate space. The Nordic state welfare-based communities may at least indicate that.[727] This may also reduce the level of crime in society and the perceived need for severe punishment.[728]

9.5 Criminal law in the administrative welfare state?

If we accept the conclusion of the previous section, this implies the legitimisation of some kind of an administrative state. This is required to facilitate welfare systems in the state, but also other 'modern' dimensions of human freedom, such as protection against life-threatening pollution as well as regulation of traffic and market regulations. This in turn invites us to clarify how our republican *criminal law* is affected by this. In other words, the question is how the state can develop in this direction without there being too much (administrative) criminal law, which would contradict the baseline conception of criminal law developed in Chapters 7 and 8.[729]

As a starting point, the aims and structure of criminal law, as described earlier in this book, are not affected by the discussion in the previous section. Also in the administrative state the criminal law should be seen as – and limited to – a part of the state's very constitution, structuring the state at a baseline level. This, it may be added, is reflected in the way Nordic criminal law science, well situated in complex modern, administrative Nordic states, often

727 This is well-captured by Niemi-Kiesiläinen (2001) p. 305: 'In one sense, the Nordic countries are communitarian. People share many common values and have a strong sense of solidarity. On the other hand, these societies do not much rely on private initiative in communal life. Instead, most societal functions are organised by the state and institutional communal structures.'

728 See e.g., Ulväng (2008) p. 600, claiming that welfare-oriented states tend to create less repressive penal cultures.

729 The administrative state is the central entrance point for Chiao (2019), suggesting that this has its own 'political morality', one that 'bottoms out on a principle of equal respect and concern' (p. 4). This might be to overstate the uniqueness of the administrative state and, at the same time, make the 'political morality' too dependent on the actual character of the state.

stresses that criminal law should not be thought of as a 'tool' for politics in solving social problems, but rather seen as serving a more specific purpose.[730]

At the same time, it follows from the discussions in the previous sections of this book that the state developing into an administrative state can and should affect the content of criminal law and the way it seeks to fulfil its basic functions. This not only applies to issues pertaining to the character of punishment and how it can reduce its reliance on force and even include a dimension of rehabilitation in it, as already discussed above. It also has impact on criminalisation, which we will focus on in this section to provide some general reflections on this issue. Whereas, the previous section focused on the relevance of the welfare state, we will concentrate here on what is sometimes thought of as 'technical' regulations, less directly connected to the aim of promoting human freedom.

The baseline view of criminal law starts out from seeing criminal law as part of a larger system of public norms, including rules which are today understood as matters of private as well as public law. As mentioned in 7.7, criminal law cuts across several regulatory fields, such as commerce, sex, religion, family life, and production forms, to fulfil its roles as a normative baseline for the civil state. This cross-cutting aspect of criminal law has several important implications. It implies, for instance, that the rules of criminal law to a significant extent relate to and overlap with rules from other areas of law, making knowledge of these areas of law important to the understanding of criminal law regulations. In an administrative state, there will simply be more such regulatory fields and hence demarcation problems for criminal law: Within each of these areas of social life, we must consider which acts violate the right to external freedom to the extent that criminalisation is warranted. From a legislative point of view, the challenge is how one can properly distribute norms and violations of them – in terms of what to include and exclude from criminal law, leaving the latter to other sanctioning systems, such as administrative sanctions.

730 See 9.3 above. How this more specifically plays out – and should play out – in regard to different social problems cannot be pursued here. For a discussion on tackling domestic violence and the relevance of welfare state means (and more), see e.g., Niemi-Kiesiläinen (2001).

On a general level, there is no reason to downplay the importance of administrative regulation for human freedom in modern society.[731] This facilitates healthy markets where individuals can exercise their right to external freedom, property, and commerce and also contributes to the kind of societal welfare required to support the state itself. Commerce generates taxes and state revenues which make it possible to fund important means for achieving external justice, such as defence, education, and health care systems. This is precisely how the civil state rules. Such administrative regulations are a central part of the state's power and ability to achieve the aims of public justice. The regulations not only order and allow control of social practices but may also curb emerging power-structures in society which may, if unregulated, pose challenges to individual freedom as well as the state's monopoly of power. Competition law provides a good example of regulation that can work in this way.[732] Well-founded and 'healthy' states get into positive spirals where state, individuals, and markets collaborate for the promotion of external freedom.[733]

Still, such administrative rules and violations of them differ widely with regard to their normative characteristics, and states that bring too many of them into their normative baseline will inevitably come into tension with the right to external freedom; much state regulation does not hold that strong

731 See in this regard also Green (1997), intending 'to show simply that there is less moral neutrality in regulatory crime than many critics have suggested' (p. 1537).

732 See on the intersection of criminal law and competition law, e.g., Hjelmeng/Jacobsen (2021).

733 What is said here is not ignoring the risk for *too much* administrative regulation, which is clearly a possibility and a problem to a republican civil state. It is, however, not necessary to pursue the principles for demarcating and limiting the administrative state here. Here, the focus in on criminal law's role in the administrative state.

a normative importance.[734] Some rules are merely technical, and violations of such rules hardly have any impact on social life and the right to external freedom of the individuals in it. Elevating such regulations to baseline status and subjecting individuals who violate them to blame of the kind punishment conveys, result instead in a state with authoritarian traits. At the same time, we should not consider it merely an 'advantage' to bring them into the criminal law. As shown above, the baseline structure of criminal law puts significant limitations on the way in which the state can address them, for instance in terms of preventing acts through criminal law. Administrative regulations, addressed by different regulations and sanctions are to a lesser degree limited by the specific normative structure of criminal law, allowing for the state to regulate, address, and prevent violations in more flexible ways. In the end, we cannot find a simple, clear-cut standard for the distribution problem. One must consider the rules and how these relate to the criminal law and its baseline function in view of their importance for the state and its capacity to function as public authority, and the importance of maintaining the criminal law precisely as a baseline negative constitution of the civil state.

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734 As mentioned in 8.2 above, this subject is sometimes discussed in terms of a distinction between '*mala per prohibita*'; acts that are wrong because they are prohibited by a legislator, and '*mala per se*'; acts which are wrong even prior to being prohibited by the legislator. Starting out from this distinction, most often, only the latter type is considered genuine contenders for criminalisation. These are, however, at best general slogans pointing us in the direction of the considerations we should make regarding the nature of the wrong and their relevance to the baseline approach. In short, it downplays the importance of many (perceived) *mala per prohibita* crimes affecting individuals' external freedom and, at the same time, disconnects such cases from their normative references point and legitimation. The *mala in se* notion for its part does not properly account for the 'political' nature of crimes central to the republican point of view in this book. See also Green (1997) p. 1577, 'The important point is that most crimes seem to have both *malum in se* and *malum prohibitum* qualities. Indeed, the most persistent criticism of the *malum in se*/*malum prohibitum* distinction has been that it is notoriously difficult to determine the category into which many crimes fit. Insider trading, selling cigarettes to minors, drug possession, gambling, and prostitution are all examples of crimes that may or may not be *malum in se*, depending on how society views the moral status of the underlying acts. Given such difficulties, a good argument exists for the complete abandonment of the distinction, at least for practical purposes.' Green, however, maintains a place for the '*malum prohibitum*' in his discussion of the subject.

An important aspect in this regard is the fact that states may differ, for instance regarding the challenges they face. An 'unmodern' state seeking to establish its authority and, for instance, gain control over markets to secure public justice, may reasonably consider certain forms of violations as more serious violations than what a similar, but well-established 'administrative state' would. States may also differ in the extent to which they have developed nuanced and differentiated regulatory systems, including legal safeguards as well as institutions for this. A lack of (or not yet established) capacity for other forms of sanctioning can give a *temporary,* contextual legitimation for criminalisation.[735]

The term 'temporary' should, however, be stressed. While criminalisation may, in a certain context, be temporarily legitimate, the state, as we will return to in the next section, clearly has a duty to progress towards social integration and lesser use of force, for instance in terms of developing less repressive sanctioning systems to deal with violations of regulations that may be described as fairly peripheral indirect violations. Mature and 'healthy' states, being well-established and hence with an adequate capacity for providing public justice, have a particular duty to look for alternatives to punishment in order for criminal law to maintain its baseline role in the civil state. Historical processes in legal orders often testify to this; that is, the process from the initial use of criminal law to non-criminal reaction systems adapted to the civil condition, including protection of individuals and their rights. Striving towards social integration and systems that relieve the criminal law and allow it to maintain a baseline function, such as the German system of *Ordnungswidrigkeiten*, thus seem well advised.[736] This development, however, works in tandem with the social evaluation of such regulations and acts that violate them, their frequency and so forth. The fact that such solutions may raise new regulatory problems and distinct rule of law concerns is a topic for another occasion.

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735 For such reasons, it is hardly a surprise to find complex and shifting developments in contemporary domestic criminal justice systems in this area. See, for instance, on the Norwegian context, Jacobsen (2017d).

736 See, for instance, Ohana (2014). For discussion, see e.g., Weigend (1988). The importance of distinguishing between punishment for crimes and penalties for regulatory offences is recognised also by e.g., Thorburn (2020) p. 58–59, however with a somewhat different justification.

What has been discussed so far in this section, we should add, provides a relevant perspective also to more contentious normative issues than the typical administrative regulation relating to public aims, standards, and control in a certain area. One might, for instance, view the development within drug regulations from this point of view. Most would probably agree that illegal production and distribution of drugs are actions relevant to criminal law, even if the drastic punishments often applied may obviously be questioned. The use and possession of minor quantities of drugs, however, have also been (often harshly) criminalised in many countries. This, in turn, has been subject to much debate.[737] Criminalising use and minor possession of drugs target acts where the harm is primarily directed at the agent performing the act, something which appears to be in tension with basic criminalisation principles such as the harm principle. Currently, though, many legal orders are taking (however small) steps towards reforming their drug regulation by decriminalising use and minor possession in favour of administrative regulations and sanctioning, including health care alternatives and administrative fines.[738] One way to see this is as a kind of developmental process that states are well advised to engage in, pointing towards less repressive and more effective regulation of the kind of complex social problems that criminal law is less suited to address. By providing and regulating 'healthy' drug markets that provide alternatives to illegal drug import, trade, and use, the state would not only better control drug use, but also benefit from it as part of the general market structure, instead of drug cartels doing so with all the negative consequences this would entail. The proliferation of serious violations of human rights as well as financially powerful forms of organised crime, ultimately becomes a challenge to state authority in some countries.

These kinds of issues are obviously too complex to be tackled in a book like this. Rather, they have their own complexity, relating for instance to the social development and, ultimately, our ability to tackle this development in ways that conform to the basic republican principles that the state project starts out from

737 See, for instance, Husak (2012). For Nordic perspectives, see e.g., Bergersen Lind (1976), Christie/Bruun (2011), and Träskman (2005a) and (2005b).

738 Regarding the ongoing development in Norway in this regard, see e.g., Jacobsen/Taslaman (2018), Jacobsen/Westrum (2021), and Jacobsen/Westrum (2022). For a further discussion of reform alternatives, see Jacobsen (2023b).

and from which it draws its legitimacy. However, the viewpoints advocated so far in this section clearly suggest at least a quite limited role of *criminal law* in achieving the aims of the administrative state. This view, it can be claimed, is particularly relevant given the development of the administrative state, with its ever-increasing scope, at some level challenging the *Rechtsstaat* and the individual freedom it was meant to guarantee. Weber's departure from Kant's progressive history, emphasising the rationalised 'iron cage' of modernity that individuals now find themselves in, is an apt illustration of this, and we will see more concrete illustrations of this in the next chapter where the ongoing development in Nordic criminal law is addressed. One part of the answer, then, is to secure that criminal law is *not enmeshed in the state project in the wrong way*. While there may be complex connections and interactions between criminal and administrative law, it is essential that reform of criminal law is ultimately driven by (the long-term perspective on) its role as a normative *constitutive* baseline for society and the state, and not turning into a means for the state on par with other forms of means and regulations.

9.6 Normativity, facts, and criticism

It follows from what has been said so far in this chapter that developing and reforming the republican criminal law in a specific social setting is a complex enterprise, one that goes far beyond merely 'deducing' solutions from the normative principles and structures presented in Chapters 7 and 8. Instead, its basic principles and structure invite us to apply these in complex social settings. Furthermore, this means that when we are to apply the normative principles in a specific social setting, several perspectives such as law, criminology and sociology, and even critical perspectives have important roles to play. This, in turn, is a point of view that takes us back to where we started – the nature of Nordic criminal law ideology. What is said here aligns with the view often stressed by Nordic criminal law scholars regarding the importance of knowledge of the social world that we live in, including the style and functioning of the criminal justice system, and the legal and empirical, as well as critical perspectives. Similarly to the republican account advocated here, Nordic criminal law is as such not a detached and static project.

This is particularly evident for the long-term reform perspective discussed in 9.3, which focused on facilitating a society where these principles can be more fully implemented. A simplified example, building onto the reflections in the previous section can be hypothesised as follows: in a society, a large number of kids drop out of school as their parents are absent due to, for instance, unreasonably long workdays, poverty, or similar social problems. Some of these kids are recruited to organised crime, where some commit violence and murder. As a result, lengthy prison sentences and preventive detention to provide security for society are at one point called for, but this would indeed be a challenging solution from the point of view of republicanism as well as in Nordic criminal law. If, however, civil society can be improved on issues such as worker's rights, the educational system, childcare, and so forth, this may possibly reduce the need for punishment, allowing for a more principled (practice of) criminal law. Such solutions require, however, legal as well as social knowledge. Things are not as straightforward as this example suggests, but that is not the central point. The point here is that these kinds of knowledge are essential for the proper (re)application of the republican principles of criminal law and (usually) carries with it a warning to those who look only to criminal law for solving social problems of the kind outlined above.[739]

This has been recognised in Nordic criminal law, with its realist and pragmatic orientation, for a long time.[740] The claim here is that developments towards (more) normative philosophy for Nordic criminal law, of the kind advocated in this book, would provide us with an even stronger connection to, for instance, criminology and sociology, and hence strengthen the Nordic project. To support this claim, it might be helpful to move out of the Nordic context to John Braithwaite's macro-criminological project, which is particularly relevant to us for several reasons.

In his restatement of his extensive intellectual project in *Macrocriminology and Freedom*, Braithwaite offers what he calls a 'normative macrocriminology'.[741] For Braithwaite, such a criminology must have freedom at its core, which the state and the society it makes possible must support. This resonates with the

739 Cf. 8.2 above on the notion of '*ultima ratio*'.

740 See also e.g., Nuotio (2007) p. 161 on 'scientific rationalism' in Nordic criminal law.

741 Braithwaite (2022) p. xx.

previous notes above of Braithwaite as a contributor to the republican branch of criminal law.[742] Braithwaite describes the core argument of his book as freedom being fundamental to achieve a low-crime society at the same time as crime prevention is fundamental to freedom.[743] Freedom, in Braithwaite's argument, should not be taken as what he coins 'thin liberal freedom', but rather understood as a more complex notion, one which 'has more radically redistributive social democratic implications than modern liberalism'.[744] These viewpoints align well with those advocated in this book.

Braithwaite is committed to the dominion point of view, which is prevalent in the Anglo-American vein of republicanism and differs somewhat from Kant's political philosophy.[745] But many of the key notions and perspectives in Braithwaite's *opus magnum* connect closely to the Kantian views advocated in this book and may provide apt starting points for an improved interaction between normative and empirical perspectives in Nordic criminal law. For instance, examples showing the possibilities as well as the potential of such interaction are Braithwaite's distinction between 'markets in virtue' and 'markets in vice', as well as his emphasis on strong institutions and the separation of powers.[746] Braithwaite's use of Durkheim's concept of *anomie* also holds great potential for explaining the opposite of the kind of normative integration for which we should strive.[747] His theory of minimally sufficient punishment and the role of deterrence in his republican theory, a discussion that briefly even touches upon Andenæs' positive general preventive view, also have merit in this regard.[748] Furthermore, restorative justice, as advocated by Braithwaite, has been advocated from a Kantian and Hegelian point of view, for instance

742 See 5.2.1 above.

743 See Braithwaite (2022) p. 2.

744 Braithwaite (2022) p. 12. See also 5.2.2 above on the relation between liberalism and republicanism.

745 See 5.2.1 above.

746 See, for instance, Braithwaite (2022) p. 6 and pp. 8–9. On separation of powers, see also Braithwaite's reflection on p. 385 ff.

747 See e.g., Braithwaite (2022) p. 79: 'Anomie means widespread uncertainty about the normative order, about what are the rules of the game and uncertainty about whose authority is legitimate.' On Durkheim, see Braithwaite's discussion at pp. 102–105.

748 Braithwaite (2022) p. 474. See also on the preventive function of criminal law in 8.4 above.

by Vogt.[749] Braithwaite's emphasis on the importance of power resonates well with Kant as well, as illustrated by the following points:

> Most good things accomplished in social life require the exercise of power. Among the things power helps accomplish are protecting freedom and preventing crime.
>
> Hence, we do not seek to limit or curb power, but to enable good power by tempering it.
>
> Untempered power dominates. It is not constrained by other powers from being arbitrary.
>
> Constitutions and their implementation are imperative conduits to power, to protecting freedom and to preventing crime.
>
> Constitutions enable tempered power by separating and balancing powers while also enabling power to be decisive.[750]

The point here is not to smooth over differences. The central point is rather the relevance of the normative principles for those kinds of research enterprises, as Braithwaite's criminological project illustrates. Braithwaite stresses this point by adding a twist to a famous quote from Kant's first critique (suggesting some common ground at least): 'Normative theory without explanatory theory can be empty, explanatory theory without normative theory can be blind – often dangerously so in criminology.'[751]

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749 See e.g., Vogt (2018).

750 Quoted from Braithwaite (2022) p. 385. Kant's emphasis on power as a core aspect of the civil state is discussed above in 5.6.

751 Braithwaite (2022) p. 37 (see also the definition on p. 62: 'Explanatory theory is conceived of here as ordered sets of propositions about the way the world is; normative theory is ordered propositions about the way the world ought to be.). For Kant's famous statement, which Braithwaite seems to play with, see Kant (1781/1787) A51/B75: 'Thoughts without content are empty, intuitions without concepts are blind.'

The relevance of criminological perspectives to the republican view of criminal law offered in this book, then, also applies to broader *sociological* perspectives and theories. These are of central importance to our reasoning on criminal law, including from a normative point of view. Braithwaite, for instance, connects to Norberto Elias's civilisation theory. Earlier on in this book, we have connected to Weber, whose sociological theory relating to the emergence of the administrative state and its rationales, provides a valuable point of view which has also more recently been utilised by Sverre Flaatten in the context of Nordic criminal law.[752] Weber, as Flaatten shows, provides important perspectives that help us understand our broader social setting and its relation to the development of law. Such sociological views certainly provide a challenge to how (easily) we can implement the above outlined normative principles in society. This observation can, however, also be seen as stressing the importance of elaborating normative ideas and principles in order to facilitate the kind of 'moral causality' which Kant recognises, and Weber brings into his interpretive sociology.[753]

These brief remarks should suffice to demonstrate that providing a better normative philosophical framework may indeed also contribute to strengthening the interaction between normative and empirical perspectives. In other words, it facilitates the use of the two dominant perspectives at work in Nordic criminal law and criminal law scholarship: constitutional values and social knowledge.

What, then, about *critical perspectives* on criminal law? Clearly, there is a long and strong tradition of critical perspectives in Nordic criminal law, closely related to the broader critical project of Nordic legal scholarship.[754] Such critical views differ, from the moderate critical views calling on the improvement of criminal law to make it less harsh and more just, to more radical views fundamentally rejecting criminal law and advocating its abolishment. The former, moderate kind of criticism has, as already suggested, an obvious role

752 See Flaatten (2019).

753 On Kant and Weber in this regard, see for instance MacKinnon (2001) pp. 334–335. More on Weber's sociology, see e.g., Couto (2018).

754 See here, for instance, works of Anders Bratholm, e.g., Bratholm (1970). On the nature of Nordic critical legal scholarship, compared to, for instance, the critical legal studies movement, see e.g., Tuori (2002) pp. 317–318.

to play within the republican conception now presented. Such critical analysis can be quite important for social emancipation, to reignite the process of approximation of the true republic, even if this requires patience and long-term dedication. Enthusiasm about reform and progress often found among critical legal scholars, may easily result in disappointment.[755] But short-term disappointments and what appears as more radical philosophies of criminal law, for instance, restorative justice as an alternative to more traditional forms of punishment, may still end up having significant impact in the long-term.[756]

More radical views, for instance such as those advocated by Koivukari, who, as part of a critical view of EU criminal law, challenges the Enlightenment values of European criminal justice more generally, considering these to be 'ambiguous and blurred', and viewing punishment and criminal justice to be 'neither fair nor justified, and is instead ambiguous and socially discriminating', suggests that it should 'be radically diminished or even abolished, and its values and ideals should be rethought' and concludes with claiming the 'philosophical unjustifiability of punishment'.[757] However, while recognising historical fluctuations as well as flaws and injustice in contemporary criminal law, while encouraging critical, emancipatory perspectives, we should be cautions not to reject the very republican principles of criminal law in that

755 An interesting and complex case study in this regard is the highly critical reception among some legal experts of the Norwegian criminal policy report from 1978, which made a number of suggestions relating to, for instance, a shift of emphasis from 'classical' forms of crime to more 'modern' crimes relating to white collar crime (see also 8.2 above).

756 An example of this from Nordic criminal law is Nils Christie, who in 1977 offered his critical views of legal conflict solutions as 'theft', taking the conflicts and the process of solving these from the ones that truly 'owned' the conflict; the individuals involved in it and the societies that were affected by it, see Christie (1977). While the legal aspect of conflict solutions has not been exchanged for a more informal order (for good reasons, according to the republican view of this book), restorative justice is today well-recognised in the philosophy of criminal law and criminology, see e.g., Braithwaite (2022), as well as having impacted, for instance, Nordic criminal law. See here also Nuotio (2007) p. 166: 'The constant criticism of criminological work by, let us say, *Nils Christie* and *Thomas Mathiesen*, has kept the law drafters as well as criminal law experts continuously ill at ease with the repressive features of criminal justice'.

757 Koivukari (2020) p. III, p. 6, and p. 315, see more generally Koivukari's conclusions on pp. 312–315.

process. Koivukari, for instance, does not discuss the potential of Kant's political philosophy in her critical appraisal of Enlightenment thinking. I hope to have shown that Kant provides us with sound political philosophical principles as a pathway to a robust republican account of criminal law, one that can even show us the way towards less violent, more just forms of criminal law and state power, relying on softer forms of power. The 'violent' aspect of punishment is also, we should recall, only one aspect of the criminal law. We should be cautious not to reject criminal law entirely. Without it we may easily find ourselves returning to where we set out at the end of Chapter 4, in arbitrary power and the state of nature.

The conclusion of this section, then, must be that if the advocated republican interpretation of Nordic criminal law holds, it clearly points us in the direction of understanding 'Nordic criminal law' as a *multifaceted knowledge project*. Philosophical, legal, and empirical or social perspectives are all of relevance to the enterprise of understanding and applying the principles of the Nordic republican criminal law principle, which we, however, must turn to philosophy to clarify in the first place. Hopefully, work of the kind done in this book can provide us with a joint project for the criminal law and thereby also facilitate for cross-disciplinary communication and collaboration.