POWER, PRINCIPLE, AND PROGRESS

KANT AND THE REPUBLICAN PHILOSOPHY OF NORDIC CRIMINAL LAW

Jørn Jacobsen

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The claim that the question of power is the first question of justice means that justice has its proper place where the central justifications for a social basic structure must be provided and the institutional ground rules are laid down that determine social life from bottom up. Everything depends, if you will, on the relations of justification within a society … Freedom as nondomination is only guaranteed where practices of justification exist that prevent some from dominating others.

Rainer Forst

The sum total of pragmatic anthropology, in respect to the vocation of the human being and the characteristic of his formation, is the following. The human being is 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.

Immanuel Kant

Nils Nygaard in memoriam.

Preface

Nordic criminal law is often thought of as a specific kind of criminal law. The Nordic societies and their political and legal orders have much in common. The expression 'Nordic criminal law' itself indicates that this includes a particular mode of criminal law. The ideal and rationale of this style of criminal law seem to unite Nordic criminal law scholars, or at least, a large part of them, seemingly providing them with a reference point for their work within the discipline. 'Nordic criminal law' is recognised even beyond the Nordic legal community.

More specifically, what we are talking about when we are speaking about 'Nordic criminal law' is, however, not quite clear. 'Nordic criminal law' is not easy to pin down. There is extensive literature on the subject, including historical, legal, and sociological perspectives that contribute to clarifying the specific and complex character of Nordic criminal law. But there is also a limitation to this literature: the deeper justification of Nordic criminal law is not discussed to any extent, not even in Nordic criminal law scholarship, the scholarly discipline perhaps most intimately connected to Nordic criminal law as a normative project. Despite the fact that many legal scholars have contributed significantly to our understanding of Nordic criminal law, there is a gap in the discipline regarding clarifying its justification and exploring its deeper meaning. Hence, we lack what is most needed when it comes to understanding *whether* and *why* one should appreciate and aim to preserve Nordic criminal law.

The aim of this book is to address this justification challenge. This endeavour is a matter of ensuring the scientific credibility of the discipline: If Nordic criminal law scholarship is to rely on this as normative basis and reference point, 'Nordic criminal law' must be clarified and justified as a normative theory. But there are also increasingly clear signs of what criminologists and critical scholars have emphasised for some time now: that the realities of and developments in Nordic penal practice do not align with the dominant perception of 'Nordic criminal law'. This requires a rethinking of the status of this normative reference point.

To do so, this book turns to a perhaps somewhat surprising ally of Nordic criminal law. Immanuel Kant (1724–1804) is often considered a leading proponent of exactly the kind of harsh metaphysical retributivism that Nordic criminal law has rejected. But this standard account of Kant usually found in Nordic criminal law scholarship is seldom grounded in a thorough analysis of his political philosophical writings and to an even lesser degree in an understanding of Kant's broader philosophical framework. At the same time, recent legal and political philosophy have done much to revive the interest, understanding, and more nuanced appraisals of Kant's views.

Building on this literature, this book will argue that Kant offers important starting points for a philosophical basis for criminal law, Nordic criminal law, and Nordic criminal law scholarship in particular: Criminal law is an essential part of the political arrangements that we are obliged to put in place and maintain in order to promote external freedom, and we should constantly strive to bring it closer to what Kant termed 'the true republic'.

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This book is a product of two decades of engagement with the issue of justification of punishment, going back to when I was a law student here at the Faculty of Law in Bergen. Back then, Jan Fridthjof Bernt and Asbjørn Strandbakken both encouraged me to pursue this topic, which has stayed with me ever since, sometimes in the foreground, other times in the background of my work on other, more concrete aspects of criminal law. The latter of the two was also kind enough to bring me into the Nordic criminal law research environment, which has provided me with perspectives and insight, and also, I would stress, great experiences and good friends (at my first Nordic Workshop in Criminal Law I met someone truly special). Many thanks are owed to this research environment and all my wonderful Nordic colleagues – none mentioned, none forgotten. I hope this book, aiming to provide Nordic criminal law with a deeper normative justification, contributes to strengthening this research environment.

Still, some individuals must be mentioned for their contribution to this specific book. Many of the viewpoints, particularly in the latter parts of this book, have matured significantly through a longstanding research dialogue with two of my colleagues here at the Faculty of Law in Bergen, Linda Gröning and Erling Johannes Husabø, in particular through working on our textbook

on criminal law. Also, David Chelsom Vogt (Bergen) has for a long time been a close dialogue partner regarding the philosophy of criminal law. David was also kind enough to read a preliminary version of the book, providing, as always, useful feedback. He also hosted a session in the Nordic Network for Criminal Law Philosophy. In that regard, thanks are also due to the other contributors to that session for the valuable input and fruitful challenges that they provided. Furthermore, Marius Mikkel Kjølstad (Bergen) generously read a preliminary version and commented on it from a historical perspective. Thanks also to Knut Bergo (Oslo), Dan Frände and Esko Yli-Hemminki (both Helsinki) for providing insightful and constructive comments on the text at different stages of the writing process. Ragnheiður Bragadóttir (Reykjavík) kindly facilitated my investigations into Icelandic criminal law science. Also, huge thanks are due to Antony Duff (Stirling), for generously taking the time to read an early version of the manuscript and offering encouragement to someone who has far greater interest in than credentials for engaging with the philosophy of criminal law. The comments from the two anonymous reviewers have also clearly improved the text, for which I am very grateful.

The Faculty of Law in Bergen granted me a sabbatical in 2022 allowing me to put together this text. The University of Bergen Library has generously supported this open access publication, and the library's department at the Faculty of Law has once again been invaluable in providing access to the materials I have needed. Helene Nilsen has helped me much on improving the text and language in it. Øystein Nordmo kindly helped me completing the register. I am also very grateful to my publisher Fagbokforlaget and editor Balder Holm in particular, for taking on the project and seeing it through in a safe and steady way. In that regard, I would also like to thank Gosia Adamczewska for her efforts in the production process.

It all started, however, when one day, out of nowhere, the late professor Nils Nygaard (1932–2015) contacted me, a lost law student. This initiated several talks in his office, displaying Nils's intellect, curiosity, and open-mindedness, and also academia as a wonderful place to be. I am sorry for not having thanked him properly in person for inviting me in.

Jørn Jacobsen
Dragefjellet, Bergen on February 15, 2024

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Part I

Introductory Exercises

This part of the book, consisting of Chapters 1 and 2, introduces the study and explains the need for a normative justification for Nordic criminal law, responding to the historical demise of normative philosophy in Nordic criminal law scholarship.

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1

Introduction

1.1 The problem: What is Nordic criminal law and its normative foundations?

Nordic criminal law is often thought of as a specific kind of criminal law. The reference to the Nordics denotes a geographical area in the Northern part of Europe consisting of Iceland, Norway, Denmark, Sweden, and Finland, as well as the autonomous areas of Greenland, the Faroe Islands, and Åland. These societies and their political and legal orders have a lot in common as they were developed in close contact with each other, on an informal as well as on a formal level. In many regards, their criminal law orders resemble each other.[1] On a more concrete level, there are specific Nordic 'models' pertaining to certain issues relating to criminal justice.[2] There has also been close collaboration on issues like jurisdiction, police collaboration and crime prevention, continuously building on the Nordic countries' shared social

1 For overviews of criminal law in the Nordic countries in English; see e.g., for Danish criminal law, Langsted/Garde/Greve (2014), for Norwegian criminal law, Jacobsen (2023), for Finland, Nuotio (2023b), for Swedish criminal law, Bennet (2022) and for Iceland, Thormundson (1998).

2 See e.g., Fornes (2021) p. 97 and p. 138 on the 'Nordic model' for youth criminal punishment, where criminal cases involving children are part of the general criminal justice system, as opposed to legal orders with specific youth criminal justice systems, such as Germany.

and cultural background – as well captured, from a Finnish point of view, by Inkeri Anttila (1916–2013) in 1986:[3]

> Finnish legal culture is part of the general Nordic legal culture. All of the Nordic countries share a legal heritage, the broad outlines of which can still be seen. Furthermore, for several decades there has been a deliberate effort to harmonize Nordic legislation. In 1962, a special agreement on co-operation was prepared, and in 1960, a permanent body called the Nordic Criminal Law Committee was established. Efforts along these lines have been justified not only by tradition but above all, by the argument that these countries have grown closer to another also in their economic and cultural relations.

For such reasons, 'Nordic criminal law', and related expressions such as 'Scandinavian exceptionalism', have become something more than merely a geographical reference.[4] Rather, the expression 'Nordic criminal law' has come to denote a particular mode of criminal law – a distinct criminal law ideology, if one likes. For instance, Katja Franko sums up some of the core characteristics of Nordic criminal law as follows:

> It has been customary to describe the Scandinavian penal climate as exceptional … Few societies can match Scandinavian countries in their commitment to welfare … particularly if this is set against the late modern punitive and security tendencies to be seen in Anglo-American countries. Despite some trends to the contrary, elements of the idea of reintegration have retained their historic centrality in criminal justice and prison service ideologies … Norway has been no exception to the Scandinavian norm. Its prisons have become popular with foreign visitors engaged in penal tourism, particularly the island prison at Bastøy. On one of his visits,

3 Anttila (1986) p. 187. See also e.g., Nelson (1973) p. 282, Thormundsson (1998) pp. 13–14, and, more detailed, Takala (2005).

4 Regarding the geographical references: 'Scandinavia' and 'the Nordics' are often seen as synonymous, although the former refer to a more limited part of the Nordics (Norway, Denmark and Sweden). To avoid any confusion, in the following I will use the term 'Nordic'.

> the influential US documentary maker Michael Moore summarised the prison systems attitude towards prisoners as 'how can we make them good neighbours'. He described Norway as a society 'which operate[s] with a sense of we' … and puts high value on social inclusion. This stance is epitomised by the Norwegian Labour Party's popular slogan 'Alle skal med' (imperfectly translated as 'Everybody in').[5]

This style of criminal law is recognised also beyond the Nordic legal communities, often cherished and seen in connection with the evolution of the equality-oriented and trust-based Nordic communities and their welfare states.[6]

Yet, it is not quite clear what it is that we are talking about when we talk about 'Nordic criminal law', more specifically.[7] Taking more specific features of Nordic criminal law into consideration, it becomes clear that this cannot be pinned down in any straightforward way: the evolution of Nordic criminal law, and Nordic legal culture more generally, have been closely connected to the development of Continental law, German law in particular. Due to this, many of Nordic criminal law's principled and conceptual views are closely aligned with perspectives found in Germany, including the shared emphasis on the principle of guilt. At the same time, Nordic law is usually considered more pragmatic in orientation, favouring empirical knowledge, consequentialism, and an 'all things considered' point of view; hence, it is in many ways more relatable to the Anglo-American style of thought. But then again, as already mentioned, Nordic criminal law also distinguishes itself from Anglo-American criminal law for instance by its emphasis on equality and social inclusion, by comparatively low levels of punishment and a strong focus on rehabilitation-oriented prisons, as well as its emphasis on positive general prevention and the use of other social means than criminal law to create well-functioning societies. Adding to this, notable differences may also be observed within the Nordics: The Danish, Norwegian, and Icelandic legal orders have more of the

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5 Franko (2020) pp. 106–107 (brackets included in the original text). Michael Moore, best known for the documentary *Bowling for Columbine*, is not to be confused with the criminal law philosopher Michael S. Moore, who we will return to in 3.3 below.

6 See, for instance, Pratt (2008) on Scandinavian exceptionalism.

7 This is not only so for criminal law, but for references to other parts of 'Nordic law', see, e.g., on 'Nordic' constitutional law in Krunke/Thorarensen (2020).

pragmatic features of Anglo-American law; Sweden has a history of French influence; while Finland, for its part, sometimes appears as 'more German than the Germans themselves' (in the words of a Finnish colleague, actually). Differences are also found in the substantive criminal law and criminal procedure of these legal orders, even at a quite fundamental level. Sweden's rejection of the insanity defence, or Norway's distinct 'medical model', for that matter, are often highlighted examples, but far from the only ones.

One possible approach when attempting to clarify what 'Nordic criminal law' ideology is really about, could be to turn to political and legal authorities, such as legislators and courts. It is, however, not to be expected that one would find a thorough elaboration and justification of the principles of Nordic criminal law in such settings: Preparatory works, for instance, are normally more concerned with applying such principles to provide concrete legislative solutions, rather than investigating and justifying these principles in themselves.[8] Instead, when looking for deeper engagement with the principles of Nordic criminal law, it is more apt to turn to academic perspectives and the very scholars that are, perhaps, most intimately engaged in and sometimes also the fiercest of defenders of Nordic criminal law: Nordic criminal law scholars.[9] Historically, at least, these scholars have in various ways also played a central role in the formation and development of Nordic criminal law. We do, indeed, find extensive relevant literature in these research outputs. But, as we will see in Chapter 2, there is also, for different reasons, a limitation

8 Preparatory works vary, of course, in how and to what extent they go into the normative basis for their proposal. One example of a relatively 'principled' preparatory work is NOU 2002: 4 *Ny straffelov — Straffelovkommisjonens delutredning VII,* part of the Norwegian criminal law commission's work on the new Norwegian criminal code, where the harm principle is central. Even this example is, however, fairly superficial regarding the more foundational questions in the philosophy of criminal law.

9 Already here, we face a challenging issue of terminology: In the Nordics, similar to for instance in Germany, it is more common to talk about the 'legal science' and 'legal scientists', while in English, the terms 'legal scholarship' and 'legal scholars' are more common. For more on this issue, and more general starting points about legal science, see e.g., Jacobsen (2022b) pp. 41–59, and with a particular view to 'legal doctrine' in this regard, Jacobsen (2021b). In this book, I will vary between the most apt English word (scholarship) and the most common and favoured Nordic point of view (science), without implying any difference between them.

to this approach: despite the fact that many refer to and make claims about Nordic criminal law, there is a gap in the discipline when it comes to justifying 'Nordic criminal law' and exploring its deeper meaning. Addressing this challenge of justification is the primary aim of this book.

1.2 Why this book

The *first*, and most important reason for this book concerns the need for such a work in Nordic criminal law scholarship – my home base. As already touched upon, Nordic criminal law is often, for good reasons, claimed to be special in terms of its values and principles. Still, and almost paradoxically, despite this strong normative identity, normative theoretical projects like this book did not have favourable conditions in Nordic criminal law scholarship for almost a century. In Chapter 2, I will account for the historical reasons for this. This leaves us in want of a proper normative foundation for Nordic criminal law that clarifies why this should be advocated, preserved, and developed in a time of change and challenges in society as well as in criminal law. By 'normative foundation' I refer here to a rational philosophical justification for the institution of criminal law as part of the legal order, of the kind called for in the philosophy of criminal law.[10] Currently, there is a revived interest in the Nordics both in political philosophy and in the philosophy of criminal law, which can also be seen in criminal law scholarship.[11] To my knowledge, there are, however, no general contributions relating 'Nordic criminal law' and scholarship to the philosophy of criminal law. Not the least in the light of the contemporary development where Nordic societies and criminal law are

10 On the connection to the philosophy of criminal law, see further 1.3 below.

11 See e.g. on law and political philosophy, Slagstad (2001), philosophy of criminal law; Duus-Otterström (2007), and, from the perspective of criminal law scholarship, Nuotio (2008). Much of the discussion revolves around notions such as the '*Rechtsstaat*' and 'the democratic *Rechtsstaat*'. Another example of this is Jacobsen (2009a). These notions, as I will return to, are also closely connected to Kant, see e.g., 5.2.1 below. The following analysis can be seen as a Kantian-republican interpretation of these notions, and hence, for my part, a re-interpretation, more directly engaging with Kant's political philosophy, allowing me to address certain weaknesses in the last-mentioned work, to which I will return.

in a state of transition, which I will return to towards the end of the book, it is evident that there is a need for such a normative framework, or in the words of Philip Pettit, a *compass* for Nordic criminal law scholarship.[12]

While the focus of this book is on 'Nordic criminal law' as a normative reference point for Nordic legal *science*, we should also note that currently, there is work to strengthen Nordic legal collaboration, including in criminal law. For instance, in a report to the general secretary of the Nordic Council of Ministers, Inge Lorange Backer recommends more collaboration in legislation. Criminal law is one of the highlighted areas, due to the humane criminal law tradition in the Nordics, but also in light of contemporary challenges to this approach.[13] Hence, there is also a clear policy side to the subject of the present analysis, relating to the view and role of Nordic criminal law science in public and political debate.

Second, and relatedly, this provides a welcomed opportunity to further strengthen the dialogue between Nordic criminal law scholarship on the one hand, and the contemporary philosophy of criminal law on the other. While this book primarily advocates a Kantian-republican approach to the topic – to be further clarified in Chapter 5 in particular – we will, along the way, have the opportunity to relate to and review several important contributions to the philosophy of criminal law. This includes contributions to German criminal law scholarship as well as the contemporary Anglo-American philosophy of criminal law. The German discussion has been closely intertwined with the philosophy of criminal law for a long time now, with Paul Johann Anselm von Feuerbach (1775–1833) as the most important forerunner.[14] As regards the latter, the Anglo-American discussion, not underestimating the importance of contributions from, for instance, Jeremy Bentham (1748–1832) and later, HLA Hart (1907–1992), accelerated significantly towards the end of the previous millennium and today displays a wealth of positions and a broad and intriguing debate, connecting legal scholarship with philosophical and sociological views.[15] Nordic criminal law scholarship has, with some sig-

12 Cf. Pettit (2014).

13 See Backer (2018) p. 61.

14 See further 6.7 below.

15 On the theoretical development in the Anglo-American context around the turn of the 21st century, see e.g., Duff (2005) and Thorburn (2008) pp. 1077–1094.

nificant exceptions, not yet managed to reach the same level of engagement with the philosophy of criminal law.[16] One aim of this book is therefore to contribute to such a development by bringing Nordic criminal law scholarship in closer connection with the forefront of the contemporary philosophy of criminal law.[17] As such, it can also be read as a Nordic contribution to, in the words of Luís Greco, 'einer *universellen Strafrechtswissenschaft*, die den Wert eines jeden Gedankens ohne Rücksicht auf seine Herkunft als Arbeit an einer gemeinsamen Sache' – written in English, the new *lingua franca* of criminal law scholarship.[18] Writing this in English also allows us to cross the difficult crevasse dividing the Scandinavian languages and the Uralic Finnish language.

Third, again related to the above-mentioned reasons, the *republican* philosophy of criminal law has received more attention in recent years. The republican approach of the book, for instance, connects to works by authors such as Philip Pettit, John Braithwaite, Antony Duff, and Malcolm Thorburn.[19] This republican approach allows us to investigate criminal law from a power perspective while maintaining a strong commitment to freedom – a fundamental value in any reasonable account of the criminal law of the *Rechtsstaat*. In Nordic criminal law scholarship, this recent republican literature has not had

16 Regarding exceptions, there are in recent years some notable contributions where Nordic scholars add to the international discussions, see for instance Bois-Pedain/Ulväng/Asp (2017) on the state and criminal law and Lernestedt/Matravers (2022) on the criminal law's person. Later on, we will also encounter the works of Nils Jareborg, for instance.

17 Regarding the use of the term 'philosophy of criminal law', see 1.3 below. A short introduction to contemporary Anglo-American discussion is provided in 3.2. The German discussion will be kept on hold a bit longer: A short introduction to the contemporary German discussion is provided in 6.7.

18 See Greco (2009) p. 30, and regarding the role of English in this regard, Dubber (2014) p. 1. Regarding Nordic criminal law, I have, as far as possible, used English texts about Nordic criminal law, as they are more accessible for non-Nordic readers to access these. To some extent, however, I will rely on texts written in Nordic languages, which are, after all, the most important contributions to the Nordic criminal law scholarship. In these cases, I will provide English translations. In these translations, I have tried to maintain the 'voice' and style of the author and the specific quotation itself. Generally, I have omitted paragraph breaks from quotations.

19 Much of this discussion also claims relevance to other legal orders than Anglo-American legal orders, see e.g., Duff (2018a) p. 5.

a direct influence.[20] Part of the reason for this is perhaps (paradoxically) that several aspects of republicanism are quite familiar to Nordic legal scholarship, including its public law point of view. Some of the historical contributors to this line of thought, Charles-Louis de Secondat, baron de la Brède et de Montesquieu (1689–1755), and Cesare Beccaria (1738–1794), are also well-known to Nordic criminal law scholars.[21] Republicanism is also closely connected to the natural law point of view that made such impact in the formative years of the contemporary legal order and legal science for instance in Norway.[22] What the political philosophy of 'republicanism' actually implies, is, however, not obvious. As we will return to in Chapter 5, different republican strands of thought may suggest different takes on criminal law, so it may be worthwhile to look further into this. Hence, this book aims to make the political and legal philosophy of republicanism more relevant to criminal law scholarship, exploring – or rethinking – its relevance to our understanding of the principles of Nordic criminal law.

Fourth, again relatedly, I will draw on one specific branch of republicanism: Kantian republicanism. Kant has frequently been referred to in debates on criminal law, typically as an advocate for a categorical and quite harsh retributive view of criminal law. His views on 'blood guilt' and fierce defence of the death penalty in the *Metaphysics of Morals* are often used as evidence in support of this take. Clearly, this is key to the aversion to Kant often witnessed in Nordic criminal law, something I will delve deeper into in Chapter 2 below. However, at the same time, Kant has for a long time mainly been subject to rather short, and often also misguided and demeriting characterisations in Nordic criminal law scholarship. I will aim to compensate for this lack of proper consideration of Kant by engaging in a more detailed appraisal, starting out from his political philosophy, which, it can be added, has attracted

20 For Nordics, the term 'republicanism' may in itself be a part of the problem here: It tends to mean either the opposite of monarchy or the political ideology of the American republican party (the 'GOP'), but these meanings of the term are not relevant to this book. Also: There are a few exceptions to this lack of engagement with republicanism in Nordic criminal law scholarship, including Kettunen (2015) who briefly connects to republican points of view. See also, from a philosophical point of view, Vogt (2018) e.g., pp. 153–160.

21 See e.g., Anttila (1990).

22 See Kjølstad (2023).

attention in recent years, also in the Nordics.[23] In his political philosophy, Kant advocates a comprehensive republican theory of law, providing important starting points also for his approach to criminal law. This body of work is of interest for several reasons, including its analysis of the conceptual relation between the state and criminal law, a topic that has gained renewed attention in recent decades.[24] Taking this work into consideration may provide insights and analytical resources which may contribute to the construction of a robust normative theory of criminal law. Particularly its views on progress and reform, aspects of Kant's practical philosophy which are not always sufficiently recognised, contribute perspectives that, in my view, are essential for any proper account of criminal law. As I will show, Kant's work may be clearly relevant to the contemporary Nordic discussion on criminal law.

Fifth, despite its richness, there may still be something to add to the existing (international) discussion on the justification of criminal law. I will argue that much of contemporary normative criminal law philosophy would benefit from paying more attention to one key issue in criminal law: power – which is, as we will see, a key theme in Kant's political philosophy. As criminal law and punishment basically concern (the use of) power, this may be surprising. However, the central issue in the philosophy of criminal law has been the *justification* of that kind of use of power that punishment ultimately concerns, not conceptual issues relating to the nature of power in itself. This may easily result in a situation where the concept itself is somewhat neglected and central presuppositions for the discussion are not articulated to a sufficient extent. This book therefore aims to contribute to this discussion by focusing on the role of power in reasoning about criminal law and its justification. In my view, this will give us a fuller picture of the fundamental questions that need to be addressed when attempting to justify criminal law and also provide important premises for solving these issues. Clearly, we should be deeply sceptical to

23 For some important Nordic works in this regard, see Eng (2008) and Arntzen (2020), and in regard to criminal law, see for instance, Vogt (2021). When I talk about Kant's 'political philosophy', referring to his 'political and legal philosophy' would be more precise. This is, however, a complex phrasing, and as Kant's viewpoints on law are intimately connected to his entire political philosophy (and through that, philosophy in general) it seems apt to simply use 'political philosophy' in this regard.

24 For an important, fairly early discussion of the relation between the state and criminal law, see Jung (1998).

that kind of use of power against individuals that criminalisation and forms of punishment such as incarceration imply. But, at the same time, most would also recognise the importance of state power for the protection of individual rights, including criminal law's central role in this regard. So, how can these seemingly different normative viewpoints or perspectives be reconciled and brought into one overarching justification of criminal law? At least, we have to be clear about what we are talking about when we talk about 'power'. The distinct features of Nordic criminal law as less repressive compared to the criminal law of many other countries where long prison sentences and harsher prison conditions are more common, make this a particularly interesting case for highlighting and discussing criminal law and power.

Sixth, related to the preceding point, this perspective not only allows us to connect criminal law scholarship to philosophy, but also gives us a good opportunity to connect criminal law scholarship to empirical perspectives on Nordic criminal law. Traditionally, Nordic criminal law scholarship has considered itself to have close connections to criminology, at least much closer connections than to the philosophy of criminal law. There has for some time been a strong social and pragmatic orientation in Nordic criminal law, connecting criminal law scholarship to criminology and sociology. When Nordic criminal law scholars speak of Nordic criminal law as 'rational', they often seem to mean that it is fact-based and directed towards social utility. Central Nordic legal scholars, including Vagn Greve (1938–2014) and Per Ole Träskman (1944–2019), often emphasised the importance of criminological and sociological knowledge for criminal law and its reform. But there have also been certain obstacles to this interaction, for instance in Norway in the latter half of the 20th century, where the combination of the legal-pragmatic approach of the criminal law scholar Johs. Andenæs (1912–2003), the critical-normative approach of Nils Christie (1928–2015) in criminology and the abolitionist view of legal sociologist Thomas Mathiesen (1933–2021), did not result in a particularly good interaction.[25] More recently, there are signs of improved communication in this regard.[26] But, as I will return to in

25 Regarding Norwegian criminology and sociology developing critical views of criminal law, see further the politics of abolition advocated in Mathiesen (2015) and the emphasis on restorative justice in Christie (1977).

26 See e.g., Johansen/Ugelvik/Franko Aas (2013).

Chapter 9, this only serves to make the need for an overarching normative framework for this research dialogue even more visible. This book seeks to further strengthen the connection between criminal law scholarship and empirical perspectives, claiming that a well-founded normative framework for the discussion is of mutual benefit and provides a better foundation for their interaction. The conceptualisation of power in this book may offer us a particularly useful way to achieve this. Worth noting is also that 'Scandinavian criminal law exceptionalism' today is subject to discussion and critical analysis in sociology and criminology, a discussion that relates closely to our investigation of the nature and principles of 'Nordic criminal law' – as the legal scholar would typically approach it.[27]

These different, but related reasons for writing this book (in this way) mean that it engages with many different discussions in political philosophy, Kant-studies, the philosophy of criminal law, criminal law scholarship, legal history, criminology, and sociology, to name the most important fields. As a result, the book is likely to fall short of each of them: political philosophers would want more of Rousseau, Hobbes, Hegel, or Pettit for that matter. Kant-scholars may object to the lack of depth in the interpretation of Kant. Philosophers of criminal law may find the book adding little new to the discussion. And criminologists and sociologists may feel underappreciated, even if I try to reach out to them towards the end of the book. Scholars in these fields may (if they read the book at all) end up disappointed, which I actually expect them to, taking into account the author's lack of competence in these different fields. Still, I hope these readers can appreciate the effort to connect the different discussions and apply them in this theoretical endeavour concerning the normative foundations of Nordic criminal law. That may at least be a contribution to an improved dialogue, which there are good reasons for pursuing.

Ultimately, however, my most important reason for writing this is to contribute to the development of Nordic criminal law scholarship, providing it with the essential normative foundations on which criminal law scholarship so heavily relies. To see why this is so, a conceptual clarification regarding the term 'philosophy' of criminal law is helpful.

27 See e.g., Pratt (2008) and Ugelvik/Dullum (2011).

1.3 Criminal law scholarship and the philosophy of criminal law

This book forms part of an overarching endeavour to provide theoretical resources for Norwegian and Nordic criminal law and criminal law scholarship.[28] The ambition to clarify criminal law's normative foundations means that I am operating in the realm of philosophy, which is challenging. The nature and justification of criminal law is first and foremost the domain of the philosophy of criminal law, a branch of philosophy which is closely connected to political philosophy. As one would clearly expect philosophers to be better equipped to conduct philosophical analyses than would a legal scholar, the question arises whether a legal scholarly project such as this is meaningful or even justifiable. However, as modern criminal law scholarship has emerged as a discipline in its own right, the justification of criminal law has become a core issue in the field.[29] Today, legal scholars engage in such discussions as part of their general interest in criminal law.

To explain why they *should* do so, it is helpful to stress the distinction between philosophy as a scholarly discipline with its own credentials on the one hand, and philosophy as a way for us to organise our thinking by means of abstraction, systematisation, conceptualisation, and argumentation on the other. In the latter regard, as elaborated upon elsewhere, legal scholarship must connect to and develop their views on the nature and justification of criminal law.[30] Such philosophically informed discussions provide an indispensable basis for criminal law scholarship's reasoning on criminal law. Views about the nature and justification of criminal law provide reference points for what research topics one engages with, what views and arguments one advocates in text as well as in teaching, and how one as a scholar contributes to public discussions and reform processes, for instance. To quote Nils Jareborg: 'Die Strafrechtswissenschaft vor den Aufgaben der Zukunft? Eine Antwort ist:

28 This project is particularly pertinent for Norwegian criminal law scholarship, which was for a long time dominated by a negative attitude towards theoretical perspectives, favouring practical problems and problem-solving, see Jacobsen (2010). See also 2.3 below.

29 As already mentioned, German criminal law science provides a good example here, see further 6.7 below.

30 See Jacobsen (2023a).

Ohne Ideologiebewußtsein geht es nicht.'[31] Criminal law scholarship is so intimately related to the positive law, its justification, its evaluation, and its development, that it can hardly be considered conceptually and normatively neutral.[32] Jareborg puts this point very sharply:

> Jede Wissenschaft hat jedoch schon deswegen eine metaphysische Seite, weil jede Theoriebildung, jede Begriffsbildung, jegliches abstrakte Denken Produkte der menschlichen Phantasie sind. Unser mentales Leben enthält eine metaphysische Prägung, sobald wir beginnen, von dem Stimulanzchaos, das unsere Sinnesorgane erreicht, zu extrapolieren. In der Bedeutung, in der ich das Wort ‚Ideologie' verwenden will, haben auch die Naturwissenschaften einen ideologischen Grund. Unter ‚Ideologie' verstehe ich nämlich (eine organisierte Reihe von) grundlegende(n) Auffassungen hinsichtlich eines Aspektes der Wirklichkeit, Grundanschauungen in einem Gedankensystem. … Wissenschaft handelt in ihren grundlegenden Bestandteilen mehr davon, Wirklichkeit zu schaffen, als Wirklichkeit zu beschreiben. Der Traum der logischen Positivisten von einer wertfreien Wissenschaft war natürlich auch eine Ideologie, aber eine unfruchtbare Ideologie.[33]

As such, there are good reasons also for Nordic criminal law scholarship to investigate its criminal law ideology: Such an ideology makes sense of, provides direction to, and legitimises their research enterprises, including their contributions to upholding and developing the legal order of which they are part. In this way, this book could be seen as contributing to Nordic criminal law scholarship's theory of science.[34] It all depends, however, on this ideology *being well justified*.

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31 Jareborg (2000a) p. 415.

32 See also e.g., Tapani/Tolvanen (2016) p. 17 on criminal law scholarship's intimate relation to normative political philosophy.

33 Jareborg (2000a) p. 413. The term 'ideology' is often used in Nordic criminal law scholarship, see also e.g., Elholm in Elholm/Baumbach (2022) p. 54. For my part, I prefer to speak of a (normative) philosophy, which is the term applied in this book, see 1.3.

34 In the meaning of *Wissenschaftstheorie*, see e.g., Skirbekk (2019).

For that reason, criminal law scholarship should do philosophy in the latter of its two meanings, and in this regard interact closely with works in the discipline of philosophy and expose itself to the discussions and standards of that discipline. Aiming for that, and in line with the understanding of 'philosophy' as a means to organise our thinking, in the following I will refer to the project of this book simply as 'philosophy of criminal law'.[35] As a legal scholarly project, this undertaking can aptly be described as a form of 'rational reconstruction' and justification of the principles of Nordic criminal law, by drawing on and applying the justification standards of normative philosophy (in the sense of a scholarly discipline). In the words of Richard Dagger:

> Rational reconstruction thus aims to discover the reason or logic inherent in the law despite its irregular development over time and the various courses it takes from one place to another. In the case of criminal law, rational reconstruction must account for the leading features of criminal law and point the way to its reform or further development.[36]

At the same time, it may be added that the results of this analysis are not only, and not even primarily, of relevance to legal scholarship. Rather, they speak to the public and political discourse about how we – as individuals and as community – should reason about the legal order and the criminal law, in itself a central feature of the republicanism advocated in this book. Criminal law scholarship is one voice, with a particular view from within, in that public debate.

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35 In German, the term 'Straftheorie' is sometimes used, see e.g., Greco (2009) p. 203 about '*normative Lehre … die den Inbegriff der Bedingungen einer legitimen Strafe bestimmt*'. Terms such as this and 'penal/punishment theory' may, however, be less helpful regarding the need to justify the (entire) criminal law.

36 Dagger (2011) pp. 44–45, with reference to Duff, who in several settings has emphasised this approach, more recently in Duff (2018a) pp. 11–13.

1.4 Outline of the book

The book is structured as follows: Part 1 consists of this introductory chapter and the following Chapter 2, which adds to the present chapter by going somewhat further into Nordic criminal law and Nordic criminal law scholarship's ambiguous relation to the philosophy of criminal law. Here, we look into the historical development of Nordic criminal law scholarship and the demise of normative philosophy within it. This will also explain how Kant has been considered obsolete in this discourse.

Part II of the book consists of Chapters 3 and 4, both concerning power, criminal law, and criminal law scholarship. Chapter 3 sets the stage by addressing the lack of attention paid to the concept of power in criminal law philosophy. To do so, I turn to the Anglo-American discussion as a reference point, as it is one of the most vigorous and stimulating discussions today. This move serves several aims: It allows us to look beyond the Nordic discussion (closely related as it is to the German discussion), to refresh our approach, including by mapping out different scholarly approaches from which we can assess Nordic criminal law scholarship. Furthermore, turning to the Anglo-American discussion shows us that, somewhat surprisingly, the concept of power is not a central topic in this discussion, which invites us to reflect on why this is so. Chapter 4 delves further into the concept of power and shows how this can provide us with analytical resources for the further investigation into criminal law. However, it also points out a fundamental conundrum of political philosophy – the constitution and justification of political power – which we need to address in order to reason properly about criminal law.

Part III of the book, consisting of Chapters 5 and 6, addresses Kant's philosophy. Chapter 5 provides an overview of Kant's political philosophy. Following this, Chapter 6 takes a closer look at Kant's conception of criminal law. Kant's political philosophy proves to be more important for articulating a normative foundation for criminal law than is his conception of criminal law. Kant's views on criminal law are fundamentally disputed: The body of work is smaller, less accessible, and subject to widely different interpretations. Kant may even be said not to have developed what we today would think of as a philosophy of criminal law. Historical perspectives on his writings and their context could potentially bring us closer to the 'essence' of his view of criminal law, but that is not the path that I will follow. Instead, I will carve out some general political philosophical themes and principles that pave the

ground for constructing a republican criminal law. But also, by working our way through Kant's political philosophy and remarks on criminal law, we have entered the historical path leading to the contemporary German discussion, which we will briefly encounter towards the end of Chapter 6. Together with the overview of the Anglo-American discussion, this exercise provides a background for the republican criminal law theory to be unpacked in the remaining chapters of the book.

Part IV of the book, consisting of Chapters 7, 8 and 9, provides a rational reconstruction of a republican philosophy of criminal law, developed in relation to core discussions also in Nordic criminal law. Chapters 7 and 8 provide the general principles for and structure of a republican conception of criminal law that addresses the key concerns and topics raised by the preceding interpretations of Kant's work. Key in this regard is the right to external freedom as the basic right of the individual, and the duty to enter into a civil state to protect it. The civil state, I will argue, requires a normative baseline to fulfil its role as protector of public justice, which gives rise to what I call a *baseline conception* of criminal law. This has three *layers*, which I call the individual, the public, and the state authority layers, and, furthermore, three *functions* to serve: the declaratory, the retributive, and the preventive function (in order of priority). Chapter 8 elaborates on the three core functions. Chapter 9 builds onto the baseline conception by addressing its reform dimension. While providing a principled framework, this must be concretised in terms of specific criminal law regulation. This is a task for the legislator, one that requires continuous maintenance reforms to ensure that the criminal law is continuously adapted to societal development. At the same time, while actual legal orders deserve respect, they also create difficulties in living up to what Kant calls 'the true republic'. While the strive towards achieving this is bound to be a long historical process, states are nevertheless obliged to improve in order to approximate the true republic. This, it is claimed, has implications for criminal law and its use of punishment and hard treatment, which should be subject to a longer timeframe reform, in tandem with social developments and reform more broadly. These viewpoints connect us closely to the central features of Nordic criminal law.

The circle of this book is then completed in Chapter 10, constituting on its own the final part of the book, Part V. While Kant may appear as a surprising ally of Nordic criminal law scholarship, this chapter argues that there

are historical as well as principled reasons for considering him as precisely that. By reconnecting to Kant in this way, we may be able to revitalise the deeper ideas of Nordic criminal law. At the same time, Nordic criminal law is changing and challenged by general developments such as the punitive turn in criminal policy in recent decades, calling on us to consider whether we should keep using 'Nordic criminal law' as parole for the criminal law we are obliged to promote, or rather turn to its republican foundations. There are at least reasons for putting more emphasis on the latter.

The way the argument is set up implies that much of this book is a somewhat strenuous walk to get to what criminal law scholars are likely to be most interested in, that is: the republican conception of criminal law provided in Part IV of the book. While readers such inclined may proceed directly to that part of the book, the foregoing chapters do important work in paving the grounds for the discussion in Chapters 7, 8 and 9. In order to get the full set of premises, these chapters should be read as well.

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2

Nordic criminal law scholarship and 'Nordic criminal law': A critique

2.1 Aim and outline

In this chapter, I will provide some further reflections on Nordic criminal law scholarship and the status of 'Nordic criminal law' as a normative reference for this discipline. In 2.2, I will say something about the view of the Nordic criminal law ideology which is dominant in the discipline. I will restrict myself to an overview of central viewpoints and the literature advocating these. A more thorough analysis of contemporary Nordic criminal law scholarship would be of great interest but is outside of the scope of this book. The central point here is that although the dominant viewpoints in the discipline appear to be sound, there is clearly a need for a more thorough justification. In 2.3, I will search for an historical explanation for this by going into the discipline's historical evolution and the demise of normative philosophy in Nordic criminal law scholarship. In 2.4, I will discuss the contemporary revival of normative perspectives, which, however, has not yet resulted in a more thorough normative explanation and justification of Nordic criminal law. In 2.5, I sum up some important observations for the further analysis, including the absence of Kant (in addition to some similar philosophical perspectives) in Nordic criminal law scholarship.

2.2 Nordic criminal law scholarship's ambiguous relation to the philosophy of criminal law

Nordic criminal law scholarship is – as many would hold – something more than simply 'criminal law scholars from the Nordic countries working on criminal law'. It refers to a community of scholars in a deeper sense. For instance, Nordic criminal law scholars are familiar with each other's works and have extensive knowledge of criminal law in the different Nordic countries. To a large degree, Nordic criminal law scholars can communicate in their mother tongues and interact with each other through institutional arenas such as Nordic journals and seminars.[37] The criminal law orders they study have a lot in common, having developed in tandem and with reference to each other. Sometimes, their analysis of criminal law cuts across the Nordics.[38] Nordic faculties of law have often recruited researchers from different Nordic countries. For such reasons, referring to 'Nordic criminal law' is, actually, almost as natural for a Nordic criminal law scholar as it is to talk about Swedish or Danish criminal law.[39] One could perhaps say that criminal law is one of the areas where legal scholars are the most open to identifying themselves and the law they study as 'Nordic'. And when they (this author included) do so, they usually do it in a favourable way: The ideal and wisdom of this style of criminal law seem to unite Nordic criminal law scholars, or at least, a great deal of them.

Underlying this is a fairly broad consensus of what Nordic criminal law is ultimately about, reconnecting us to the general mode or ideology of Nordic criminal law introduced in 1.1. Key notions such as 'liberal criminal law',

37 See e.g., *Nordisk Tidsskrift for Kriminalvidenskab*.

38 See, for instance, Elholm/Feldtmann (2014) for a 'Nordic perspective' on jurisdiction, starting out from analysis of the different jurisdiction rules in each of the different Nordic countries. Not all contributions to the field apply an explicit Nordic perspective, see e.g., Holmgren (2021) who makes use of Swedish, German and Anglo-American theory when analysing the Swedish law of sentencing. But also here, the analysis is dominated by viewpoints and principles, such as the principle of humanity and *ultima ratio*, central to the Nordic criminal law ideology.

39 Examples of references to Nordic criminal law are easily found in the literature, see e.g., Anderberg (2022) and Nuotio (2023a).

'rationality and humanity', criminal law as '*ultima ratio*', and more indicate a shared ideology: A particular view of criminal law and its role in society, one which recognises the societal importance of criminal law, but is also very sceptical towards it, or at least, towards the extensive use of it as a social means. As explained above in 1.1, the emphasis is on humanity and rationality, social effectiveness, (relatively) low levels of punishment, and a strong focus on rehabilitation-oriented prisons, as well as emphasis on positive general prevention and social means other than criminal law to create well-functioning societies.[40] The central point here is that in this way, 'Nordic criminal law' is not only a mode of criminal law, but just as much a mode of criminal law *research*. It constitutes the 'worldview' of and guiding principles for the criminal law scholars (the majority of them, at least) in the Nordics. One must work hard to find a 'law and order' criminal law scholar in the Nordics, advocating extensive use of criminalisation and punishment to solve societal problems.

So far, one may get the impression that Nordic criminal law scholarship is founded on quite strong normative conceptions of criminal law. The problem, though, is that what 'Nordic criminal law' more precisely amounts to, and how it can be justified, is not evident. So, we must look closer to find a more detailed explanation and justification of Nordic criminal law.

Basic normative starting points are typically found in the introduction to general outlines of criminal law, but these are often fairly short and not

40 For a valuable introduction to 'Nordic criminal law', see Nuotio (2007). Emphasising these characteristics is also common among the critics of (also Nordic) criminal law, see, for instance, Koivukari (2022) p. 136: 'Rationality, humaneness, legitimacy and *Rechtsstaatlichkeit* are all values or features linked to Nordic criminal law and policy. Even though any of these features might bear slightly different meanings and connotations in different contexts, they all have a strong connection to an understanding of criminal law as a system, a system that strives for coherence, norm hierarchy, objectivity, proportionality and legality ... It seems that in particular Nordic neo-classicism commits itself to this kind of systemic understanding of criminal law by emphasising the requirements of proportionality and foreseeability or legal security as well as humanisation of the criminal justice system'. I return to Koivukari's and similar critical views towards the end of the book. At the same time, these key notions are not limited to the Nordic context, but applied also in, for instance, German criminal law science, see, for a discussion from the point of view of 'the rhetoric of criminal law', Dubber (2018) pp. 33–95. I will return to Dubber's works below in 3.2 and 3.3.

particularly elaborate regarding the specific nature of *Nordic* criminal law.[41] At several points, the literature even appears to display a certain disagreement on the issue. For instance, Träskman has emphasised the so-called neo-classical view of sentencing, in particular related to the works of Jareborg and Andrew von Hirsch, as a shared feature of Nordic criminal law.[42] But although proportionality can certainly be said to hold importance in the Nordic countries at large, this neo-classical theory never really gained foothold in Norway and Denmark.[43] Furthermore, when Nordic criminal law scholars frequently use the term 'rational' in describing Nordic criminal law, there is a fundamental ambiguity in the notion of a 'rational' criminal law: As already touched upon in 1.2, 'rational' criminal law is often understood in terms of facts, social *utility* and a sound distribution of the social costs of crime.[44] But at the same time, social *justice* is also considered important in this regard.[45] The prioritisation between these aspects may vary between scholars.

Some legal scholars have sought to clarify the concept of 'Nordic criminal law', and thus contributed to the elaboration of Nordic criminal law and its 'exceptionalism'.[46] Träskman, for instance, considers it to be characterised by: 1) 'an emphasis on caution in the use of the criminal justice system', relating to the *ultima ratio*-principle, 2), a corollary of 1), the notion that 'the criminal policy measures are to be *rational and socially defensible*' – meaning that crime cannot be expected to be abolished, but should rather be regulated and reduced to tolerable levels, and 3) a strive to reduce the level of repression,

41 See e.g., for Finland, Tapani/Tolvanen (2016) pp. 22–48, and for Denmark, Elholm in Elholm/Baumbach (2022) pp. 53–88.

42 Träskman (2013) p. 335. For more on the so-called neo-classical view, see e.g., Hirsch/Jareborg (1991).

43 Träskman (2013) p. 346 points this out as well.

44 See e.g., Träskman (2013) p. 355 referring to the Finnish criminologists Inkeri Anttila and Patrick Törnudd.

45 See e.g., Lahti (2021) p. 5.

46 See also Christensen (2022) on the role of the Nordic journal *Nordisk Tidsskrift for Kriminalvidenskab* in this regard. As Christensen emphasises, non-academic institutions and persons have also been important in promoting Nordic criminal law scholarship.

adding that '[t]his means that it is characteristic of the criminal policy to work purposefully against the expansion of the penal system'.[47]

Another influential, if not the most influential contribution, is Jareborg's conception of the 'defensive' criminal law ideology – in contrast to the 'offensive' approaches to criminal law found in some other countries.[48] The term 'defensive' refers first and foremost to the state of being reserved, cautious, and non-aggressive, while being 'offensive' is understood as being eager and forward (in football, for instance, being defensive is about guarding one's own goal, while the offensive team attacks the goal of the opponent). While Jareborg does not explicitly connect the defensive criminal law ideology to 'Nordic criminal law', the implicit connection seems obvious and is made by others.[49]

Jareborg's account is a key contribution to contemporary conceptions of Nordic criminal law. It seems to fit well with the terrain: For instance, a key aspect of Nordic criminal law is precisely *not* to think of criminal law as a 'tool' to be actively used to solve social problems. Rather, criminal law and punishment should be restricted to what is absolutely necessary to protect – defend – the core values and structures of society, a view that leads to a well-founded scepticism towards 'active' use of criminal law as a social instrument. Crime is rather a social phenomenon that we cannot fully get rid of, and crime control through criminal law is costly, less efficient and should be used sparsely.[50] It is telling that Jareborg's influential article appeared in an anthology featuring key Nordic criminal law scholars in the 1990s with the title 'Beware of punishment'.[51] Jareborg's terms in a sense work even better in English than in Swedish: In English, being 'offensive' can also mean being rude, and Nordic criminal law scholars indeed regard the 'offensive' form of criminal law as more or less insulting, considering it as inhuman, irrational, crude and, well – offensive. Russia and the U.S., both states with high incarceration rates,

47 Träskman (2005b) p. 158.

48 An English version can be found in Jareborg (1995). This should also be read in tandem with other works of Jareborg. For English texts, see e.g., his discussion of 'crime ideologies' in Jareborg (2002) pp. 72–87. See also Jareborg (2005) on '*ultima ratio*'.

49 The importance of Jareborg's discussion of Nordic criminal law is recognised in, e.g., Träskman (2013) pp. 335–336.

50 For an apt and explicit statement of this view, see Anttila/Törnudd (1992) p. 205 reporting on the Finnish reform of the criminal code.

51 Snare (1995).

often are applied here as examples of forms of criminal law to be avoided.[52] Nordic criminal law, one might say, emphasises soft forms of power, a point which we will return to later on.

Jareborg's viewpoints is also clearly expressed in a short German text from 2000. Here, he establishes two ideal types which are contrasted to each other. In the list below, the left side would be comparable to the defensive ideology and the right side to the offensive ideology, even if these expressions are not used in this text:[53]

Rule of law ('Rechtsstaatlichkeit')	*Efficiency*
Proportionality	*Prevention*
Humanity	*Law and Order*
Radical crime ideology	*Collective crime ideology*
Self-critical criminal law morality	*Moralist criminal law morality*

Jareborg's preference for the left version is clear from his view of the right version, which he considers a road map to state terrorism.[54]

Then again, Nordic criminal law scholars are neither naïve nor radicals. While, for instance, abolitionism became influential in Nordic legal sociology through the works of Mathiesen in particular, it did not make much impact on criminal law scholarship.[55] Generally, Nordic criminal law scholars do recognise the importance of criminal law (as we know it) for society and show due respect to the criminal justice system and its functions and needs. Many Nordic legal scholars have engaged in close dialogue with political and legal institutions, providing them with expert input and advice, and to some extent, even defended the criminal justice system against what has been considered as unjustified critique and too progressive reform initiatives, as for instance the

52 See, for instance, Greve (2005).

53 Jareborg (2000a) p. 414 (translated from German).

54 Jareborg (2000a) p. 414: 'ein Wegweiser, der zum Staatsterrorismus zeigt'.

55 See e.g., Mathiesen (2015). Tapani/Tolvanen (2016), for instance, emphasises the importance of taking abolitionism seriously, but considers it hard to find a better founded and functional system as replacement for the criminal justice system. See also e.g., Andenæs (1996) pp. 33–39 and, beyond the Nordics, the critical appraisal of (different forms of) abolitionism in Greco (2009) pp. 207–227.

reception of the Norwegian Criminal Policy Report in 1978 well illustrates.[56] Here, it is worth noting that it has been common to see professors of criminal law moving on to become Supreme Court judges or to achieve other key roles in the Nordic criminal justice systems (or *vice versa*). For instance, Francis Hagerup (1853–1921), who we will return to, was even Norwegian prime minister for two periods. His close colleague Bernhard Getz (1850–1901) left academia to become General Director of Public Prosecutions in Norway, and became, along the way, deeply involved in making the Norwegian criminal procedure code of 1887 and the criminal code of 1902. Without an understanding and recognition of the intimate relation between the state and its criminal law, filling such different roles would not be likely.

The duality of normative criticism of and engagement with (or even involvement in) the criminal justice system seen in Nordic criminal law science, also causes a certain tension: Nordic criminal law scholars have somewhat different 'profiles' in this regard. While some are more prone to adopt a mainly critical approach to the state and the criminal justice system, others, in particular in the Danish-Norwegian pragmatic tradition, approach the discussion through a perspective from 'within' the criminal justice system.[57] Variations of this kind, however, are best characterised as differences within the family.

When we delve deeper into the normative foundations of and justifications for Nordic criminal law ideology, an interesting contrast to this markedly normative profile of Nordic criminal law scholars becomes apparent. While the defensive Nordic criminal law ideology has been advocated and defended for some time, the attempts to justify it at a more foundational level are rather few. There is a historical explanation for this, which is closely connected to the aims of this book. I will venture a brief outline of this story, beginning with the emergence of what we may call modern Nordic criminal law scholarship

56 See e.g., Andenæs et al. (1979) but also the retrospective view of the Minister of Justice delivering the progressive report, Inger Louise Valle, see Valle (1989) p. 180. The intertwinement of law and politics in Nordic criminal law was much stronger in earlier epochs, something I will return to in 2.3 below.

57 For an example of the latter, see Kjelby (2013) pp. 49–53, describing his study of prosecution law as founded on a 'user perspective' (p. 49, in quotation marks).

towards the second half of the 19th century and its views on normative philosophical projects such as the justification of criminal law.[58]

2.3 The demise of normative philosophy in Nordic criminal law scholarship

Nordic criminal law has for a long time been heavily influenced by German philosophy and law.[59] This is where it primarily draws its fundamental ideas from, including its emphasis on the principle of guilt and the importance of the legality principle, as well as several of its core concepts. While Norwegian legal science did not establish itself on its own terms until the 19th century, the Finnish, Swedish, and Danish legal science (the latter with Norwegian contributions as well, a result of the union between the two countries between 1537–1814) all have a longer history.[60] For instance, Hannu Tapani Klami considers the founding of the Academy of Turku in 1640 as the starting point for Finnish legal science.[61] This first period of Nordic legal science includes natural law scholars influenced by Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694). Pufendorf, in particular, who himself spent parts of

58 A disclaimer may here be appropriate: The following outline will restrict itself to some main figures and lines of development and does thereby not provide an in-depth analysis. A thorough study and analysis of the development of Nordic criminal law scholarship would be desirable. This, however, cannot be offered here.

59 From a historical point of view, see Björne (1995) p. 10, speaking about the German-Romanic literature's strong influence on Nordic legal science.

60 Broader historical perspectives on criminal law and Nordic criminal law scholarship can be found in Hauge (1996), while some periods are studied in more detail, such as the shift to the 20th century and the emergence of positivism, see e.g., Häthen (1990) on Sweden primarily, and Flaatten/Heivoll (2017) on Norway. In addition, legal historical perspectives have been developed on both specific regulations and their developments as well as key figures in Nordic criminal law scholarship, see e.g., Michalsen (1997). Nordic criminal law scholarship must, of course, be seen in connection with the broader developments within Nordic legal scholarship more generally. On this subject, there are extensive discussions which would go beyond the scope of this book. For a thorough historical analysis, see, however, Björne (1995), Björne (1998), Björne (2002), and Björne (2007).

61 See Klami (1986) p. 137.

his academic career in Lund in Sweden, was highly important for the evolution of modern legal scholarship, criminal law scholarship included, not only in the Nordics.[62] While philosophical engagement of this kind was to emerge there as well, Danish-Norwegian legal scholarship was somewhat more practically oriented compared to Swedish and Finnish legal scholarship, a dividing line to which we will return.[63] Gradually, criminal law science evolved as a distinct branch of Nordic legal scholarship, in Finland, for instance, with the works of Matthias Calonius (1738–1813) in the latter decades of the 1700s.[64]

The modern Nordic criminal law orders developed in the first part of the 19th century.[65] In the first period, a view of criminal law as part of public law emerged.[66] This development is closely related to the emergence of the *Rechtsstaats*-ideology, with the Age of Enlightenment and the critique of brutality and arbitrariness in the criminal justice system as an important

62 As I will return to below in 8.3.2, Pufendorf has been important in particular for the development of the doctrine of criminal responsibility. Here, we should mention that the discussion after Pufendorf has two related lines, one pertaining to the purpose of criminal law and punishment, another to the criteria for criminal responsibility (imputation). While these cannot be strictly separated, we will focus here on the first issue, but return to the second in Chapter 8 below. On Pufendorf and Nordic criminal law scholarship, see e.g., Wahlberg (2003) pp. 27 ff. on Finland, and Jacobsen (2011b).

63 The development of Nordic criminal law science and the demise of normative philosophical perspectives in it, is part of a broader issue concerning the development of Nordic legal philosophy more generally. There is extensive literature on the latter subject, into which it is not within the scope of this book to go deeper. See e.g., Kinander (2004) for an analysis and critique of legal realism.

64 See further for Calonius' works on criminal law and his 'divine but empirical natural law doctrine' in Wahlberg (2003) p. 1–130 (quote from p. 129).

65 See Björne (1995) for an overview of the Nordic legal science in this period. The tendency to consider the field as a 'Nordic' legal science emerged gradually but became dominant first towards the later decades of the 1800's. The Nordic legal meetings, for instance, started in 1872, this year in Copenhagen. See Björne (2002) pp. 2–3 and pp. 22–24.

66 See e.g., Björne (1995) p. 251 and Björne (1998) pp. 249–250 on the development in German legal science. See also below in 7.7 on the public law point of view and its importance in contemporary criminal law philosophy.

background.[67] Kant and Hegel, the key figures of German idealism, and also Feuerbach, were important references for the contemporary Nordic criminal law scholars.[68] An outcome of the *Rechtsstaats*-ideology in the Nordics is, for instance, the Norwegian Constitution of 1814, influenced by the Continental constitutionalist movement. The Constitution, in turn, led to the Norwegian criminal code of 1842, a criminal code that was formed with reference to conceptions about the purpose of the state and the relation between law, morality and religion, formed by the contemporary political philosophy.[69] The influential Danish-Norwegian legal scholar Johan Frederik Schlegel (1765–1863) was a Kantian.[70]

In the first half of the 19th century, viewpoints drawn from German idealism were also influential in criminal law scholarship: The Finnish legal scholar Karl Gustaf Ehrström (1822–1886) was a Hegelian, but also emphasised reform of the criminal, claiming that, in the words of Klami, 'deterrence was not a part of the essence of punishment at all' and that it was 'reformation that negated the guilt of criminal behaviour and belonged to the essence of punishment'.[71] His colleague Knut Lagus (1824–1859) favoured other contributions to German idealism and is described as an 'eclectic' with regard to the philosophy

67 I will not go further into the Age of Enlightenment and its impact on criminal law in the Nordics, however see Anners (1965) as well as some remarks below on figures such as Montesquieu, Beccaria, and Rousseau. Björne (1995) pp. 305–336 discusses the impact on the Enlightenment on Nordic criminal law and criminal law science, but – unfortunately from the point of view of our discussion – plays down the importance of the philosophy of criminal law in this regard (p. 306).

68 I use the term 'German idealism' in a broad sense, basically as a reference to a philosophical epoch in Germany, starting out with Kant but then leading into romantism. For a further analysis, see e.g., Guyer/Horstmann (2021) Sect. 4, showing that substantially, Kant's position cannot be reduced to a label of this kind.

69 See, for instance, Rørvik (2013a).

70 See Björne (1995) pp. 185–188 and Mestad (2013).

71 Klami (1986) pp. 208–209 (quote from p. 209). See also Björne (1998) pp. 215–217 and also p. 380 on the broader recognition of Hegel's philosophy of criminal law in Nordic legal science in the early decades of the 1800's.

of criminal law.[72] Ehrström's successor Jaakko Forsman (1839–1899) was a retributivist, considering punishment as 'reversing the crime'.[73] Among the late contributors to this classical period of Nordic criminal law scholarship, we should mention the Danish legal scholar Carl Goos (1835–1917), whose ideas were closely related to natural law and the classical criminal law. Goos studied Danish constitutional law as well. He was also the one who wrote about 'Nordic criminal law' in the Nordic legal encyclopaedia, testifying to his status in the discipline.[74] Goos, amongst others, advocated a viewpoint that we will encounter later on: the importance of upholding the legal order. Punishment, according to Goos, was about upholding the law for the sake of society.[75] We see, then, that Goos has elements of utilitarian as well as retributive considerations.[76]

So far, then, we have seen a normatively engaged discipline emerging in close contact with German philosophy and legal science in its foundational epoch. However, throughout the 19th century, things were changing. In Norway in the 1840's, the founder of Norwegian criminal law scholarship, Anton Martin Schweigaard (1808–1870), set out by vehemently rejecting German philosophy and the legal science informed by it, turning instead to a form of social utility-oriented pragmatism. His article on German philosophy concluded: 'The German philosophy has caused much evil; it has led many

72 On Lagus, see Klami (1986) p. 208, stating that Lagus did not accept 'the Hegelian objective idealism which was the opposite of *Rousseau*'s, *Fichte*'s and *Kant*'s ideas of Law and the State as conventional limitations on an individual freedom which was in principle unlimited.'

73 Klami (1986) p. 210, quote from Forsman. On Forsman, see also Björne (2002) p. 192.

74 Goos (1882) and Goos (1889). In addition to this encyclopaedia, a Nordic journal for imprisonment, *Nordisk Tidsskrift for Fængselsvæsen og øvrige penitentiære Institutioner*, and then the still existing *Tidsskrift for Retsvidenskab*, were founded, facilitating the Nordic legal scientific discussion, see further Björne (2002) p. 30.

75 Goos (1875) p. 6.

76 See also the discussion of the development in Goos' viewpoints in this regard in Frosell (1987).

good minds astray. It is time to do away with it.'[77] Kant, Hegel and other idealist philosophers were key targets for his critique, but he found Feuerbach's deterrence-oriented viewpoints more acceptable.[78] Feuerbach's viewpoints had already gained strong influence in Denmark-Norway through the works of Anders Sandøe Ørsted (1788–1860). Through the Bavarian criminal code of 1813, Feuerbach would also influence the aforementioned Norwegian criminal code of 1842.

Ørsted considered criminal law as a means of deterrence and prevention, viewpoints that resonated well with the pragmatic inclinations in Norway and Denmark in particular, of which Ørsted's intellectual development is representative: Ørsted, often considered the father of modern Danish criminal law, wrote a dissertation on Kant and praised him as the great sage from Königsberg, but later moved on to Fichte, only for his (later) conception of law to turn to what are called practical and realistic viewpoints.[79] The Swedish professor Johan Hagströmer (1845–1910), for instance, was also influenced by Feuerbach.[80]

Gradually, then, scholarship on criminal law was disconnected from its political philosophical basis, a detachment that even may be claimed to be

77 See Schweigaard (1835) on German philosophy (the quote translated is from p. 300), and Schweigaard (1834) on German legal science. Schweigaard seems to have been even more negative to other idealist philosophers than to Kant, but also Kant is characterised in negative ways, see e.g., on Kant and issues relating to political philosophy and criminal law in Schweigaard's text from 1835 at pp. 247–248, but also e.g., pp. 252–254 where Fichte is ascribed responsibility for having destroyed what good there was to find in Kant. Hegel is the end point of this negative development, this 'high priest of hair-splitting and harassment' (*sic*), p. 296. In letters, the German Hegelian Eduard Gans (1897–1839) was described as a 'charlatan', see Rørvik (2009) p. 74. But Schweigaard's discussion of Kant has been criticised, see e.g., Stubberud (2009) p. 115–118, claiming that it is too incomplete to merit attention and that Schweigaard's critique of Kant is particularly unfair.

78 See further, e.g., Jacobsen (2010). On Feuerbach, see e.g., Hörnle (2014).

79 E.g., Langsted/Garde/Greve (2014) pp. 23–24 ascribes Ørsted this role in Danish criminal law. See, however, Rørvik (2013b) p. 163 pointing out that Ørsted's discussion of criminal law contained also more fundamental viewpoints, e.g., pertaining to the relation between law and morality.

80 See further on Ørsted, e.g., Hurwitz (196) p. 59–60, Björne (1998) p. 63 and on Hagströmer, Björne (2002) p. 146.

inherent in Feuerbach's philosophy of criminal law.[81] How strong and immediate the breach in the Nordics with the previous philosophy of criminal law actually was, is an open question.[82] But clearly, there was a shift away from 'metaphysics' and towards empiricism as knowledge standard and towards social utility as a normative reference point, decoupled from the normative philosophy of Kant and Hegel.

In Norway, for instance, Hagerup held somewhat different views compared to Schweigaard. Hagerup was inspired by scholars such as Friedrich von Savigny (1779–1861) and Rudolf Ihering (1818–1892) and, in criminal law, Franz von Liszt (1851–1919), who was central to the emergence of modern German legal science and criminal law science.[83] Even if Hagerup's views on criminal law are complex, he was, particularly in his younger years as a scholar, clearly sceptical to 'metaphysics', and therefore hostile towards Kantian philosophy.[84] More generally, political and normative philosophy was not very prevalent in this period. The perspective of this period was instead one of positivism and empiricism, in theory of science as well as in legal scholarship in general.[85] It was, in Hagerup's own laconic words, a time when everything that smelled like 'dissection rooms and laboratories' had 'a particular force of attraction on the spirit'.[86]

This development did not only result in the emergence of sociology as a scientific discipline. It also led to a 'modernisation' of the aims of criminal law, as illustrated by the conflict between the classical and modern schools of criminal law, the latter with Liszt as key proponent. In Norway, alongside Hagerup, Getz should again be mentioned.[87] In Denmark, Carl Torp (1855–1929) was a key proponent for the modern criminal law ideology. In Finland, Allan Serlachius (1870–1935) was a central figure in this regard.[88] Dedicated

81 See further on Feuerbach, and Greco's re-actualisation of Feuerbach, in 6.7 below.

82 See more generally, Kjølstad (2023).

83 On the nature and development of German criminal law scholarship, see, further below in 6.7.

84 On Hagerup's view of criminal law, see Jacobsen (2017).

85 For this epoch, see e.g., Häthen (1990) and, for Norway, Flaatten/Heivoll (2017).

86 See Hagerup (1893) p. 5, commenting on the influence of Lombroso's theories.

87 See further about Getz, in e.g., Vogt (1950).

88 See e.g., Klami (1986) p. 211, who also describes Liszt as Serlachius' 'master in criminal law' (p. 206.)

to positivism was also the influential Swedish legal scholar Johan Thyrén (1861–1933).[89] Many of these scholars, however, had more than one side to them, suggesting a complexity in the issue at hand to be addressed later.[90]

Later, towards the mid-20th century, the Danish realist legal philosopher Alf Ross (1899–1979), while not first and foremost a contributor to Nordic criminal law scholarship, probed into issues of criminal law as well.[91] Ross was particularly outspoken in his rejection of normative philosophy of the kind advocated by Kant. The title of Ross' central work at this point, *Kritik der sogenannten praktischen Erkenntnis, zugleich Prolegomena zu einer Kritik der Rechtswissenschaft* (1933), testifies to this. Ross characterised natural law as 'a harlot … at the disposal of everyone'.[92] By turning to a sort of (meta-ethical) moral emotivism, he had allies in the Swedish legal philosophers of the Uppsala-school, Anders Vilhelm Lundstedt (1882–1955), Karl Olivercrona (1897–1980), and Per Olof Ekelöf (1906–1990), who for their part were heavily influenced by the non-cognitivist views of the philosopher Axel Hägerström (1868–1939), professor of philosophy in Uppsala from 1811.[93] Ross and his Swedish companions were, in turn, central to the development of what has become known as Nordic legal realism. They agreed on a notion of criminal law, its irrational normative language included, as a means to affect behaviour in society. According to Ross, one could simply do away with the conflict between retribution and prevention, the former being merely a feeling to be utilised as a means to achieve the latter: 'Retribution, censure, is

89 See Jareborg/Zila (2020) pp. 85–86, who connects Thyrén to Liszt's viewpoints, and also mentions Karl Schlyter (1879–1959) and Ivar Strahl (1899–1987), however, the latter two inspired by others in the positivist movement.

90 See here, for instance, the observations made by Björne (2002) about Thyrén (p. 381) and Serlachius (pp. 385–386).

91 While Ross discussed not only the aims of criminal law but also central doctrinal subjects, such as intent, his contributions to the discussion are more aptly described as legal philosophical, relating to his general legal philosophical project. His studies in criminal law were carried out late in his career (after he had turned 70 years of age) and suggest at points radical departures from core viewpoints in the contemporary Danish criminal law. On Ross as a doctrinal scholar, see Jareborg (1989), and for a more general perspective on Ross' intellectual career, see Evald (2010).

92 See Ross (1959) p. 261.

93 For some key works, see Lundstedt (1920), Olivecrona (1940) and Ekelöf (1942). For an overview, see e.g., Hauge (1996) pp. 296–300.

an emotional, hostile reaction which in itself acts as a punishment, i.e. directively, preventively.'[94] Ross also distinguished sharply between the aims and the justification of punishment.[95] In this way, Ross advocated a distinction between the general aim of penal legislation and the justification and (just) distribution of punishment.

Ross and the contributors from the Uppsala School had allies in the less theoretical minded, pragmatic criminal law scholars such as Stephan Hurwitz (1901–1981) in Denmark and Johs. Andenæs (1912–2003) in Norway.[96] These two saw little potential in theoretical abstraction for legal scholarship. Hence, they could join in the chorus rejecting normative philosophical approaches, such as for instance Ross advocated, turning to social utility considerations – general prevention in particular – in their justification of criminal law. This, however, did not bar Hurwitz and Andenæs, for instance, from being normatively engaged. Their jurisprudence is clearly informed by normative considerations. Hurwitz, for instance, recognises 'justice considerations' as a limit for criminal law, as well as 'general cultural ideas', such as humanity – thereby indicating that justice has a deeper, non-contingent character.[97] Ideas such as these are not elaborated upon and discussed at a theoretical level. In Finland, Brynolf Honkasalo (1889–1973) advocated 'relative' viewpoints, considering criminal law as a means to prevent crime, even if he paid attention to the importance of just retribution for criminal law to achieve this end.[98] Sociological and criminological perspectives were also central to Inkeri Anttila (1916–2013), as referred to several places in this book. To this

94 Ross (1975) p. 28.

95 See e.g., Ross (1975) p. 44: 'The traditional opposition of retribution and prevention (*quia peccatum— ne peccetur*) is meaningless because the opposing answers are not concerned with the same question. To maintain that punishment is imposed *in order to* prevent crime is to offer an answer to the question of *the aim of penal legislation*. To say that punishment is imposed *because* the criminal has incurred (legal, moral) guilt, is to offer an answer to the question of the (legal, moral) *justification for imposing penalties*.' See also p. 45: 'To say that the aim of punishment is to fulfil a moral duty is to mix two incompatible dimensions; the dimension of actual interests and the dimension of moral evaluation and validity'.

96 On Hurwitz, see Garde (2018). On Andenæs and his influence in Norway, see e.g., Jacobsen (2011a).

97 See Hurwitz (1952) p. 91.

98 See e.g., Frände (1990) p. 253.

epoch, one may also include for instance the Swedish professor Alvar Nelson (1919–2018), whose 'defensive' attitude towards criminal law can be seen in several writings, including this quote from 1970:

> Still, one senses – perhaps stronger than before – the need for humanitarian responsibility. Even in the area of criminal regulation, today one recognises that it is humans that one legislates *for*, and not humans that one legislates *against*. With this insight, it is natural to collaborate with those that the legislation concern, to maintain dialogue and together seek to find constructive solutions instead of repressive means. To fight new views and new techniques with criminal legislation and implementation is in vain. Once more one recognises the truth in the saying: 'The sword does not put out the fire.[99]

The shift that began in the middle of the 1800's, turning away from natural law-oriented justifications, did not thereby result in Nordic criminal law scholarship fully rejecting normativity, but rather turning more towards utility arguments and empirical perspectives. The outcome of this is seen in many works, for instance in the works of the Icelandic criminal law professor Jónatan Thormundsson:

> Criminal law is essentially *a punitive law*. Punishment is imposed on somebody because he is proven guilty and convicted of having committed a criminal offence and must 'pay' for it with his liberty or part of his property. This does not necessarily mean that we favour or implement retributive justice. In modern Iceland several constructive goals and means are attached, which further justify punishment by making it less detrimental and more humane, and by making it serve preventive and rehabilitative purposes at the same time.[100]

Correspondingly, this shift did not occur in a principled, philosophical manner: there was, so to speak, never a Bentham of Nordic criminal law. At the

99 See e.g., Nelson (1970) p. 220.

100 Thormundsson (1998) p. 4, see also e.g., Thormundsson (1994).

same time, the viewpoints that Nordic criminal law scholarship turned to in order to legitimise the claimed-to-be utilitarian criminal law, regardless of whether they referred to Feuerbach's emphasis on general deterrence or Liszt's emphasis on special prevention, themselves faced problems of justification, something to which I will return. While such problems have been central driving forces for the continued discussions in the philosophy of criminal law, in Nordic criminal law scholarship a certain normative-theoretical 'closure' and a turn to social, and often 'all things considered' points of view in this epoch, ensured that justification gaps and possible normative incoherence did not require much attention. The influential meta-ethical viewpoints relating to non-cognitivism and emotivism provided an (for some perhaps merely convenient) intellectual background, doing away with any need for a systematic normative justification of criminal law.

2.4 The return of normativity?

The value-informed, pragmatic approach characteristic of the scholars just mentioned is even more evident in Nordic criminal law scholarship in the latter decades of the 20th century. Then, the normative perspective gradually reclaimed its place in Nordic criminal law scholarship. Concepts such as justice returned to the discussion, for instance relating to the critique of rehabilitation ideologies and the so-called neoclassical turn in Nordic criminal law, or 'humane neoclassicism' as it has also been referred to in Finland.[101] The normative contributions of scholars such as the Danish scholar Vagn Greve (1938–2014) and Per Ole Träskman (1944–2019), the latter of Finnish origin but spending much of his academic life in Denmark and Sweden, should not be underestimated.[102] However, these scholars' normative engagement with

101 See e.g., Heckscher et al. (1980). Regarding the two related expressions, see Lappi-Seppälä (2020) pp. 210–211, stating that the latter alternative refers to 'a penal orientation that combines the requirements of legal security with the aim of humanization of the criminal justice system'.

102 See generally, e.g., Lappi-Seppäla (2020) p. 229 pointing to 'the influence of an active and liberal-minded generation of penal reformers in all the Nordic countries' when explaining 'some successful examples' in recent decades relating to penal policy choices in the Nordic countries.

Nordic criminal law cannot be described as philosophical in style. While clearly normatively engaged and often critical towards contemporary developments in criminal law, for instance the way it was used to deal with the drug problem, they did not elaborate on general justification theories, but instead focused on socio-legal and pragmatic perspectives.[103] Socio-legal perspectives were also central for the emergence of feminist perspectives by authors such as Tove Stang Dahl (1938–1993).[104] Later critical approaches have built onto such perspectives.[105]

Despite a certain re-normativisation, Nordic criminal law scholarship still seems to be influenced by the anti-metaphysical view and scepticism towards normative philosophy which emerged from the middle of the 19th century and onwards. For instance, in 2002, Greve had this to say about the foundation of what he called 'criminal law theories' – a claim that demonstrates the lasting influence of Ross and the Uppsala school on the discipline:

> As such, the term 'theory' is used in a quite different meaning than when speaking about a scientific theory. Criminal law theories are human choices, and as such they are political, non-scientific decisions: One cannot decide on their correctness: There is no truth criteria. However, one may demonstrate the meaninglessness of a certain view set forth. Demonstrating such meaninglessness could be done through a logical or linguistic analysis, revealing inner contradictions (….) in the argumentation chain. It can also be done thorough empirical investigations, showing with sufficient certainty that one cannot reach the given aims through the proposed means (…).[106]

Some contributors to the recent normative drive in Nordic criminal law scholarship have, however, more of an analytical-theoretical approach, such as Jareborg, whose important contribution to the understanding of Nordic criminal

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103 For critical perspectives on drug criminal law and EU criminal law, see e.g., Träskman (2011) and Träskman (2002).

104 See, for instance, Stang Dahl (1994).

105 Later on, in 9.5, we return to the role of critical perspectives within the republican account to be developed.

106 Greve (2002) p. 33.

law has already been mentioned. Jareborg's scholarly approach has been much more philosophically oriented than most of the scholarship in this discipline. While clearly recognising the importance of 'ideologies' for criminal law and criminal law scholarship, Jareborg's studies of criminal law have, first and foremost, been influenced by analytic philosophy in the tradition of Wittgenstein, as well as philosophical pragmatists such as Hilary Putnam and Richard Rorty, and it has not taken the route into normative philosophy of law.[107] Jareborg's defensive criminal law ideology appears mainly to be considered as a cultural value phenomenon closely related to the *Rechtsstaats*-ideology, ultimately a well-functioning normative language that improves society and the human condition.[108] This is reflected in the fact that Jareborg, for instance, recognises the historical importance of classical criminal law figures such as Feuerbach and Binding (while distancing himself from Beccaria and Bentham), but without addressing their viewpoints to any extent.[109]

At this point, it should be added that viewed as (national) research communities, the normative-theoretical engagement of Nordic criminal law scholarship seems to grow as one travels eastwards. The traditional pragmatic style of Nordic criminal law seems today to have its stronghold in Iceland and Denmark. While normative in style, I am not aware of any deeper engagement with the normative foundations of criminal law here, although, for instance, the discussion about the emerging EU-criminal law has spawned important studies.[110] Human rights perspectives have also been emphasised.[111] Norway was in the same situation for a long time, but more theoretical perspectives started to develop at the turn of the millennium, mainly in relation to specific

107 For a core work, see Jareborg (1969), see also e.g., Jareborg (1992), for instance pp. 19–28 concerning different conceptions of 'metaphysics', and Jareborg (2002). On the importance of 'ideologies' for criminal law and criminal law scholarship, see e.g., Jareborg (2000). See also, e.g., Jareborg/Zila (2020) pp. 67–68 on 'justice'.

108 This is also characteristic of my own approach in Jacobsen (2009a).

109 See Jareborg (1995) p. 35 (footnote). However, see also Jareborg (1980) p. 44 where the connections to German classical criminal law are toned down.

110 See e.g., Elholm (2002).

111 See e.g., Baumbach (2014).

issues in criminal law.[112] In Norway, a somewhat broader discussion is now emerging, connecting legal scholarship to philosophical, historical, and sociological perspectives.[113] The discussion in Swedish criminal law scholarship is richer in a theoretical sense, partly due to the works of Jareborg, but it also contains other theoretical perspectives, including more critical takes.[114] The principled engagement seems to be at its greatest in Finnish legal scholarship. Inkeri Antilla and Patrick Törnudd observed in 1992 an ongoing generational shift in Finland, where 'the youngest generation seems to be less interested in the social sciences and in the policy relevance of criminal law than in purely theoretical issues'.[115] Scholars such as Raimo Lahti, Dan Frände and Kimmo Nuotio have facilitated a comparatively rich discussion in Finnish criminal law scholarship on the principles of Nordic criminal law, today with a number of contributors.[116] Both in Sweden and Finland, the emerging EU-criminal law has provided a central reference point for discussing the principles of criminal law.[117]

This 'geographical diversity' reflects more general legal, cultural, and academic traditions in the Nordics, the Finnish one being closest to the

112 An important, early work in this regard is Husabø (1994) on euthanasia and related topics. See also the shorter, but more general Hegelian contribution by Kinander (2013). I myself had a first stab at the criminal law in a *democratic Rechtsstaat* in view of terrorism legislation in Jacobsen (2009a). Here, Kant did play a significant role, but merely as one piece of a larger puzzle, mainly due to lack of insight and understanding of his philosophy in general. This prevented me from properly accounting for important aspects of criminal law, its state dimension in particular.

113 Many of these perspectives are represented in Fredwall/Heivoll (2022).

114 In the first regard, see e.g., Ulväng (2005) on concurrence of crimes and sentencing principles in regard to multiple offenders, and Asp (2005) on criminalisation of preparatory acts. See, furthermore, e.g., Lernestedt (2003). In Sweden notably, feminist and gender perspectives have also gained traction, see e.g., Berglund (2007).

115 Anttila/Törnudd (1992) p. 206.

116 See e.g., Lahti (2000), Frände (2012) and Nuotio (2007). For a helpful overview of Finnish criminal law scholarship in the period 1970–2010, see Lahti (2017). Parts of the Finnish literature is, unfortunately, not accessible to me due to the language barrier between the Scandinavian languages and Finnish.

117 See e.g., Gröning (2008), Öberg (2011), Melander (2013), Kettunen (2015), and Koivukari (2022).

theoretically oriented German branch of legal scholarship.[118] In terms of systematisation of law, for instance, Lahti describes Finland as being 'in this respect nearer to German penal thinking than the other Nordic countries'.[119] This connection implies that the normative-philosophical gap identified here appears to be smaller in Finland than in, for instance, Norway, Iceland, and Denmark. This makes a book of this kind particularly relevant for the western part of the Nordics. At the same time, the Finnish discussion is first and foremost closely related to the discussion in German legal scholarship, not philosophical discussions on their own terms, suggesting a certain potential for this kind of analysis also there.

2.5 The villain of the play

Despite important contributions and the development towards, or rather, back to more normative engagement, a fuller account and justification of Nordic criminal law seems to be needed.[120] It is the aim of this book to address this need, and the analysis so far has provided us with several more specific observations facilitating the investigation. For instance, it is notable how Nordic criminal law scholarship in its foundational periods was intimately connected to a broader discussion pertaining to the nature of law and the state. Later, in Denmark and Norway in particular, the perspective became narrower, limiting itself to more pragmatic, empirical perspectives and with

118 At this point, in particularly, we connect to a much deeper historical and comparative discussion about the nature, developments and characteristics of the different Nordic legal orders. As the normative project on this book does not rely on more specific viewpoints in that regard, I will not pursue this here. See, however, e.g., Husa/Nuotio/Philajamäki (2007).

119 See Lahti (2020) p. 10. Variations are seen also in criminal law and criminal policy, see e.g., Antilla (1975) pp. 92–96, pointing out that while Norway was a forerunner in introducing preventive detention, Finland was the Nordic country 'less willing to give up the principles of classical criminal law, and to replace punishment with other measures'.

120 This, I will venture, will become clearer when we unpack, for instance, the many perspectives at play in contemporary Anglo-American philosophy of criminal law in 3.3 below.

social utility as an overarching normative reference point. One might ask whether something got lost along the way here. Another important observation is the variety of historical viewpoints in the Nordic discussion as well as the fact that many of the most interesting contributions appear to be complex with regard to their view and justification of criminal law. How this plethora of relevant viewpoints can be tackled within a philosophy of criminal law, without merely resorting to an unwarranted juxtaposition of conflicting principles, provides a central topic for the following discussion.

But perhaps the most intriguing observation is how figures like Kant and Hegel came to disappear from the discussions.[121] There is certainly a lack of thorough engagement with normative philosophy in Nordic criminal law science more generally, even after the re-emergence of normativity in Nordic criminal law scholarship. Even Goos has become criticised for lack of proper engagement with the German philosophy that he turned to in order to make room for the 'absolute' viewpoint at the heart of his conception of criminal law.[122] But with regard to Kant and Hegel notably, we are not merely talking about an absence in terms of disinterest in their philosophies, but of clearly negative characterisations and an outspoken rejection of them as contributors to understanding criminal law. As Kant will play a central role in this book, I will elaborate on the dominant view in the Nordics of Kantian philosophy and criminal law.

Kant was, as we have already seen, indeed highly influential in Nordic criminal law scholarship's foundational epochs but later turned into one of the key villains of the play. For about one and a half centuries, then, there was little discursive space for Kant in Nordic criminal law scholarship. Few paid much attention to him and to the extent they did, they offered negative appraisals. In the story just told, we find most of the engagement with Kant in Ross, who is not usually considered a part of Nordic criminal law scholarship. Rather, Ross' engagement with the subject starts out from his broader legal philosophical point of view and within the framing of his own approach to the discussion on the aims and justification of criminal law. As such, it is

121 This is also pointed out by Kinander (2013) pp. 179 ff. regarding Norwegian criminal law.

122 See Frosell (1987) p. 164 considering it a significant weakness in Goos' account of criminal law.

perhaps not surprising to see engagement with Kant here.[123] In any event, as already mentioned, he was clearly rejecting Kant's conception of practical reason. For Ross, one might say, Kant's practical philosophy was not to be taken seriously, to put it mildly. At this point, Ross is certainly representative for Nordic criminal law science.

Notably, though, two premises have co-functioned to create that situation. First, there is the more general rejection of 'metaphysics' and shift towards empiricism and 'realism' from the middle of the 19th century and onwards, later to be supplemented by the non-cognitivist claims from Ross and others. Kant's intellectual project has most often been understood as strictly metaphysical, not without reason. The title of his central work on law is after all *The Metaphysics of Morals*. Therefore, many Nordic legal scholars have viewed Kantian philosophy to be of precisely the kind style of thinking one wanted to move away from in favour of an orientation towards empirical facts, perspectives, and arguments. Secondly and relatedly, Kant's theory of punishment has often been read as a kind of hardcore retributivism, categorically calling for punishment without any regard for social consequences.[124] This view of Kant has been dominant in Nordic criminal law scholarship as well. As a consequence, he has often been taken to be a prime representative of the opposite of what Nordic criminal law has been considered to be about.

One easily finds evidence of the co-function of these two closely related premises. One example is Greve's discussion of theories of criminal law, seeing Kant as a central representative of retributive theories. Greve considers this 'too metaphysical', and even claims that it is logically impossible for retribution to be a purpose of criminal law (a viewpoint drawn from Ross, by the way).[125]

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123 See in particular Ross (1975) pp. 54–57 on the 'restrictive principles' of criminal law, where Ross provides a more engaged analysis of Kant's criminal law than often seen in Nordic literature,

124 See, for instance, Holtman (1997) p. 3: 'Traditionally, Kant's account is labelled as "thoroughgoing" retributivism, and many overviews cite it as their paradigm retributivist example.' We will return to the international debate on Kant's philosophy of criminal law in Chapter 6 below.

125 Greve (2002) pp. 35–36. See also p. 47 where Greve points to a historical tendency where preventive arguments sometimes come under attack, leading to 'a fleeing to metaphysical considerations about justice', clearly a negative development in Greve's view.

Another example can be found in Icelandic criminal scholarship, where Thormundsson briefly mentions Kant in relation to 'old-fashioned and adamant' retributive viewpoints.[126] A further example of how this marginalisation of Kant has occurred in Nordic criminal law scholarship can be found in works of the Norwegian criminal law scholar Jon Skeie (1871–1951), who put much energy into the history of criminal law as part of his doctrinal legal scholarship. Regarding the philosophical development, Skeie stresses the importance of the Age of Enlightenment, mentioning Locke, Montesquieu, Rousseau, Voltaire, Beccaria, Hommel, and Michaëlis.[127] Following this, Kant's view is described as the opposite of the utility-oriented criminal law philosophies, before Skeie quickly goes on to claim that 'about at the same time', Feuerbach delivered his theory of general deterrence, and moving on to address Hegel and later criminal law philosophy in Germany.[128] Skeie thereby disconnects Kant from his intimate connections to Enlightenment thinking and notably Rousseau, while at the same time seeing his view of criminal law and punishment as a quite one-sided and categorical retributive philosophy. In this way, Kant, in the broader history of the philosophy of criminal law, is merely a parenthesis, quickly sidestepped by Feuerbach, whose Kantian background is not mentioned.[129] A third example, this time from Finland, is Anttila and Törnudd's more general remark about Nordic criminal law's rejection of retributivism: 'It should be clearly understood that few Nordic crime experts have any sympathy for a "just deserts" philosophy based on either populist clamour or metaphysical demands for retribution ("punishments must be inflicted because a crime has been committed")'.[130] While not explicitly mentioning Kant, it is likely that his philosophy of criminal law was amongst those that the authors had in mind. More recent contributions uphold the view of Kant as a prime example of 'absolute' justifications of criminal law.[131]

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126 Thormundsson (1994) p. 93.

127 Skeie (1937) pp. 30–32.

128 Skeie (1937) pp. 30–32.

129 See further 6.7 below.

130 Anttila/Törnudd (1980) p. 122.

131 See e.g., Holmgren (2021) pp. 56–58, see also on Kant and the talion principle at pp. 196–197.

The problem, of course, is that both premises – the rejection of metaphysics and the view of Kant as a hardcore retributivist – can be challenged.[132] The 'positivist' ambition of limiting science strictly to empirically or analytically justified knowledge is futile, as already aptly pointed out by the quote from Jareborg earlier in this chapter. Moreover, Ross' non-cognitivist philosophy has itself been subject to critique.[133] And while Kant's intellectual project has important metaphysical dimensions, Kant's theory of knowledge is still a sophisticated blend of rationalism and empiricism, arguably more open to the importance of the empirical perspectives so central to the Nordic 'style of thought' than what it has been claimed to be. Some prominent Kant-readers even note the wide acceptance of 'the anti-metaphysical implications of Kant's position'.[134] Secondly, there is good reason to question whether Kant's criminal law can really be understood as a crude and categorical form of retributivism. More recent interpretations suggest that it is not.[135] In fact, viewed in relation to the broader political philosophy of Kant, with its roots in Enlightenment thought and re-emergence in contemporary philosophy, Kantian criminal law has potential to offer us ways to account for the complexity we have observed within the Nordic criminal law discussion. More generally, the normative republican tradition, which this book turns to in order to rethink the principles of Nordic criminal law, has not been considered.[136]

In line with the broader Kantian revival in political and legal philosophy, in other words there seems to be room to explore whether closer engagement with Kant could refresh the Nordic discussion on the nature and aims of

132 The same goes for conceptions of Kant's ethics prevalent in Nordic criminal law scholarship, see e.g., Jareborg (1992) pp. 36–38. However, it is not necessary to go into that subject as well, see further 5.4 below.

133 See e.g., the critique in Stubberud (2004). More generally, Greco (2009) p. 144, for instance, claims that 'der Nonkognitivismus *seit langem depassé* ist'.

134 O'Neill (2015) p. 4.

135 See further Chapter 6 below. Here we could also add Ross, who – in usual fashion – rejected the view of Kant as a retributivist: 'People simply parrot one another's hearsay that the absolute theorists claim retribution, and not prevention, to be the aim of punishment. No one stops to consider how unreasonable such an assumption is; how a thinker of Kant's calibre could have thought anything so foolish.', see Ross (1975) p. 63.

136 Skeie (1937) pp. 32–34.

criminal law and provide us with starting points for a normative philosophy for Nordic criminal law. I think it can. To see how, however, we must start out elsewhere. For now, we leave Nordic criminal law scholarship, but we will return to it towards the latter stages of this investigation.

In view of the discussions outlined so far, we must address three related challenges. First, and most generally, we must be able to account for the basic principles of criminal law and their justification on a more general level: Historical, social, and cultural premises and traditions are not capable of providing us with a normative justification of 'Nordic criminal law'. Rather, we must be able to explain why it is a sound expression of foundational normative principles. If it is, that is not only of relevance to Nordic criminal law science but would be a model for a sound criminal law also elsewhere. Secondly, and closely related, we must clarify what role power has in law as a normative project.[137] This is challenging for several reasons. One is that power is often considered as a factual issue, and sometimes even a problem for law and its rule. At the same time, law, and criminal law in particular, aims to be (a certain form of) power, capable of fulfilling its functions in society. This connects us to a fundamental problem in political and legal philosophy: it indicates how closely linked criminal law is to the overall normative project of the state. Third, and relatedly, we must look for a way through the historical conflict between on the one hand, the pure normative analytical or rationalist conceptions of criminal law that does not account for the state of society, the causes of crime, the effects of criminal law, and so forth, and on the other hand, empirical, and merely utility oriented conceptions of criminal law devoid of normativity. Here, German and Anglo-American philosophy of criminal law offer more and richer perspectives, not seldomly through Kantian references, suggesting that we should take a step out of the Nordic discussion to enrich and rethink it. In the end, the villain of the play we have just witnessed may prove to be not Kant, but rather the lack of proper engagement with his practical philosophy.

137 See also e.g., Pawlik (2012) p. 26: 'Wie sind Zwang und Freiheit auf einen Nenner zu bringen?'

Part II

Power as concept and problem

This part of the book, consisting of Chapters 3 and 4, analyses the concept of power. Criminal law is often considered to respond to power (abuse) in society. At the same time, criminal law itself is often seen as a form of power, and then a particularly problematic form of it. Despite power as such being a frequent premise in discussions about the justification of criminal law, the concept of power is seldom elaborated upon. By analysing it, we gain important starting points for a philosophy of law, and hence, of criminal law.

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3

Power and criminal law scholarship: Some starting points

3.1 Aim and outline

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

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

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

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

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

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

139 See 6.7 below for German criminal law scholarship.

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

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

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

141 Dubber (2018) pp. 1–2.

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

143 Tadros (2011) p. 1.

144 Feuerbach (1799–1800) p. 31.

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

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

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

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

146 Ripstein (2009) p. 145.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

154 Duff (2018a) pp. 9–10.

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

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

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

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

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

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

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

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

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

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

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

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

164 Chiao (2018) p. 30.

165 See on Kant in chapter 4 and 5.

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

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

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

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

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

168 Norrie (2001) pp. 19–20.

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

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

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

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

170 Farmer (2016) p. 299.

171 Farmer (2016) p. 300.

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

173 Lacey (2016) p. 79.

174 Lacey (2016) p. 79 ff.

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

176 Garland (1990).

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

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

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

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

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

178 See further Chapters 7–9 below.

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

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

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

179 See e.g., 2.4 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

185 Papendorf (2006).

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

187 Ugelvik (2014) p. 44.

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

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

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

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

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

189 Lovett (2010) pp. 64–84.

190 More about this in Chapters 7–9 below.

191 Valverde (2008) pp. 17–18.

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

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

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

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

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

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4

Power – a political philosophical starter

4.1 Aim and outline

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

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

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

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

4.2 Dictionary and theoretical approaches to 'power'

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

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

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

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

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

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

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

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

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

197 Austin (1832) pp. 13–33.

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

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

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

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

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

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

199 Yankah (2008) p. 1217.
200 Yankah (2008) p. 1205.
201 See e.g., Ripstein (2004).
202 Yankah (2008) pp. 1217 ff.

> theorists have devoted a good deal of attention to power and the phenomena associated with it.[203]

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

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

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

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203 Dahl (1957) p. 201.
204 Dahl (1957) p. 201.
205 Weber (2013) p. 53.
206 Dahl (1957) p. 203.
207 Dahl (1957) p. 201, himself referring to one position in the discussion on power.
208 Weber (2013) p. 53.
209 Dahl (1957) pp. 205–214.

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

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

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

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210 Scott (2001) p. 28.
211 Ugelvik (2014).

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

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

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

212 Weber (2013) p. 53.

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

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

4.4 The basics of power: Some general features

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

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

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

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

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

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

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

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

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

217 Ripstein (2009) p. 40.

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

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

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

219 Hobbes (1651) at xiii.

4.5 Riflemen, bear-psychologists, and deontologists

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

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

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

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

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

4.6 Power as a factual-normative concept

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

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

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

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

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

222 See 3.2 above.

223 See the quotation from Ripstein in 4.4.

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

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

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

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

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

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

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

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

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

227 See 2.2 above.

4.7 The political philosophical conundrum

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

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

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

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

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

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

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

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

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

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

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

229 Kant (1786) 8: 109.

230 Kant (1786) 8: 111–112.

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

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

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

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

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

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

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

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

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

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

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

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

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

238 Kant (1786) 8: 112.

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

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

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

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

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

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

Part III

Kant's republicanism and criminal law

This part of the book, consisting of Chapters 5 and 6, explores Kant's republican legal philosophy and how Kant views criminal law's role within this. While Kant's general legal philosophy provides solid ground for discussing the philosophy of criminal law, Kant's criminal law leaves several questions open.

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5

Kant's republicanism

5.1 Aim and outline of the chapter

As I have already emphasised several times, in order to provide a proper normative justification of criminal law, we need to turn to normative philosophy: only this can provide the broader normative foundations for our reasoning on criminal law in the subsequent chapters.[242] In this book, we refer to Kant for the necessary political philosophical starting points. Therefore, this chapter will provide an overview of how Kant approached the political philosophical conundrum elaborated in 4.7 above, i.e., his republican political philosophy. This, I will argue, provides us with more robust political philosophical principles, compared to other political philosophies such as communitarianism and utilitarianism.

Furthermore, my argument is based on the premise that Kant's republicanism is preferrable to other versions of republicanism. These different versions are, however, relatable. Therefore, 5.2 will start out by describing the different strands of republicanism and their relation to liberalism (a more familiar notion to Nordic criminal law), before the following sections outline Kant's republicanism. As Kant's political philosophy is a broad and challenging topic,

242 For a similar approach to political philosophy as basis for criminal law, see e.g., Duff (2018a) p. 52 on criminalisation, see also Duff's general recognition of, but also disagreements with, similar views of Thorburn and Chiao at pp. 149–152 in the same book.

I begin by addressing some of the main challenges of interpreting Kant's political philosophy in 5.3. In view of these challenges, this chapter will be restricted to providing (hopefully) a representative, although simplified, account of a selection of key features or themes in Kant's political philosophy. Many of these key themes will be important for our later discussion of the republican criminal law. In 5.4, some overarching clarifications on Kant's usage of the terms *morality*, *ethics*, and *law* are provided. In 5.5, I address the *state of nature* as Kant conceives it, including the innate right to external freedom, and how deficiencies in the state of nature steer us in the direction of the civil state. In 5.6, the main features of Kant's *civil state* are outlined, whereupon the *democratic* dimension is further elaborated in 5.7. In 5.8, we look into Kant's political philosophy as residing between fact and norm, reality and ideal, and how on the one hand, this calls for us to recognise and respect the existing order, leading to a kind of *legal positivism*, while on the other hand, this implies a *reformist drive* and focus. Next, in 5.9, I discuss what drives such progress in Kant's view, which reconnects us to *our responsibility* for this development. The chapter is concluded in 5.10 with some issues that need more elaboration, such as: the *application issue* of Kant's philosophy, the *power dimension* and, finally, what is implied in the *right to force someone into, and to stay in, the civil state*. Together, this chapter and the following chapter on Kant's criminal law cover a fair number of pages. This is necessary not only to facilitate the discussion later in the book, but also to compensate for the absence mentioned of Kant in modern Nordic criminal law scholarship.[243]

As Kant is granted such a pivotal role in this regard, it is reasonable to begin by asking: is Kant's philosophy still relevant today? Is it not an abandoned stage of philosophy's historical progress? This question has many sides to it, including whether one considers the foundational philosophical or transcendental issues of Kant's philosophy decisive to his political philosophy, which we will be concerned with, and, if so, the extent to which these are valid – a subject of debate since its advent. However, while contested, Kant's philosophical project

243 See 2.3–25 above.

is still strongly defended.[244] This goes also for Kant's political philosophy.[245] Kant's continuous relevance for core ideas in, as well as the language of, law, such as human dignity and autonomy, testifies to the impact of his philosophy today. As Ripstein puts it: 'Kant's influence on contemporary political philosophy is indisputable.'[246] Also in contemporary criminal law scholarship, Kant is often seen as a central reference point for the discussions.[247] Kant's influence is also seen in contemporary Nordic legal philosophy.[248] Hence, and also taking into account Kant's absence from Nordic criminal law scholarship for some time, it seems quite reasonable to continue the exploration of his works.[249] First of all, however, it may be helpful to situate Kant within the larger republican tradition in political philosophy.

5.2 The republican tradition in political philosophy

5.2.1 Two strands of republicanism

As mentioned in 3.3, references to republican political philosophy are common in contemporary criminal law scholarship. Several authors apply this

244 See e.g., Höffe (2010).

245 In fact, it is only more recently that the importance of Kant's political philosophy has become generally recognised, see e.g., Brocker (2006) pp. 9–10, stressing the importance here of John Rawls' seminal work *A Theory of Justice* from 1971.

246 Ripstein (2009) p. ix. Pursuing this influence would take us into many different discussions and authors, among them Rawls' political liberalism, see e.g., Rawls (1999) and Rawls (2005), as well as Jürgen Habermas' discourse theory of law, see Habermas (1992), and the Frankfurt school more generally. In Jacobsen (2009a), I connected to such discussions, but consider now that for exploring the normative foundations of Nordic criminal law, we are better helped by going 'back to Kant', in particular in view of recent contributions to and discussions about Kant's political philosophy. Therefore, I will not pursue engagement with Kant in broad philosophical projects such as those of Rawls and Habermas. Doing so also amounts to a research enterprise on its own.

247 I will return to examples of that in the final chapters of the book, see e.g., 6.7 on German criminal law science.

248 See e.g., Eng (2008).

249 See 1.2 above for more explanation.

label as part of their justification of criminal law. By doing so, they connect to one branch of the political philosophical debate on the nature and justifiability of political power, one that differs from, for instance, Bentham's utilitarianism.[250] There are, however, different republican theories in political philosophy, and even different *strands* of republican theories. Briefly outlining the republic tradition in political philosophy helps us to see how Kant is situated within it and, in turn, contributes to clarifying the nature of the republican criminal law theory in Chapters 7–9.

Republican political theory has basically developed along two historical traditions: the Italian-Atlantic and the German.[251] A third approach is also sometimes mentioned, for instance by Yankah, who speaks of an 'Athenian' civic virtue-oriented take related to Aristotle.[252] For now, I will focus on the two main traditions due to their shared engagement with freedom. I will return to their relation to the civic bonds focus of this third approach at a later stage of the analysis.[253]

The *Italian-Atlantic* tradition of republicanism is based in Roman law and its conception of citizenship: free men, as opposed to slaves. Later, it was further developed by medieval thinkers such as Niccolò Machiavelli (1649–1527) as well as Enlightenment thinkers such as Montesquieu in France. The latter, alongside Beccaria, who should also be mentioned in this regard, have often been referred to in criminal law scholarship as well.[254] Disappearing somewhat from the scene, it was then revived by scholars (sometimes termed as 'neo-republican') in the Anglo-American world, notably Quentin Skinner in

250 For a critical appraisal of Bentham's utilitarianism, see Eng (2008) pp. 315–345.

251 Various terms have been used for these two strands of republicanism. Maliks (2009) p. 439, for instance, speaks of the 'Anglo-Saxion version' for what is here described as the 'Italian-Atlantic version', the latter term is useful considering Machiavelli's influence. For the German strand, Pettit (2013) p. 169 uses the term 'Franco-German', due to Rousseau's influence. However, another French author, Montesquieu, is also considered as an important writer in the Italian-Atlantic traditions.

252 See Yankah (2012) p. 267.

253 See 9.4 below.

254 Beccaria is more often considered a utilitarian and an early law-and-economy advocate. However, while not thoroughly elaborated in his key work, *Dei delitti e delle pene* (1764), this starts out from republican perspectives, see further Bois-Pedain/Eldar (2022).

the 1990s, and, more recently further explored by particularly Philip Pettit, building on Skinner's work.[255] The key, at least according to Pettit and other recent contributors to this line of thought, such as Frank Lovett, is *dominion* – freedom from being subjugated to the arbitrary will, i.e., domination by another.[256] To a significant extent, these recent Anglo-American contributions are written in opposition to Thomas Hobbes, notably by challenging his theory of liberty and the view that liberty is simply the absence of 'external impediments'.[257]

The Italian-Atlantic emphasis on dominion is often related to the difference between being a slave and a *free man*, which in turn reflects the Roman origin of this line of thought. As Skinner expresses it: 'The nerve of the republican theory is thus that freedom within civil associations is subverted by the mere presence of arbitrary power, the effect of which is to reduce the members of such associations from the status of free-men to that of slaves.'[258] The Italian-Atlantic line of thought has also been brought into the discussion of criminal law by, among others, Pettit in collaboration with John Braithwaite.[259] Notwithstanding, other scholars have questioned its capacity to contribute to our understanding of criminal law.[260]

The German tradition (a term that downplays its importance in, for instance, the northern parts of Europe) is primarily based in Kant, who describes his ideal state as a 'true republic'. Kant's importance in this regard can be illustrated by B. Sharon Byrd and Joachim Hruschka's claim that Kant

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255 See e.g., Skinner (1997a), Pettit (1997), Pettit (2002). The term 'neo-republican' is used e.g., by Dagger (2011) p. 65.

256 Lovett (2010).

257 See, in particular, Skinner (2008), who describes Hobbes as 'the most formidable enemy of the republican theory of liberty, and his attempts to discredit it constitute an epoch-making moment in the history of Anglophone political thought' (p. xiii). Skinner is, however, for his part sceptical to the use of the term 'republican' liberty and prefers to have called it 'neo-Roman' (p. viii).

258 Skinner (2008), p. ix. This reasoning, which places 'domination' and 'arbitrary power' at its core, reconnects us to the discussion of power in Chapters 3 and 4.

259 See Braithwaite/Pettit (2002). For examples of 'republican' references in criminal law, see 2.3.

260 Horder (2021), for instance, is sceptical to the potential in the republican conception of liberty as advocated by Pettit. See further below in 5.2.2.

'fathered the idea of a juridical state', that is, what in German and other European countries is known as the *Rechtsstaat*.[261] Kant is not the only contributor in this regard. Contributions such as those of Fichte and Hegel, who we will return to, are also important, at the same time as Kant's contributions can hardly be properly understood without considering the impact of Rousseau on his work.

How does this German tradition differ from the Italian-Atlantic strand of republicanism? To begin with, two distinguishing key features can be noted: first, whereas the dominion-idea is central to the Italian-Atlantic approach, the core notion of the German approach is *autonomy*. This notion connects the German approach strongly to Kant, often considered the inventor of (the concept of) morality as autonomy.[262] Second, and relatedly, the two strands of republicanism appear to differ somewhat in their style of approach. Whereas Kant's legal and political philosophy is closely connected to his broader transcendental idealism at the core of his entire philosophical project, the Italian-Atlantic tradition tends to leave such foundational issues behind and thereby seems more pragmatic in style and approach. And while Kant's political philosophy starts out as, so to speak, pre-political, the Italian-Atlantic tradition appears to start out from a specific political context, aiming to provide principles for improving it in line with the idea of freedom as nondomination.[263]

Distinguishing between these two historical pathways of republicanism is important also from the point of view of the philosophy of criminal law. One of the reasons for this is the fact that the adherence to republicanism in contemporary Anglo-American philosophy of criminal law often seems to relate to the recent contributions of the Italian-Atlantic tradition, by reference to Pettit in particular.[264] The German/Kantian approach is decisive for much of German criminal law and, as my discussions aim to show, Nordic criminal

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261 Byrd/Hruschka (2010) p. 1.

262 See the historical evolution in philosophy here in Schneewind (1998).

263 This point should not be exaggerated, one way or another. Kant, for instance, was clearly relating to contemporary political issues and discussions of his time, see e.g., Maliks (2014).

264 See e.g., Chiao (2018). See also Dagger (2011), who, however, also relates to, for instance, Rousseau. However, it should be noted that also Kant's practical philosophy has been influential in Anglo-American criminal law scholarship, something I will return to.

law and criminal law scholarship. So, the distinction between these two republican traditions provides an important piece of the theoretical backdrop for contemporary criminal law scholarship, and therefore for the analysis in this book. But it also has the added value of allowing us to draw insights from both of them, with the potential of an improved account of republicanism.

While there are historical differences, clearly, there is enough common ground to relate these two different branches of republicanism to each other. For instance, they share a commitment to freedom as the central political value and a strong interest in and engagement with its implications for criminal law.[265] In my view, Kant provides us with a better and more comprehensive understanding of freedom than does the Italian-Atlantic tradition.[266] However, this does not exclude the possibility for Montesquieu – whose engagement with criminal law is well reflected in his key work *De l´esprit des lois* (*The spirit of laws)* from 1748 – to offer us valuable insights in the implications of the notion of freedom.[267] Although the present book favours the German/Kantian tradition, I recognise the value and insights in the Italian-Atlantic tradition. This approach, one could say, reflects the history of Nordic criminal law as well.

As I will return to later in the book, we will draw on a similar approach to the contemporary philosophy of criminal law. While criminal law was a subject of interest to Kant as well, his remarks on criminal law leaves much to be desired, suggesting a need to go beyond Kant to carve out a proper republican account of criminal law. This is an enterprise which can benefit from the extensive philosophy of criminal law that has evolved afterward, and partly in relation to deficiencies seen in, Kant. In Chapters 7–9, I will therefore link

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265 The closeness/distance between the two strands of republicanism depends also on how each position is interpreted in this regard. For instance, Ripstein's independence-focused interpretation of Kant's political philosophy may be claimed to lie somewhat closer to the Italian-Analytic branch compared to other, more substantive, autonomy-focused interpretations of Kant. See, for instance, Ripstein (2009) p. 43, where Ripstein points out that Kant's view simply takes the fear of domination beyond the Italian-Atlantic fear of despots to relations among citizens. See in this regard also Arntzen (2020) p. 288.

266 See also e.g., Forst (2013), from the point of view of the concept of justice. While I will stick to the concept of freedom as my focus, this does not exclude justice as a relevant focus on the subject, see e.g., Vogt (2018).

267 For an outline of Montesquieu's views on criminal law, see Carrithers (1998).

my discussion to similar views within the contemporary republican criminal law, even if they connect to Kant to a various degree.

5.2.2 Republicanism and liberalism

Expanding on the initial remarks on republicanism in political philosophy, it is worth clarifying its relation to liberalism. One reason for this is that liberalism is by far a more common term than republicanism in the Nordic context.[268]

Liberalism and republicanism are clearly related. In the German/Kantian tradition, for instance, these terms are often related to each other as well as to the *Rechtsstaat* concept.[269] But it is also clear that both republicanism and liberalism come in many different shapes, and some versions of liberalism seem clearly to be more compatible with (some versions of) republicanism than others, and *vice versa*.[270] The use of such labels depends on how we more precisely understand 'republicanism' and 'liberalism', and on the concepts informing them, such as 'freedom', 'liberty', 'autonomy', 'the rule of law', and so forth. While closely connected to the idea of personal autonomy, which is central also to many liberal views, Kant's conception of external freedom and individual autonomy is not necessarily the same as the conception advocated by some liberals. Hence, Kant is not necessarily to be described as a 'liberal' thinker.[271] Also, in the Anglo-American discussion, there is a certain divide between 'liberal' and 'republican' points of view, for instance in the republicanism of Pettit.[272] Jeremy Horder, however, considers Pettit's republican view of freedom to be a supplement rather than a challenge to liberal theories of freedom, which Horder prefers:

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268 For one example from Nordic criminal law science, see Lernestedt (2003) p. 358. More examples can be found in some of my own previous works, see e.g., Jacobsen (2009a).

269 See e.g., Bielefeldt (1997).

270 See e.g., Fukuyama (2022) pp. 1 ff. on 'classical liberalism', including its relation to e.g., 'neoliberalism', and, in a somewhat different way, Flikschuh (2000) p. 14, differing between 'classical liberals' and 'critical liberals'.

271 See e.g., Arntzen (2020) p. 306. See also e.g., Kersting (2004) pp. 125–126 and Hirsch (2017) pp. 20–21.

272 See e.g., Pettit (2013) p. 175.

> …Pettit's republican theory of freedom should be regarded as in this respect supplementing, rather than challenging, sophisticated liberal theories of freedom focused on personal autonomy. What Pettit's theory adds is a theory of what it means to enjoy 'political' autonomy, alongside personal autonomy. In other words, to play one's full part in a republican state is to be able – on the same basis as others, and in appropriate circumstances in combination with them – to engage in valuable political activity, as oneself (part) author of that activity.[273]

As this discussion illustrates, there is no simple dichotomy between (forms of) republicanism and (forms of) liberalism. To carve out the more precise (understanding of the) relation between liberalism and republicanism that informs the analyses in this book, one option would be to coin a more complex phrase, such as the 'liberal republic of free and equal citizens' or 'a liberal communitarian species of republicanism'.[274]

However, it suffices to say for now that I consider 'republicanism' to be one distinct branch of liberalism. Republicanism is, to begin with, characterised by a concern for the individual and individual rights typical of liberalism in general. But where some liberalists focus on individual rights and have a certain scepticism towards the state and state power, republicans tend to have a more positive view of the state in itself and more emphasis on the need for establishing authorities and institutions for the protection of the equal liberty of all citizens (which will be a central issue in the following analysis).[275] As such, it is at least quite clear that republicanism sits badly with the *libertarian* preference for the 'nightwatchman state'. Furthermore, a key aspect of republicanism of the kind that, with Kant, will be advocated here, is the democratic element, leading some to describe it as a form of 'liberal democracy'.[276] This suggests that, at some level, the people itself must develop its political identity and decide more precisely how 'liberal' this is to be. As such, the republicanism

273 Horder (2022) p. 208.

274 Duff (2018a) p. 8 and p. 188, see also p. 195 on 'liberal'/'republican'.

275 This tension can be illustrated by the question posed by Hirsch (2017) p. 4 in this regard: '*Kein Staat ohne Freiheit oder keine Freiheit ohne Staat?*'

276 See e.g., Weinrib (2019), see e.g., p. 634.

to be advocated here is in one way undetermined with regard to its more specific liberal character, a point to which we will return.

5.3 Some starting points about Kant's political and legal philosophy

The corpus of Kant's writings on politics and law consists mainly of the following works, which will constitute the basis for my readings of Kant: The main work is the *Metaphysics of Morals* (in the following MM). The first edition was published in 1797, the second edition in 1798.[277] But some of Kant's shorter works are also essential for his political and legal philosophy, including *An Answer to the Question: What is Enlightenment?* (1784), *On the Common Saying: That may be Correct in Theory, but it is of no Use in Practice* (1793) and *Towards Perpetual Peace* (1795). In addition, Kant's drafts and lectures, his *Groundwork of the Metaphysics of Morals* (1795, in the following GMM), as well as the three critiques, all provide important premises and, to some extent, passages of direct relevance for his political philosophy. The importance of his general philosophical account is based in Kant's ambition to reach *a priori* insights into the nature and capacity of reason, combined with the strong systematic orientation this philosophy carries with it. But the influence also goes in the other direction. The use of legal metaphors in *The Critique of Pure Reason* (1781/1787, hereafter CPR), such as 'the court of reason', illustrates this.[278]

Despite this rich body of literature, interpretations of Kant's political and legal philosophical writings and views should be conducted with some caution, not only due to the depth of its content. In itself, the relevant text corpus poses challenges as well; reading Kant is not a straight-forward exercise. It is well-known that Kant was not a rigorous writer. Even CPR, the first critique, and the product of Kant's 'Silent Decade', which was revised in a second edition, and generally recognised as a key text in the corpus of Western philosophy, is

277 The second edition from 1798, the year after the work had first been published, contained only marginal changes, see the translators note to Kant (1797/1798). A third edition was published in 1803, but without Kant being involved.

278 On the legal metaphors, see e.g., Møller (2013).

hard to access.[279] Many of his texts on political philosophy are shorter works, sometimes more polemic in style, which also reflect developments in Kant's view on central topics. Important parts of the political philosophical corpus consist of lecture notes and materials, some of which are notes made by his students.

It has also been claimed that the core work in political and legal philosophy, MM, was written at such an old age that Kant may have been impeded by age and dementia by this time. This, which is sometimes referred to as 'the senility thesis', would of course make this key piece unreliable.[280] Born in 1724, Kant was 73 at the time of publishing the first edition of MM. The expected longevity was lower than it is today, and at this point, Kant's capacities were clearly reduced. The senility thesis is, however, contentious and not influential today.[281] Already as a young philosopher, Kant was 'concerned with questions of law and right'.[282] Manfred Kuehn provides a nuanced description of the background for MM and its coming into being, which adds to the difficulties with studying Kant's political philosophy:

> Finally, at the age of seventy-four, in the process of tying things up, he gave to the public this work, which was more comprehensive than the one planned, offering not only an account of all ethical duties but also views on the philosophy of law. Yet, compared to the *Groundwork* and the second *Critique*, the *Metaphysics of Morals* is disappointing. It exhibits none of the revolutionary vigor and novelty of the two earlier works. Indeed, it reads just like the compilation of old lecture notes that it is. Given Kant's difficulties and weakness, it is not surprising that much remains cryptic and that some of the text is corrupt. Kant simply did not have the energy to satisfactorily pull together all the different strands of his argument, let alone polish the work. Indeed, he even had difficulties with supervising

279 Kant was disappointed by the reception of the first edition and even felt the need to popularise the first edition of the work. This resulted in the famous *Prolegomena to any Future Metaphysics That Will Be Able to Present Itself as a Science* from 1783, published two years after the first edition of the CPR.

280 See e.g., Flikschuh (2000) p. 8.

281 See e.g., Flikschuh (2000) p. 8.

282 Höffe (2006) p. 1, see also pp. 4–5.

> the printing of the book. This, of course, does not mean that the work is without interest or even unimportant. The ideas Kant presented go back to his most productive years. It is important for understanding not only his moral philosophy, but also his political thinking. It is indeed a veritable tour de force. Yet, if the work 'make[s] demand upon its readers that seem excessive even by his standards', its creation made demands upon Kant that were even more excessive.[283]

It seems generally recognised today that while MM should be taken seriously, it is in many ways a troubled text. The *Rechtslehre* is at times 'extremely obscure', which may even be the product of errors in the printing process.[284] This calls for caution in reading and interpreting the work. Kuehn also captures this point well:

> Historically speaking, it is just true that it is the final form Kant gave to his moral philosophy. It is also true that the development of a *Metaphysics of Morals* was Kant's ultimate goal throughout most of his philosophical life. But it is far from clear that what Kant ultimately produced is representative of his best intentions and fits unproblematically with his critical moral philosophy as developed in the *Groundwork* and second *Critique*. I think we need to be careful especially when we evaluate its substantial moral doctrines, such as his views on servants… or 'on defiling oneself by lust'.[285]

Even Kant himself acknowledged that parts of MM relating to public right (which include his reasoning about criminal law) were not thoroughly worked out. He states at the opening of the book:

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283 Kuehn (2001) p. 396, quoting Mary Gregor's introduction to a translation of MM (the bracketed 's' is included in Kuehn's text). See in this regard also Hirsch (2017) pp. 24–25 on the development of Kant's views, pointing to the fact that 'sein Rechtsdenken einen langen Reifungsprozess durchlauften hat'.

284 The quotation is from Flikschuh (2000) p. 7, which also discusses Bernd Ludwig's thesis about misprints (p. 9). The difficulties related to accessing the *Rechtslehre* have also been pointed out by others, see e.g., Ripstein (2009) p. x, describing it as 'not an easy work to read'.

285 Kuehn (2010) p. 21 (references to MM at the end of the quote omitted).

> Toward the end of the book I have worked less thoroughly over certain sections than might be expected in comparison with the earlier ones, partly because it seems to me that they can be easily inferred from the earlier ones and partly, too, because the later sections (dealing with public right) are currently subject to so much discussion, and still so important, that they can well justify postponing a decisive judgement for some time.[286]

How much one should make of this is hard to say. But such a disclaimer is untypical for Kant, so clearly there must be some reason for him to write this. Thus, this also contributes to make Kant's political philosophical text corpus challenging.

Another reason to approach Kant's political philosophy with caution is more of a substantial kind. Kant's intellectual orientation is first and foremost towards the fundamental principles of law. At the same time, his writings on politics and law often go beyond the strict analytic/metaphysical *a priori* perspective applied (not least) in the CPR, and into more empirical or anthropological premises.[287] Such premises have often been claimed to have an uneasy place in Kant's philosophical project in general. This is, perhaps, most visible in his political philosophy, for instance in his reflections about the state of nature, which include claims such as: 'Nowhere does human nature appear less lovable than in the relations of entire peoples to one another.'[288] This larger role of *a posteriori* premises is natural given the topic of the political philosophical writings, compared to, for instance, the topics of the first and second critique as well as GMM. As will become clear, Kant still does not clarify how, precisely, his philosophy of law relates to his anthropology. Kant is obviously sensitive towards the development of society, its level of enlightenment and the long-term progress required for society to live up to the ideal of the true republic. But his view of the republic does not tell us clearly how law can encompass social development and how we, as reasoning citizens, can account for and relate to this development. We will return to this challenging aspect of Kant's political and legal philosophy towards the end of the chapter.

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286 Kant (1797/1798) 6: 209.

287 This issue has also been raised with regard to his moral philosophy, see e.g., Frierson (2003) and Louden (2011).

288 Kant (1793) 8: 312.

Furthermore, and related to the two preceding points, Kant's writings cannot be understood without reference to the contemporary political and legal context within which he was writing. For instance, the French revolution and the Prussian state, including the reign of Frederic II, are both important for understanding Kant's writings and the debates in which he engaged.[289] Several of the smaller works mentioned above, for instance, explicitly address the views of other scholars at the time. This context and the purposes of the texts are also likely to have influenced the claims Kant makes and the way in which these claims are presented. Whether and how they can be 'translated' to a quite different societal context is something to which we will return.

Challenges in discerning Kant's viewpoints such as these spill over into the extensive Kant-literature: As Kant's political philosophy contains many contested premises and features, its character is contingent on interpretation, of which there are many. In the following, I aim to identify some key debates in contemporary Kant scholarship. However, since the aim is a simpler one: to point out some key themes or aspects of importance to our discussion of criminal law, I will not delve deeper into them here. I do not provide a systematic and complete literature review, which would be a challenging research enterprise in itself. As a guideline, I have made use of literature that is either broadly acknowledged as central contributions to the Kant discussion and/or contributes to clarifying specific discussions and viewpoints in it.

Furthermore, in this chapter in particular, a well-known problem of translating Kant and discussing his works in English will be pressing: The lack of a proper English term for the German term *Recht*. As often pointed out, this term expresses something more than 'positive law', but it is not aptly translated to 'justice' either.[290] The problem is reflected in the constant challenge to properly translate the German notion of the *Rechtsstaat* into English, where terms such as the 'rule of law' or 'constitutional state' is frequently used, but still unsatisfactory alternatives. Mary Gregor's solution, translating *Recht* as *Right* (capital R), is often applied, for instance by Katrin Flikschuh.[291] That would also give us reason to use the term *Right state* for the *Rechtsstaat*, which,

289 Cf. Maliks (2014).

290 See e.g., Flikschuh (2000) p. 11.

291 See e.g., Flikschuh (2000) p. 11.

when one thinks about it, has some advantages. However, this solution has also been criticised.[292] The term 'Right' does not seem to do the work in English that the term 'Recht' does in German. Hence, it would perhaps be more apt to translate it to 'public justice'. Which solution is best, depends somewhat on the context. My terminology will therefore vary a bit in the following, but I will at all points try to be clear about how I use these expressions.

Already here, however, we should stress the distinction between right, i.e. *the law of reason* – the *Vernunftsrecht*, and *positive law*, that is, the law as enacted by the sovereign.[293] As we will return to, Kant's political philosophy is in a sense an ongoing dialogue between the ideal or 'true' republic, and actual legal orders seen as imperfect interpretations and expressions of this ideal, in an historical process moving towards it.[294] To the extent that Kant is to be characterised as a 'natural law scholar', it is worth stressing that he is not advocating a natural law theory from an axiological premise, deducting a detailed set of 'given' rules and claiming these to be positive law merely by virtue of their character as natural law. Kant would not accept claims such as these.[295] Rather, also in his political philosophy, one might say, Kant sets out a third course between pure rationalism and pure empiricism.

292 See e.g., Kuehn (2010) p. 10 (footnote).

293 Or, in Höffe's terms, 'law that has positive validity' and 'law that has moral validity', see Höffe (2006) p. 3.

294 See e.g., Arntzen (2020) p. 198 on the ambiguity in Kant on the civil state or condition.

295 See here notably Höffe (2006) pp. 8–9.

5.4 Morality, ethics, and law

Kant's practical philosophy concerning morality in a broad sense, The *Metaphysics of Morals*, contains Kant's moral philosophy specifically and Kant's political philosophy more generally. In this regard, Kant relies on a distinction between ethics and (juridical) law.[296] This is in turn closely related to the distinction between the 'inner' dimension of our agency and the 'outer' or external perspective on human agency, such as the actual consequences of our acts in society, for instance in regard to the well-being of other people.[297] The *ethical* point of view is centred on the (required) origin of agency in the free (rational) will, i.e., that we, as rational agents, act *autonomously*. For Kant, moral autonomy is a matter of acting out of respect for the moral law. This is opposed to heteronomous agency, where 'empirical' desires, feelings, inclinations, and needs direct how we act. Such acts do not qualify as ethical actions regardless of whether the outcome of the act is desirable in itself. Hence, the outer consequences of our agency are not in themselves decisive for whether we act ethically. That does not mean that Kant does not recognise the 'real effects' of how we act towards each other and its effects: the very categorical imperative, at the heart of morality, requires us to treat each other as ends, not merely as means for achieving our own purposes, a norm which clearly

296 On the inner/outer distinction, see further Pfordten (2007). Here, we encounter a terminologically important issue: Kant uses the term 'moral' in a broader meaning, as the laws of freedom, distinguished from the (causal) laws of nature. 'Moral' in this meaning covers the autonomous morality of the individual, i.e., ethics, as well as public justice, see Kant (1797/1798) 6: 214 and, e.g., Newhouse (2019) pp. 532–533. See also Hirsch (2017) p. 34 for an overview of Kant's terminology in this regard. However, in contemporary Continental and Nordic scholarship, this is usually spoken of as a distinction between morality and law, which is reflected in the criminal law discourse as well, see e.g., Jung/Müller-Dietz/Neumann (1991). See also Sarch (2019) p. 64, who considers criminal law a 'stripped down analog' of moral blameworthiness. I will follow Kant's terminology here, and the reader should be mindful of Kant's use of the terms.

297 See also e.g., Kersting (2004) p. 14. How Kant more precisely draws the line here is however not obvious. Kant did not clarify this, see further Pfordten (2015), where Kant is ascribed a broad understanding of the 'external'.

has implications for the way we act towards each other.[298] However, fulfilling our ethical duties requires us to do so out of regard for the moral law itself. A consequence of this is that one cannot force others to act ethically.

This also separates ethics from law, the latter a system of positive law, or '*positive right*', as Kant names it.[299] This system of norms is not a matter of the individual's rational self-legislation, but the commands of the legislator, i.e., what the state has 'laid down as right'.[300] Whether we act from reverence for the nature of the rules in themselves or from fear of being reproached for our disobedience, is not decisive, making possible the use of sanctions. This possibility is due to their limited scope compared to ethics: law basically regulates only 'the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other'.[301]

Kant explains the distinction between ethical law and juridical law in the following way:

> In contrast to laws of nature, these laws of freedom are called *moral* laws. As directed merely to external actions and their conformity to law they are called *juridical* laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are *ethical* laws, and then one says that conformity with juridical laws is the *legality* of an action and conformity with ethical laws is its *morality*. The freedom to which the former laws refer can only be freedom in the *external* use of choice, but the freedom to which the latter refer is freedom in both the external and the internal use of choice, insofar as it is determined by laws of reason.[302]

298 More generally, see e.g., Ameriks (2006) p. 129: 'Even in his most metaphysical mood, Kant surely wants to affirm real effects and real value in what happens empirically – for example, that people are truly helped by us and not merely that there is an impression of being helped – even if he also believes that this requires some kind of non-empirical source.'

299 Kant (1797/1798) 6: 229.

300 Kant (1797/1798) 6: 229.

301 Kant (1797/1798) 6: 230.

302 Kant (1797/1798) 6: 214.

Of these two parts, Kant's ethics have clearly received the most attention, and is easily thought of as the core of his practical philosophy, making the political and legal philosophy an 'annex'. But their relation is more complex, as suggested by, for instance, the fact that Kant discusses the nature of ethical duties in the second part of the MM, *after* having presented his political and legal philosophy. This invites us to reflect a bit more on the more specific relation between Kant's ethical and legal philosophy, a subject which will also be of relevance to us later when we will discuss the nature of criminal law.[303]

One view here is the so-called independence thesis, which claims that Kant's political philosophy can be considered as disconnected from his ethics. The fact that Kant, as already mentioned, clearly distinguishes between ethics and law, allowing the latter to be upheld by means of force, may support this thesis. On the other hand, it is also clear that to Kant, legal norms may overlap ethical norms in significant ways. Also, ultimately, they have a common source in our capacity for practical reason and belong to Kant's concept of morals. Even if positive law is the outcome of external legislation, the question whether this legislation is also in accordance with public justice, is something that we can only clarify by turning to reason's Universal Principle of Right. For such reasons, Kant clearly saw ethics and law to be closely connected, as *parts of a broader system of morals*, with a common source in practical reason, allowing for them to be treated together under that heading and in one work: MM. These points, in my view, speak against the independence thesis.[304] The intimate connection between morality and law can also be claimed by Kant who considered us to have (as we will address in the following section) an obligation to enter into a 'juridical state' to preserve right. As Paul Guyer, who rejects the independence thesis, points out,

> … these are genuine obligations, so not matters of prudence. They can therefore be nothing other than moral obligations, which is possible only

303 See e.g., Brandt (2016) pp. 7–12.

304 For a broader discussion and rejection of the 'Unabhängigkeitsthese', Hirsch (2017) pp. 67–168. See also e.g., Kersting (2004) pp. 37–44.

> if both the content and the necessity of the coercive enforcement of right derive from morality.[305]

The extensive debates on the relation between ethics and law in Kant's political philosophy must be left aside here. In line with what has been suggested, we start out from a conception of juridical law as separate from, but also intimately related to ethics, both part of the broader concept of morals.

5.5 The state of nature: The innate right to external freedom

The starting point for Kant's political philosophy is the state of nature ('state' must not be confused with the 'state' as political arrangement, which we will refer to as a *civil state*). This state of nature is not thought of as a historical fact, but as an idea of reason.[306] This 'state' is not necessarily a war-like condition where everyone is in conflict with one another. Quite the contrary, the state of nature can, and is likely to, involve societal formations.[307] Furthermore, the state of nature, while lacking the institutional features of the civil state, is

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305 Guyer (2016) p. 55. See also Höffe (2006) p. 1, who relates this to the late appearance of Kant's political philosophy: 'Because he saw the foundation of his political philosophy in morals, he exposed the former to the public only after he gained reasonable clarification on the grounding of the latter.'

306 See e.g., Fang (2021) p. 36: 'For Kant, a state of nature is not the starting point of politics; it is just an idea of reason in the metaphysics of right.' See also e.g., Hirsch (2017) p. 211. More generally, on the relevance of the 'state of nature' for republican political theory, see also e.g., Dagger (2011) pp. 52–53, drawing, however, on Rousseau, not Kant. I will elaborate more on the notion of 'state of nature' later on, see 7.3 below. Kant, it may be added, also makes use of the state of nature in CPR, using 'this reference to show how the critique of pure reason provides lawful stability and a peaceful way of resolving conflicts among philosophers', cf. Møller (2020) p. 22. The relevance of the state of nature in that regard must, however, be left aside here.

307 In his conjectural beginning of human history (see 4.7 above), Kant starts out not from a couple in a garden (with reference, of course, to the Genesis) which has 'already taken a mighty step in the skill of making use of its powers', such as walking, speaking and even '*discourse*, i.e. speak according to connected words and concepts, hence *think* … skills which he had to acquire for himself', cf. Kant (1786) 8: 110.

not a state devoid of rights. Most fundamentally, there is one – but also only one – innate individual basic right, the right to freedom:

> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.[308]

Freedom in this sense is called *external freedom*, and in the following, Kant's claim will be simplified as 'the right to external freedom'.

The expression 'external freedom' is closely related to, but still different from, freedom of will and choice in Kant's practical philosophy.[309] For this reason, it is helpful to unpack these different meanings and the relation between them.[310] At the heart of it, there is the freedom of *will* in Kant's meaning of the term, which is central also to the ethical dimension of Kant's doctrine of morals.[311] Freedom of will relates, as we have already touched upon, to our ability to reason: that is to think and engage in discourse. But here we should stress that freedom of will is not whatever we should come to desire but rather (our capacity) to subject ourselves to the laws of reason:

> Autonomy, as Kant understands it, is not mere self-assertion or independence, but rather thinking or acting on principles that defer to no ungrounded 'authority', hence demands principles all can follow. For Kant, autonomy is living by the principles of reason; and reason is nothing but the principle that informs the practices of autonomy in thinking and doing.[312]

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308 Kant (1797/1798) 6: 237. For further discussion on Kant's concept of external freedom, see e.g., Uleman (2004).

309 See also e.g., Ripstein (2004) p. 8.

310 On the different conceptions of freedom in Kant, see e.g., Allison (2006), see also Ludwig (2015) p. 29, pointing out four concepts of freedom in Kant's practical philosophy.

311 See 5.4 above.

312 See e.g., O'Neill (2015) p. 31.

The more we live by the principles of reason, the more we achieve 'positive freedom'.[313] Freedom of will is, in turn, closely connected to *choice* in agency. Kant clearly distinguishes between *Wille* and *Willkür*, the latter usually translated to 'choice'. As mentioned in 4.7 above, it is debated how these notions are to be understood and related to the problem of free will.[314] Not least from a criminal law point of view, it is also relevant to connect to Kant's theory of action.[315] This involves a number of core concepts related to Kant's practical philosophy – reason, desire, choice, and will.[316]

External freedom, for its part, can be summed up as an absence of interference from others as I exercise my freedom of choice.[317] As Ripstein explains it: 'External freedom is a matter of being able to set and pursue one's own ends.'[318] From one point of view, then, external freedom may be said to be a prerequisite for achieving positive freedom or becoming autonomous: External freedom facilitates us to become ethical subjects. External freedom, in any regard, is arguably social, in the sense that its realisation implies a duty for others not to interfere with you and your doings, provided that you do not infringe upon others equal right to freedom. What this concretely implies in terms of what you can and cannot do, is not clear. It depends partly on, in Jennifer K. Uleman's terms, what 'my historical and social milieu' allows for, but also requires 'recourse to guidelines, to practical rules, that go beyond the abstract imperative to protect external freedom'.[319]

313 Kant's distinction between positive and negative freedom has been subject to different interpretations, something which cannot be pursued here. However, it is worth stressing that it should not be confused with Isaiah Berlin's view of negative and positive view of liberty, see e.g., Ludwig (2015) p. 27.

314 See e.g., McCarthy (2009), who considers Kant's use of the term *Willkür* to be more in line with desire than with a free choice, so that 'our free actions can be causally determined by psychological choices', see McCarty (2009) p. 61. For now, at least, this subject can be set aside for our part.

315 Cf. McCarthy (2009).

316 See e.g., Engstrom (2010).

317 See Kant (1797/1798) 6: 230.

318 Ripstein (2004) p. 19.

319 Uleman (2004), quotations from p. 595 and p. 594 respectively.

As mentioned, the distinction between ethics and law connects to the fact that (autonomous) moral action cannot be enforced by others.[320] Hence, while political rights may (seemingly) overlap with ethical imperatives with reference to which kinds of actions it permits, the key issue with political rights is that you may secure these by means of *force*: A right to external freedom is here connected to an authorisation to use force against those who do not respect your innate right to external freedom. As Kant describes it:

> Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hinderance to freedom in accordance with universal laws. But coercion is a hinderance or resistance to freedom. Therefore, if a certain use of freedom is itself a hinderance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hinderance of a hinderance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.[321]

Here, we connect to a core feature of Kant's political philosophy, one which is also stressed in the literature; the relation between freedom and force.[322] For Kant, the right to external freedom and the right to use force to secure it is more or less two sides of the same coin, or at least inherently dependent on each other. As for instance Byrd points out:

> In Kant's *Introduction to the Theory of Justice,* he establishes an almost mathematical relationship of equality between external freedom and external coercion. It is founded on the idea of the double negation of a cause and effect relationship and through the necessary equality of effect and

320 See 5.4 above.

321 Kant (1797/1798) 6: 231.

322 This is even the title of Ripstein (2009). See also, for instance, Wood (2010) pp. 119–120 and Kersting (2004) pp. 17–18. See also O'Neill (2015) pp. 182–183, who connects this feature of Kant's philosophy to the relation between the principle of Right, by O'Neill described as 'The Universal Principle of Justice', and the social contract aspect of Kant's political philosophy.

> counter-effect in the free movement of physical bodies. His insistence on exact equality has two consequences in addition to equating coercion and freedom. First, if the coercion exerted against a forceful limitation on freedom is too great, then it is no longer compatible but rather itself a limitation on freedom, or wrong. Second, if the coercion is too small, then although not wrong it is ineffective in nullifying the limitation on freedom and the net result is still a reduction of freedom.[323]

Already here, then, we have launched two of the themes most central to the analysis in this book: a basic right to external freedom and the rightful use of coercion to ensure the realisation of this right. But coercion in this regard should not be equated with sanctions of the kind that we find within the legal order, which, of course, are not in place at this stage of the argument. Coercion should rather be understood more broadly as limitations to one's choices. As Ripstein points out:

> This way of setting up the idea of coercion differs from the sanction theory in two key respects; what coercion is, and what can make it legitimate. First, it supposes that although threats are coercive, actions that do not involve threats can also be coercive. An act is coercive if it subjects one person to the choice of another. … Second, Kant's conception of coercion judges the legitimacy of any particular coercive act not in terms of its effects but against the background idea of a system of equal freedom.[324]

The centrality of the basic right to external freedom in Kant's political philosophy relates, however, not merely to its connection to the right to use force to secure it. The right to external freedom is important also because it is the basis for the individual to gain other *acquired* rights in the state of nature, a feature which gives rise to an 'extreme demand of unity' within Kant's system of political rights.[325] Most notable here is Kant's view of the right to property, where the requirement that the acquisition of an object is to be respected by

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323 Byrd (1989) p. 172. See also e.g., Wood (2010) pp. 119–120, and Hirsch (2017) p. 63.
324 Ripstein (2009) p. 54.
325 Ripstein (2009) p. 31.

others immediately presupposes the willingness to respect others in their acquisitions. More acquired rights may emerge with the level of social formation, but as already mentioned, basic acquired rights can also be thought of in the state of nature.

Kant's state of nature, then, is in many ways a normatively 'dense' state of affairs. But it is also riddled with uncertainty in that regard. The rights in the state of nature, innate or acquired, are always uncertain in the sense that each individual can make claims about rights, but there is no public authority to decide on such claims and conflicts relating to them.[326] The problem here goes deeper than simply the lack of effective *enforcement* of rights, even if that is also a problem.[327] While reason may provide us with standards for reasoning, which give rise to a universal principle of right, these do not provide us with clear-cut solutions. As Ripstein aptly points out: 'The problem is not just that the principles are too general – though that, too, is a problem – but rather, that the application of interpersonal norms to facts always generates problems of determinacy'.[328] Hence, with regard to applying rational norms, there are no guarantees that we will arrive at the same conclusions. To this we may add that we as individuals are fairly fallible when it comes to exercising our reasoning powers. And, even if we were to come to the same normative conclusion, our freedom of choice and action is also a freedom to act against the commands of reason, i.e., we can fail or refuse to be guided by reason in our choice of action. Such features leave rights in the state of nature unsecure and vulnerable, that is, a state of injustice. Rights would, eventually, depend on what power you have to secure them for yourself – your 'incidental features of … strength', and even when you are powerful enough to defend your rights by means of force, you may end up doing wrong anyway.[329] Kant clearly acknowledges this power dimension of his moral philosophy as well: 'For, the moral law in fact transfers us, in idea, into a nature in which pure reason, *if it were accompanied with suitable physical power*, would produce the highest good, and it determines our will to confer on the sensible world the form of

326 On the following, see also e.g., Ripstein (2009) pp. 145–181 on the 'three defects in the state of nature'.

327 See Uleman (2004) p. 598.

328 Ripstein (2004) p. 27.

329 The quotation is from Ripstein (2004) p. 27.

a whole of rational beings.'[330] But, as we have seen in Chapter 4, social power is a challenging and fluid issue.

As long as one stays in the state of nature, the uncertainty of rights, at different levels, is unavoidable. Given the fact that the space on this planet is not unlimited, in the absence of a civil society with political authority, we are bound to find ourselves in a social state plagued by competing claims about what is right. None of us has any reason not to follow one's own claims in this regard as one is entitled to protect one's right, even by means of force. Such features of the state of nature are likely to bring us into conflict or at least a need for intersubjective conflict resolution.[331] Herein lies the kernel of a duty to enter into a civil constitution. We are rationally obliged to leave the state of nature and enter into a civil state of public justice with our fellow human beings.[332] Or, in Kant's own words:

> From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is a condition of distributive justice. – The ground of this postulate can be explicated analytically from the concept of *right* in external relations, in contrast to *violence* (*violentia*).[333]

In fact, men do each other wrong 'in the highest degree' by remaining in the state of nature:

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330 Kant (1788) 5: 43 (italics added).

331 Hirsch (2017) pp. 210–247 stresses the latter problem as the core problem in the state of nature, see e.g., p. 227: 'Das Problem des Naturzustands ist also, dass dieser sittlich unterbestimmt ist, weil rechtliche Fremdverpflichtung nicht als autonome Gesetzgebung gedacht werden kann'.

332 Hence, 'civil state' in this sense seems to lie close 'civil order', i.e., 'a polity's … normative ordering of its civic life – of its existence as a polity', see Duff (2018a) p. 7.

333 Kant (1797/1798) 6: 307. See also for instance Kersting (2004) pp. 51–52. Notable here is the conceptual contrast between 'the concept of right' and 'violence', which connects us to the discussion of power in Chapter 4. This could be understood precisely as suggested there, that forms of power turn into forms of violence by their lack of justification according to the principle of right. See, however, Varden (2022) about translation challenges in this regard.

> No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning)? And it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already by his nature, threatens him with coercion. … Given the intention to be and to remain in this state of externally lawless freedom, men do *one another* no wrong at all when they feud among themselves; for what holds for one holds also in turn for the other, as if by mutual consent … But in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.[334]

This, as Kant elaborates in a note to the text, connects to Kant's concepts of formal and material wrong: While there is no wrong in the interaction between them, they both do harm to the higher duty to enter into a civil society, where each are assured of his rights.[335] The nature of Kant's distinction

334 Kant (1797/1798) 6: 307–308.

335 The footnote concerns the expression 'wrong in the highest degree' and reads like this: 'This distinction between what is merely formally wrong and what is also materially wrong has many applications in the doctrine of right. An enemy who, instead of honorably carrying out his surrender agreement with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement, cannot complain of being wronged if his opponent plays the same trick on him when he can. But in general they do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such.'

between formal and material wrong is debated, and we will pick up on it in the next chapter.[336]

Kant insists that it is not experience, but the very (intelligible) *possibility* that violations like this may occur that should lead us to into civil society.

> It is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not some deed [*Factum*] that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this.[337]

Kant's political philosophy is, then, not founded on premises relating to, for instance, the propensity to evil and conflict in human beings. But even if Kant's reasoning does not rely on premises of that kind, they may give additional reason for the constitution of the state and our obligation to enter into such a project with others.

Only entering into the civil state brings about a 'rightful condition', that is, 'that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights'.[338] The italics are Kant's own and should be noted; the rightful condition – the civil society – does not create the most basic rights, but rather allows us to have these (pre-political) rights (respected) in community with others. Kant adds that

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336 As suggested also by the footnote in Kant (1797/1798) 6: 307, Kant makes this distinction in different settings, see e.g., Kant (1785) 4: 428 on formal and material practical principles: 'Practical principles are *formal* if they abstract from all subjective ends, whereas they are *material* if they have put these, and consequently certain incentives, at their basis.' See on Kant's distinction, e.g., Newhouse (2016), and Hirsch (2017) pp. 305–310.

337 Kant (1797/1798) 6: 312.

338 Kant (1797/1798) 6: 307.

'the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called public justice'.[339] Hence, there is a need for establishing (and submitting oneself to) an authority that lays down what is right. As already noted, this is the basis for our duty to depart from the state of nature and enter into a civil constitution wherein the authorities are to lay down the justice and thereby bring certainty to it.

Hence, the fundamental role of political authority is one of translating the laws of reason into rules for the political community, that is; exchanging the law of reason into positive legal rules. But its role goes further than this; it also includes a responsibility to solve societal conflicts by means of these rules, using force if needed, and thereby to assign to each what is his or hers. In doing so, the political power holder becomes the political authority in society. In order to fulfil its role in this regard, however, a number of preconditions must be in place. Most basically, it requires each of us, as individuals, to transfer the right to use 'force with which you could coerce others' to the state.[340] This, thereby, also sows the seed of a power monopoly on behalf of the state, a subject we will return to in Chapter 7.

As we have now seen, at the heart of Kant's political philosophy is the external right to freedom and the need for the state to secure it in order for the individuals to see this right made actual or real. Legal institutions are an essential part of the public constitution of these rights in themselves, or, as Ripstein puts it, 'the consistent exercise of the right to freedom by a plurality of persons cannot be conceived apart from a public legal order'.[341]

The civil state, we should also stress, is for Kant not only a matter of individuals having their rights respected. It is important for the development of the human species in a broader sense: 'If one hinders the citizen who is seeking his welfare in any way as he pleases, as long as it can subsist along with the freedom of others, then one restrains the vitality of all enterprise and with it, the powers of the whole.'[342] As Kant also states in the eighth proposition of his idea for a universal history: 'One can regard the history of the human species in the large as the completion of a hidden plan of nature to bring

339 Kant (1797/1798) 6: 306.
340 See also e.g., Byrd (1989) p. 187.
341 Ripstein (2009) p. 9.
342 Kant (1784b) 8: 28.

about an inwardly and, *to this end*, also an externally perfect state constitution, as the only condition in which it can fully develop all its predispositions in humanity.'[343]

5.6 The structure of the civil state

The (duty to) move from the state of nature into a civil state is, as shown, key to Kant's political philosophy. Kant's political philosophy is not a theory about the evolution of modern states. How the civil state actually came about is largely undescribed. Kant's political philosophy does not, for instance, rely on a naïve conception of a (one-time) social contract as a historical fact.[344] Rather, for Kant, this contract is an idea.[345] The civil state as it exists, Kant seems to think, most likely came about by means of force – as we have already seen, the use of force by others for this purpose, is also legitimate:

> Unconditional submission of the people's will (which in itself is not united and is therefore without law) to a *sovereign* will (uniting all by means of *one* law) is a *deed* that can begin only by seizing supreme power and so first establishing public right.[346]

For 'supreme power', Kant uses the German term '*Machtvollkommenheit*'. In securing this, as Marie Newell states it, the state '*constitutes* the omnilateral

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343 Kant (1784b) 8: 27.

344 On Kant related to other social contract theories, see Kersting (2004) pp. 97–123 and O'Neill (2015) pp. 170–185, the latter stressing the differences between Kant and other social contract theories, viewing this as a strength for Kant's approach.

345 See e.g., Kant (1793) 8: 297 on 'the original contract' as '*only an idea of reason*'. See also 5.5 above on 'the state of nature'. Some would describe the original contract as an 'ideal' for Kant (as well), see e.g., Hirsch (2017) p. 18: 'ein *Vernunftideal* … welches ausschließlich als regulatives Prinzip politischer Herrschaft fungiert'. But, it may be added, Kant is 'occasionally evasive when he speaks of consent, sometimes interpreting it as hypothetical and other times as actual', see Maliks (2009) p. 436.

346 Kant (1797/1798) 6: 372, see also e.g., Hirsch (2017) p. 21 and also Maliks (2009) p. 432, pointing out that 'Kant, despite his contractarianism, shares with Aristotle on a very general level the conception of the state as an organic community existing by nature'.

will: its juridical effect is to unite the wills of individuals present within the controlled territory', which connects us to the democratic aspect of Kant's theory to be discussed in the next section.[347] Power is, however, not merely an additional but rather an intrinsic feature of the state as a legal order.

While the emergence of the state is a factual, historical process, Kant is clear about how it must be organised in order to be(come) a legitimate political power, i.e., a republic. This is one of four forms of government, alongside barbarism, anarchy, and despotism, but at the same time, the only legitimate form of it.[348] Kant offers a form for the republican state. Key to this is the separation of powers. The state consists of the following three 'dignities': The sovereign authority in the person of the legislator, the executive authority in the person of the ruler, and the judicial authority in the person of the judge.[349] However, for Kant, this is not simply an external limitation or structure imposed on political power, but rather an inherent feature of the civil constitution. Kant considers them as similar to the premises of practical syllogism:

> '… the major premise, which contains the *law* of that will; the minor premise, which contains the *command* to behave in accordance with the law; and the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand.'[350]

The legislator, then, has a key role: The executive is '*irresistible*' and cannot be opposed as it uses its power in society. The verdict of the highest judge is for its part '*irreversible*' and beyond appeal. But the basis for both of them is the decisions of the legislator, and in that regard, the legislator is '*irreproachable*' when it comes to deciding what is externally mine or yours.[351] Together, these provide the state with its autonomy, that is; 'by which it forms and preserves

347 Newhouse (2019) p. 537.

348 See further e.g., Varden (2022).

349 Kant (1797/1798) 6: 313–314. See further e.g., Kersting (2004) pp. 134–136.

350 Kant (1797/1798) 6:313–314.

351 Kant (1797/1798) 6: 317. On the legislative authority and its central role, see e.g., Newhouse (2019).

itself in accordance with laws of freedom'.[352] Here, then, it is useful to recall the basic, innate right to freedom that each and every one of us have. In the construction of the republic, this right works constantly as a background premise that we must keep in mind in order to unpack the different parts of this construction.

Apart from the supreme role of the legislator, the three powers complement each other, but they are also mutually subordinate to each other.[353] Their unity is decisive for the state's well-being. The state's 'well-being', Kant emphasises, is not primarily a matter of the citizen's well-being (even if one could consider it a step in that direction). Rather it is about the degree to which the state lives up to its basic principle:

> By the well-being of a state is understood […] that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.[354]

This is important and connects us to the issue of reform, which we will return to later on: The well-being of the state is not a matter of either-or, but of more-or-less, and we are constantly involved in a process of improving its well-being, and, to the extent that it is in a state of well-being, we should work to preserve that condition. At this point, there seems to be a certain element of dynamics and development in Kant's philosophy, which we will also take up in a later section.[355] This reformist aspect is another key theme in Kant's political philosophy.

Furthermore, as regards the characteristics of the civil state, Kant rejects paternalism as the 'most despotic of all' forms of government, as this treats

352 Kant (1797/1798) 6: 318. See Newhouse (2019) pp. 534–536 for an explanation of how Kant considers the three authorities and their inner relation.

353 Byrd/Hruschka (2010) p. 2.

354 Kant (1797/1798) 6: 318.

355 See further 5.9, and on criminal law reform, see Chapter 9 below.

the citizens like 'children'.[356] Also, his reasoning about a number of legal institutes, such as constitutional law, the tasks of the police, and taxation issues, contributes to shaping his republican political philosophy.[357] Kant, however, also stresses the importance of the general will in his system, which connects to the central place of the legislator in it.

5.7 The general will, democracy, and development

Legislation has its origin in the general will of the citizens, united for this purpose. The key role of the citizens in this regard, according to Kant, relates closely to three fundamental attributes: *lawful freedom*, 'the attribute of obeying no other law than that to which he has given his consent', *civil equality*, 'that of not recognizing among the *people* any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other', and *civil independence*, 'of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people'.[358] Hence, the general will – the basis for legislation – is the will of all (free) citizens.

How, more precisely, one should understand the democratic aspect of Kant's political philosophy, is debated.[359] While some consider him as anti-democratic, others see him as a radical democrat. A more moderate version is perhaps most accurate. Kant rejects the idea of direct democracy. However,

356 Kant (1797/1798) 6: 317. See here also Kaufman (2007) p. 38, pointing out that Kant 'rejects a political principle which assigns to the sovereign the right and responsibility to determine *for* its subjects what the basis of their happiness should be and to secure that basis *for* the subjects, possibly independent of or contrary to their autonomous willing'.

357 Below, we will reconnect to these starting points regarding the form of the state, see in particular 9.4 where the compatibility of Kant's political philosophy with the welfare state will be discussed.

358 Kant (1797/1798) 6: 314.

359 On Kant and democracy, see e.g., Maliks (2009), considering Kant's republicanism as 'inherently democratic'.

he does stress the importance of representation of the people in the state.[360] He also stresses public use of reason and the general will as the basis for legislation through a representative system, even if it would be limited to those that are (full) citizens, i.e., those 'fit to vote'.[361] As already touched upon, the general will is not a one-time phenomenon in terms of a signed social contract. Rather, as we shall see, the citizens are constantly and actively involved in (re)crafting the legal and political order. In order for the citizens to fulfil their role of exercising public reason, Kant places much emphasis on the freedom of the pen.

As such, Kant envisions an intimate relation between the idea of freedom, the civil constitution with authority to guarantee it, and the people, through their use of public reason. Each civil constitution's 'realization is subjectively contingent', as Kant himself phrases it.[362] Whether, and how, the principle of right should be put into practice, requires consideration and, possibly, legislation provided by the legislative assembly in the relevant situation. Kant's law of reason is not (only) a fixed scheme for organising the state, but a framework for us to self-legislate within the realm of reason. While Kant in his remarks on aspects of public right – e.g., the right to impose taxes – sketches some more specific features of the civil state, the viewpoints mainly concern the system of rights in itself.

As already mentioned: While often considered a form of natural law, Kant's law of reason, thereby, is not deducing from axioms more detailed rules of conduct for citizens (an ambition which natural law theory is often associated with, and which, indeed, is sometimes seen in classical natural law).[363] Rather, a core feature is the need for interpretation and application of the basic demands of reason in terms of exchanging it into a concrete legal order, which, ultimately, is a task for the people. Therefore, we have once again connected to the relevance of application and judgement, a topic which we will return to in several sections below.

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360 Byrd/Hruschka (2010) p. 2.

361 Kant (1797/1798) 6: 314.

362 Kant (1797/1798) 6: 264. This provides an important premise for our later discussion of criminalisation, see 8.2 below.

363 See 5.3 above.

5.8 The authority of law and the importance of its reform

From one point of view, Kant's political philosophy provides a baseline justification for the rule of law. Central to this was, as elaborated in 5.5, the need to remedy deficiencies in the state of nature. Following this, while the actual origin of the civil state is not a central topic for Kant, from the moment the civil state is constituted, it warrants respect. Actually, to Kant, to even question the (factual) origin of the civil state in order to attack it may put it in jeopardy, and this would go against the strong duty to respect and obey one's sovereign.[364] Individuals placing their own judgement over the sovereigns' judgement risk leading society back into the state of nature and must as such be prohibited. One way to understand Kant on this point, then, is this: The duty to enter into the civil state should be seen as containing, or at least being accompanied by a duty *not to return to* a state of nature. This implies that one can be prevented from abandoning the civil state.[365] In other words, the state can use force to keep you in the civil state, as the state itself has charted it through its legislation: Laws are the authoritative expressions of the ruler's interpretation of the law of reason. For the sake of avoiding (a return to) the state of nature, where there is no such authority, we must subject ourselves to the law.

Based on such premises, some have described Kant as a legal positivist. Others, on their part, have contested this labelling.[366] This depends a lot on what one considers as 'legal positivism' in the first place, a discussion that would fall outside of the scope of the discussions of this book.[367] However, Kant's strong emphasis on respect for positive law is still clear, which also implies that the perspective of lawyers are the rules that have been enacted. Kant puts this point very clearly in his *Conflict of the Faculties*:

> The jurist, as an authority of the text, does not look to his reason for the laws that secure the *Mine* and *Thine*, but to the code of laws that has been

364 See Kant (1797/1798) 6: 318.

365 Byrd (1989) p. 181.

366 See e.g., Waldron (1996), compared to Alexy (2019).

367 See however Klein (2021) who discusses Kant as a legal positivist from a number of alternative criteria for 'legal positivism'.

> publicly promulgated and sanctioned by the highest authority (if, as he should, he acts as a civil servant). To require him to prove the truth of these laws and their conformity with right, or to defend them against reason's objections, would be unfair. For these decrees first determine what is right, and the jurist must straightaway dismiss as nonsense the further question of whether the decrees themselves are right. To refuse to obey an external and supreme will on the grounds that it allegedly does not conform with reason would be absurd; for the dignity of government consists precisely in this: that it does not leave its subjects free to judge what is right or wrong according to their own notions, but [determines right and wrong] for them by precepts of the legislative power.[368]

The duty to respect the sovereign, and hence to remain in the civil state, furthermore, implies a rejection of revolutions.[369] While the sovereign may violate the law of reason (according to one's opinion), it is nevertheless wrong to challenge the sovereign's authority and to seek to overthrow it. How, more precisely, Kant is to be read here, is, however, contested. While many claim that he rejects any kind of such a right to resistance, some advocate more nuanced interpretations, for instance that his rejection of revolutions does not apply in a despotic state.[370] In any regard, Kant's political philosophy appears as to have a certain conservative flavour: Like Hobbes, Kant seems to go a long way towards accepting and protecting in-place political arrangements. When combined with the fact that Kant's *Rechtslehre* is part of a larger philosophical project relating to foundations, principles, and boundaries of reason, one might easily get the impression that the Kantian concept of law is metaphysical, static, and conservative.

However, there is more to Kant's political philosophy, which makes such an 'conservative' interpretation far too one-sided. Kantian law also carries a (regulative) ideal for us to (re)form civil society and its political institutions,

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368 Kant (1798) 7: 24–7: 25 (the text in brackets is included in the English translation).

369 For Kant's views on this subject, see e.g., Kant (1793) 8: 297–8:306. See further e.g., Arntzen (1996), connecting the subject to Kant's view of duties to oneself, which is also the central perspective in the analysis in Hirsch (2017).

370 See e.g., Byrd/Hruschka (2010), p. 184.

that is, to bring our legal orders closer to the 'true republic'.[371] Kant clearly sees a need for development and progress, not only in human beings but also when it comes to the level of perfection of actual legal orders. His push for Enlightenment is closely related to both of these aspects. Kant considered the legal order he lived in as lacking in many respects, and it is likely that he recognised that it would stay that way for a long time: The often-quoted remark that 'out of such crooked wood as the human being is made, nothing entirely straight can be fabricated' suggests that both human beings and our legal and political arrangements are riddled with imperfection compared to the state of the 'true republic'.[372] As Kant also puts it: 'Only the approximation to this idea is laid upon us by nature.'[373] Even approximating this idea requires an effort to work our way out of our own immaturity.[374]

In this regard, Kant sees *reform*, not revolution, as the proper way to go about improving the civil state. If displeased with the current state of affairs, one must put one's faith – and patience – in future reforms. Here, 'the true republic' – the greatest possible realisation of each individual's innate right to as much external freedom as is compatible with the equal right of others – should guide the sovereign, which can, hence, also reform itself. But it can also guide its citizens when working for reform, for instance, through public discussion and the 'freedom of the pen'. This reformist aspect of Kant has recently been emphasised in relation to, for instance, constitutional law.[375] As Jacob Weinrib stresses in that regard, this is an important response to a familiar, but misguided critique of Kant's constitutional law theory, and political philosophy more generally, being considered as 'abstract' and 'unpractical':

> Constitutional theorists often claim that the more abstract a theory is, the more it is incapable of articulating the nature of legal and political

371 Kant (1797/1798) 6: 315. See also e.g., Hirsch (2017) p. 311 distinguishing between 'dem Staat in der Idee und dem Staat in der Erscheinung', adding that '[w]ird der Staat in der Erscheinung diesem Ideal gerecht, so ist die Regierungsart *republikanisch*' (p. 318)

372 Kant (1784b) 8: 23.

373 Kant (1784b) 8: 23.

374 See in particular Kant (1784a).

375 See Weinrib (2019) contrasting Kant's public justice paradigm to preservationist and procedural paradigms in constitutional law discourse.

> reform. Because Kant's theory of the state emerges from abstract principles rather than historical or sociological facts, he has become the leading target of this criticism. … Because constitutional reform must respond to the concrete circumstances of an existing society, reform cannot be illuminated by abstract principles. These objections overlook the way in which particularity enters Kant's theory.[376]

We will return to the implications of this reformist aspect for our view of criminal law in Chapter 9, in particular. Already here, however, it is worth noting that reform of and progress in the state develop in tandem with the individual's moral improvement and education. This is well captured by the following quote from Kant:

> We are *cultivated* in a high degree by art and science. We are *civilized*, perhaps to the point of being overburdened, by all sorts of social decorum and propriety. But very much is still lacking before we can be held to be already *moralized*. For the idea of morality still belongs to culture; but the use of this idea which comes down only to a resemblance of morals in love of honor and in external propriety constitutes only being civilized. As long, however, as states apply all their power to their vain and violent aims of expansion and thus ceaselessly constrain the slow endeavor of the inner formation of their citizens' mode of thought, also withdrawing with this aim all support from it, nothing of this kind is to be expected, because it would require a long inner labor of every commonwealth for the education of its citizens.[377]

In this way, the qualities and progress of the state become, ultimately, a matter of the level of enlightenment in society and its authorities, which is an ongoing process of improvement. Kant states in his famous essay *What is Enlightenment?*: 'If it is asked whether we at present live in an *enlightened* age, the answer is: No, but we do live in an age of *Enlightenment*.'[378] This leads us to

376 Weibrib (2019) p. 640.
377 Kant (1784b) 8: 26.
378 Kant (1784a) 8: 40.

further consider how we as a civil society, our political and legal institutions included, can progress further towards an enlightened age.

5.9 How Kant foresees progress towards public justice

From what is said so far, Kant's political philosophy emerges as somewhat dual-tracked, combining metaphysical principles and anthropological premises in intricate ways. As we have just seen, the latter becomes more noticeable when we unpack the reformist dimension of Kant's political philosophy. This invites the question of whether Kant has a particular view of how a concrete, actual civil state can go about fulfilling the normative standards to which it is subject. The best way to answer this question, may be to take a broader look at the nature of Kant's moral philosophy.

To begin with, while claiming to provide a new and improved moral philosophy, Kant did not perceive it in terms of radically changing our moral practices and intuitions. Rather, for Kant, reason is always at work in us, 'guiding' us even when we are not necessarily consciously applying its laws. Hence, we have reason to think that what is actual, at some level at least, is rational, to briefly borrow terms from Hegel.[379] Thereby, we have reason to consider the current legal order as a starting point and foundation as we strive to approximate the true republic, rather than overthrowing it and being brought back into the state of nature. At the same time, philosophy can be very helpful in improving our understanding of reason's commands and our moral practices, of which we may not have a sufficiently clear view. In the *Anthropology Mrongovius*, for instance, Kant talks about 'obscure concepts' and how these dominate our thinking, which also provides us with a neat image of how the principles of morality, for ethics as well as for law, may be better 'illuminated':

379 See Hegel's preface to his Philosophy of Right, Hegel (1821), where it is claimed that '[t]he rational is real, and the real is rational'.

> One could represent the human soul as a map whose illuminated parts [and] the clear, certain, particularly bright parts signify the distinct representations, while the unilluminated parts signify the obscure representations; the latter occupy the greatest space and also underlie the clear representations and constitute the majority of our cognition. In analytic philosophy, I simply make obscure representations in the soul clear.[380]

Moral philosophy is precisely meant to 'illuminate', i.e., to systematically structure and explain how and why we reason and judge in moral matters, helping us to reason better and, thereby, improve ourselves as moral agents.[381] Political philosophy, then, can help us to improve our understanding of concepts such as right and justice and their application, in particular through systematic reconstruction of our actual political practices. Hence, philosophical work on the principles of public justice can be an important driver of reform.

Still, this is not to say that philosophers should do the job for us. Philosopher kings, as suggested by Plato, are not something Kant would support. In the words of Sofie Møller:

> Most importantly, Kant always considers theoretical and practical progress as mutually dependent. Theoretical progress encompasses the progress in the sciences and in philosophy, which expands our knowledge of the world and systematizes our existing cognition. Practical progress comprises the complexities of legal, political and moral progress, which Kant describes as an interdependent development, in which the development of one aspect promotes progress in the others. Kant's fundamental idea is that

380 Kant (1784–1785a) 25: 1221 (the text in brackets is included in the English translation). The title is due to the name of the student, Krzysztof Celestyn Mrongovius, whose notes from Kant's lectures on anthropology this work is based upon.

381 This view is reflected in different parts of Kant's philosophy, also in his logics. See, for instance, Hanna (2006), who defends 'the broadly Kantian thesis that logic is the result of the constructive operations of an innate protological cognitive capacity that is necessarily shared by all rational human animals, and governed by categorically normative principles' (p. ix). But that does not mean that Kant considers humans to always perfectly utilise their protological cognitive capacity.

> the promotion of education and the development of a just civil society will promote the moral development of citizens.[382]

A part of this process, then, is that the people must reform itself, civil society, and its rulers, making the latter facilitate further progress towards the true republic.[383] This kind of approach only makes sense if we presuppose, as Kant does, that we are (already) rational beings capable of applying reason in our thought and agency. Our freedom allows us to act as we chose, but it is our duty to recognise these standards of reason, to make them 'ours', and apply them as principles for our choices *in practice*. Conforming to the principles of public justice is for us as society and the public will to conform to through the political and legal institutions, and the obligation for each individual to contribute. Both ethics and public justice require processes of development and maturing, which each and every one of us must subject ourselves to in order to improve ourselves and the political community in which we live. These are interconnected, but the latter political development may be thought of as particularly challenging. At the individual level, we may imagine a 'wise' individual, who, after a life of philosophical contemplation and practice, to a large degree lives according to the demands of ethics, even in a rotten society. Achieving a state of public justice requires, as we will return to in Chapter 9, long-term, even generational, development in terms of political processes, public discourse, welfare and education, and more, a process challenged by, for instance, individuals' desire and struggle for power. Kant, in this way, may be said to 'democratise' Plato's philosopher king.[384]

Luckily, one may say, to Kant it is not only our rational constitution that commands us to move in this direction.[385] Nature's providence also has an

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382 Møller (2021) p. 130.

383 See here also Varden (2020) p. 313: 'Also, as we continue reforming our system, we will want to develop rather than eliminate public officials' abilities to reason as our representatives, namely by analyzing legal political issues in terms of each citizen's basic rights (innate, private, and public right) and then making space for appropriate concerns of human culture. To do this, we must also strive towards a legal-political culture in which such reasoning is expected and encouraged in public discourse.'

384 See Höffe (2006) pp. 144–149.

385 Here, we connect to the subject of Kant's view of history and historical progress, see e.g., Kersting (2004) pp. 163–168. See further also Chapter 9.

important role to play, and our fate as a species that represents (what we must conceive of as) the culmination of nature has a role to play – the central topic of Kant's 1784 essay on an idea for a universal history.[386] Here, he suggests that it is hardly accidental that humankind has evolved towards state formations. Civil society is 'the end of nature itself, even if it is not our end'.[387] Kant seems to suggest that there is a certain natural drive within human beings to enter into a political order, closely related to our 'propensity to enter into society, which, however, is combined with a thoroughgoing resistance that constantly threatens to break up this society' – our 'unsociable sociability'.[388] We strive for freedom and individuality but also for being in communities with others, and this inclination is key to the development of human culture.[389]

In humankind's progress (as a species) from its self-incurred immaturity and wickedness to enlightenment and humanity, the fate of individuals can play different roles.[390] In Kant's view, our vices, too, play an important role in our development towards rational *humanity*, as his conjecture of the beginning of human history shows:

> Whether the human being has gained or lost through this alteration [into a condition of freedom] can no longer be the question, if one looks to the vocation of his species, which consists in nothing but a *progressing* toward perfection, however faulty the first attempts to penetrate toward this goal – the earliest in a long series of members following one another – might turn out to be. – Nevertheless, this course, which for the species is a *progress* from worse toward better, is not the same for the individual. Before reason awoke, there was neither command nor prohibition and hence no transgression; but when reason began its business and, weak as it is, got into a scuffle with animality in its whole strength, then there had to arise ills and, what is worse, with more cultivated reason, vices, which

386 Kant (1784b).

387 Kant (1790) 5: 432.

388 Kant (1784b) 8:20. This notion is discussed, e.g., in Wood (1991), who clearly shows how this notion relates to premises laid out in many of Kant's works relating to anthropology, history, religion, and morality.

389 Kant (1784b), 8:20–21.

390 On 'self-incurred immaturity' and Enlightenment, see in particular Kant (1784a).

> were entirely alien to the condition of ignorance and hence of innocence. The first step out of this condition, therefore was on the moral side a *fall*; on the physical side, a multitude of ills of life hitherto unknown were the consequence of this fall, hence punishment. The history of *nature* thus begins from good, for that is the *work of God*; the history of *freedom* from evil, for it is the *work of the human being*.[391]

From this, there seems to be only a short step towards expecting that even crimes and our responses to them should play an important role in our strive towards humankind's progress as well, which connects us to Kant's views about crime and criminal law, the topic of the next chapter.

What we have seen so far, is that reforming the law of the state is a complex process for which Kant has no straightforward 'recipe'. It is a process which we do not easily control, but which we are still responsible for bringing forward, whatever point of progress – or backlash – we find ourselves in, by using our capacity to reason. If there is one point where the static, metaphysical and the dynamic, anthropological side of Kant's political philosophy come together, this seems to be it.

5.10 Some important, but not fully resolved issues (?)

We are about to close this general overview of Kant's political philosophy. However, there remain some, notably two, issues that will be important to the further analysis, but where Kant's views are not evident. One is what we may call the application issue, which has several sides to it. The other is the power issue, which includes the question of what is more precisely implied in the notion that the individual can be forced to enter into, stay in, and even be forced to return to, the civil state.

The first issue to be addressed is this: given that one acknowledges the basic principles of Kant's republicanism and considers them philosophically valid, how can their application be understood in a given social-historical

391 Kant (1786) 8: 115

context, regardless of whether it is an individual applying ethical norms, or a legislator applying the principles of public justice? Kant clearly seems to presuppose this kind of application. If not, his political philosophy would have (only) a quite static and, to be fair, in parts, a rather anachronistic character. However, as we have already seen from its reform dimension, this is not an apt description of Kant's political philosophy. However, the application issue proves to be difficult, leading us into other issues pertaining to the nature and importance of its maxims and judgements and questions of to what extent these should be seen as socially situated. This is partly due to Kant not having addressed this issue directly. To be sure, he dedicates the third critique, *The Critique of Judgment* (CJ) from 1790, to the nature of judgements. But this is mainly a matter of taste, beauty, and judgement in arts. It has, at first glance at least, less to say about his practical philosophy.

Some has considered this application issue to be a weak point in Kant's political philosophy. For instance, Heiner Bielefeldt, building on Seyla Benhabibs' works, makes the following claim:

> At times Kant confuses the strictness of the unconditional moral law with the inflexible formulation of a concrete maxim which itself thus seems elevated to a timeless dogmatic truth … What Kant fails to consider is the fact that maxims are not only subjective principles but *historic* principles. They come about and develop within the life of the morally judging individual, depending not only on her personal experience but on the ever-changing social context in which moral action and reflection take place. In other words, moral maxims are inevitably conditioned by time and space and by experience and psychic development of the individual, as well as by the social and cultural environment at large. Hence, a moral maxim cannot represent the moral law once and for all. The *unconditional* 'ought' of the categorical imperative only *conditionally* takes shape through maxims which themselves must therefore remain open to criticism and further development. Succinctly put, the unconditional moral law underlies the entire *process* of generating maxims by employing all faculties of judgment to the service of the self-legislative moral will.[392]

392 Bielefeldt (1997) pp. 535–536.

This, in turn, applies also to the political philosophy. As Bielefeldt points out:

> Kant, however, does not sufficiently consider the particular societal circumstances from which laws are derived and to which they are to be applied. Thus, what I critically remarked earlier with regard to Kant's *moral* philosophy holds also for his philosophy of *right*: he largely fails to take into account the role of judgment and experience for the development of concrete norms. Instead of conceiving the coming about of moral or legal norms in terms of an open historic process, Kant holds norms to be directly deducible from the supreme principles of morality and right, respectively. As a result, his philosophy of right – like his ethics – at times takes on a certain dogmatic shape. An example of this dogmatic tendency is his categorical rejection of any possibility of a right to resistance, a rejection which he thinks can be deduced immediately from the principle of right.[393]

Judging from these viewpoints, Kant's political philosophy needs to be complemented on this point. We are left with the task of clarifying how this affects Kant's political philosophy and, if possible, determining how it can be complemented. According to Bielefeld, the application of Kant's basic political philosophical principles must be adapted to a given context in order to be applied. This would also allow more anthropological and societal aspects in our discussions of law. As we will return to, such perspectives may also be helpful in the philosophy of criminal law.

But we should not dismiss Kant too easily on these issues.[394] Other commentators have seen more potential in Kant here. Ripstein stresses that 'Kant's account of the need for a political state turns in part on the importance of judgement'.[395] Similarly, O'Neill emphasises that:

> Discussions of judgement, including practical judgement, are ubiquitous in Kant's writings. He never assumes agents can move from principles of

393 Bielefeldt (1997) pp. 543–544.

394 Kant is at least certainly aware of the subject with regard to his moral philosophy more generally, see e.g., Kant (1785) 4:412 and Kant (1793) 8: 275. See also Kaufman (2007) pp. 85 for an overview of important contributions to this discussion.

395 See for instance, Ripstein (2004) p. 29 (footnote) on Arendt's claims in this regard.

> duty, or from other principles of action, to selecting a highly specific act in particular circumstances without any process of judgement. He is as firm as any devotee of Aristotelian *phronesis* in maintaining that principles of action are not algorithms, and do not entail their own application.[396]

Relatedly, Bo Fang emphasises the distinction between, on the one hand, Kant's metaphysics of right, and on the other, his *political* philosophy, the '*ausübende Rechtslehre*', argues, in response to the question '[h]ow can the principles of right be realized in experience?':

> Kant claims that to establish a perfect constitution, at least three conditions are required, namely 'correct concepts of the nature of a possible constitution, great experience practiced through many courses of life and beyond this a good will that is prepared to accept it' …. These three conditions correspond to principles, judgement, and decision. The first condition can be provided by the metaphysics of right, whereas the latter two are obviously not contained in the metaphysics of right; instead, they relate to two basic elements of political practice: the political judgement to integrate the principles of right with empirical conditions and the political will to promote the realization of these principles. The construction of Kant's political philosophy should revolve around these two elements.[397]

The question of how far we should go in considering a distinction between the metaphysics of right and the political and democratic aspect of Kant's philosophy can be left open here. In any case, it is clear that we must somehow accommodate a space for politics, reform, and development in Kant's reasoning on law. As later chapters will show, criminal law may provide us with a useful case for doing so.

Secondly, a pressing issue in Kant's political philosophy is the issue of power or force. The centrality of this issue for Kant's political philosophy is unquestionable. The leap from the state of nature to the civil state to a large extent concerns the constitution of an authority with the power required

396 O'Neill (2015) p. 50.

397 Fang (2021) p. 36, quoting Kant (1784a) 8:23 (reference omitted here).

to guarantee rights for the individual. But what does it take for the state to guarantee the rights of the individual? In other words: what kind of power is presupposed as a capacity in order for the state to be able to fulfil this role? This leads us to question whether we can rely on Kant's conceptualisation of power. Kant does not say much explicitly about this, even if some starting points can be found. In the CJ, for instance, Kant states that:

> *Power* is a capacity that is superior to great obstacles. The same thing is called *dominion* if it is also superior to the resistance of something that itself possesses power.[398]

This passage is intriguing as it connects Kant strongly to a central concept of republican thought in general: that of *dominion*, and can also be used to rephrase central aspects of the concept of power as developed in Chapter 4.[399] But Kant does not delve much deeper into the concept of 'power' than this, even though the notion is clearly central to his political philosophy.[400] We might infer from this that power is the kind of empirical, or phenomenal, issue that Kant does not occupy himself much with in his political philosophy.

That might, however, turn out to be an unwarranted conclusion. If we look closer and try to reconstruct Kant's view here, the three branches of the state clearly have important roles in this regard. The legislator must lay down the rights of the individual, and the court must assign to each what is his, i.e., solve social conflicts on (claims about) rights. The executive, for its part, must be able to rule in society on the basis of the rules of the legislator and the decisions of the court. More generally, it is clearly implied that the state must be the ultimate authority, capable of hindering the hindrance of right. The state cannot guarantee rights if it is subordinate to some or groups of its citizens. This must imply a duty to *use* power when needed, to protect and

398 Kant (1790) 5: 260.

399 See 5.2.1 above regarding republicanism. Regarding the concept of power, see 4.4 in particular.

400 See e.g., Kant (1790) 5: 432: 'The formal condition under which alone nature can attain this its final aim is that constitution in the relations of human beings with one another in which the abuse of reciprocally conflicting freedom is opposed by *lawful power* in a whole, which is called *civil society* …' ('lawful power' italicised here).

restore interventions in rights, as well as a duty to *supress* social formations that challenge the state's control in society. This may itself imply a more basic duty for the state to always maintain the *capacity* for control of society. At the same time, the basic right to freedom as the starting point for all individual rights and the need for a political order to protect them, remains. So, there is a strong normative implication on behalf of the state to use these duties of power, control, and suppression to keep us in the civil state, but only insofar as it promotes the external freedom of the citizens and no more than needed for that purpose, as well as to strive to reduce the levels of power applied to increase freedom in society.

With regard to the latter duties, it seems, criminal law may come play a key role, in particular as we elaborate on what it actually would mean to *return to* the state of nature. This we will revisit in Chapter 7, where I will begin by recapturing some key themes from this chapter.[401] For now, at least, this outline of Kant's political philosophy has come to an end. In the next chapter, I will turn to Kant's view of criminal law.

401 See further 7.2 below.

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6

Close encounter: What Kant says about criminal law and punishment

6.1 Aim and outline

Whether, how, and to what extent one can justify the use of punishment has been a longstanding discussion. The need for a justification is evident: the more 'brute' forms of power the state displays, the more pressing the justification challenge will be, and criminal law operates as a form of manifest power.[402] Hence, it is no surprise that political philosophers, including Kant, also address the issue of penal power in their strive to define legitimate political power. Kant's view of criminal law is, however, a contested issue.[403] It is, for a number of reasons, not easy to discern what view of criminal law Kant actually subscribes to, nor is it a straightforward exercise to determine how he should be interpreted on issues such as those mentioned: 'Few philosophical

402 See also 3.2 above.

403 This is not the case in Nordic criminal law scholarship, though: As shown in Chapter 2 above, there has been a general consensus that Kant holds a fairly crude hard-core retributive position.

discussions have been interpreted so variously, so condemned on some fronts, praised on others, as Immanuel Kant's theory of punishment'.[404]

There is disagreement on even the most general characteristics of his account of criminal law: It is much debated whether he really was the hard-core retributivist that he sometimes appears to be, or if he rather considered punishment as a means to an end, a kind of deterrence to provide security for rights. One can find writings that support both views, and, correspondingly, attempts in the literature to frame Kant as advocating either this or that kind of criminal law theory, or somehow merging these two perspectives.[405] Different strategies are applied to solve the apparent inherent tensions in Kant's remarks on criminal law and punishment and the debate relating to it. Thom Brooks, for instance, has suggested that Kant is a retributivist in the ethical domain, but a consequentialist in the domain of law.[406] In recent years, what are called mixed theories have also been influential.[407] Others, such as Jean-Christophe Merle, is critical of these mixed theories: Merle considers these as leaning towards retributivism after all, and suggests reconstructing Kant on Kant's own premises, resulting in a 'special deterrence' view of punishment.[408] A different approach is Greco's, claiming that Kant's critical philosophy provides space for different criminal law philosophies:

> *Die Kritizismus ist keine eindeutige Philosophie, dem nur eine Straftheorie entsprechen kann*. Viele seiner grundlegenden Konzepte sind vielmehr im höchsten Maße unklar und umstritten, so dass sie einen Spielraum für unterschiedliche Konkretisierungen offen lassen.[409]

404 Holtman (1997) p. 3. There is extensive German literature specifically focusing on the difficult topic of Kant and criminal law, see e.g., Enderlein (1985) who also points out different interpretations and their problems. See also further below in 6.8.

405 Wood (2010) p. 111 clearly considers Kant a retributivist: 'It seems to me there can be no doubt that this common [retributive] view of Kant is correct.' This view is also common in German criminal law science, see e.g., Greco (2009) pp. 73–74. For the deterrence view, see in particular Byrd (1989). See also e.g., Mosbacher (2004).

406 See Brooks (2003).

407 Cf. Merle (2000) p. 312.

408 Cf. Merle (2000) p. 325.

409 Greco (2009) p. 87.

Some have even questioned whether Kant can be said to have a theory of criminal law in any reasonable sense of 'theory'.[410] The discussion on Kant's view of criminal law tends however, to also be influenced by some of the harsh viewpoints he (apparently) advocates. As George P. Fletcher has pointed out: 'No area of Kantian thinking provokes us more than his stringent injunction of punishment'.[411] In a similar vein, Holtman claims that: 'Unquestionably, Kant's work on punishment is perplexing, at times seemingly contradictory, and for some Kantians disquieting.'[412]

In view of this, for our purposes of exploring Kant as contributor to explicate the normative foundations of Nordic criminal law, it seems well-advised to take a step out of this discussion about Kant's viewpoints. This allows us to instead devote time and effort to clarify what Kant explicitly says about criminal law. For this reason, this chapter will contain several longer quotes from Kant's discussions of criminal law and punishment. This exercise will show that grasping Kant's view of criminal law is indeed challenging, to the extent in fact, of suggesting that Kant's criminal law is not a fully thought through or finished project; that it is less capable of (directly) providing criminal law scholarship with sound foundations for criminal law. The aim of this chapter can thus be described as *negative*: it aims to show that it is indeed deeply challenging to discern in Kant's remarks about criminal law a hidden, coherent conception of criminal law that matches the level of Kant's philosophy

410 See in particular Murphy (1987).

411 Fletcher (1987) p. 432. See also e.g., Ripstein (2009) p. 300.

412 Holtman (1997) p. 3.

more generally.[413] For our part, this implies that we should take a step back to his political philosophy more generally to reconstruct a sound republican conception of criminal law, which is the aim of the remainder of this book.[414]

In accordance with this chapter's aim, I will not delve deeper into the scholarly debates on Kant's criminal law. As already mentioned, these debates have spurred different views, each emphasising different aspects of Kant's writings, while also being dependent on more underlying premises about Kant's philosophy, which would make a proper outline and view of this debate an extensive research enterprise on its own – an undertaking which is not needed for this book. Moreover, such an exercise would most likely bring us back to the starting point for this chapter: That grasping Kant's view of criminal law is challenging. At the end of the chapter, however, I will address the reception of Kant in German criminal law scholarship from the middle of the 19th century. Kant came to influence German philosophy of criminal law in various ways, with consequences also for Nordic criminal law scholarship.[415] A particular reason for delving into this is the ongoing debate between Greco's revival of Feuerbach, reconnecting us to the breach with Kant also in Nordic criminal law scholarship, and Michael Pawlik's Hegelian point of view. The latter in particular, may be said to have links to the reconstructive enterprise that we

413 In order to avoid any misunderstanding of what is said here, I do not claim: 1) that Kant did not have a (coherent) conception of criminal law and punishment, and their justification, 2) that even if he had such a (coherent) conception, the nature of his writings makes it impossible to discern it or 3) that there is nothing of relevance to us in this part of Kant's textual corpus. The claim made is only that as long as there is disagreement on these issues, we (in this project) are well advised to review what Kant says and make some observations, but then fairly quickly take a step back to what appears as a solid foundation for reasoning on these issues, i.e., to Kant's more general political philosophy. One of several reasons for making this claim is the observation made in Chapter 2 about Kant's fate in Nordic criminal law scholarship (see 2.5 in particular). If one's focus is Kant's specific (but fairly short) remarks about criminal law, one easily gets disappointed and fails to grasp the broader political philosophical project and the resources in it – which also hold relevance for debates about criminal law.

414 See also e.g., Wood (2010) p. 121: Referring to the coercion aspect of Kant's political philosophy, he claims that: 'In the context of Kant's practical philosophy, this seems to be a much better grounded justification of punishment than Kant's retributivism'.

415 See 2.3 above.

will embark on, thereby adding to the background for developing a republican account of criminal law in the remaining chapters.

In accordance with these starting points, this chapter is structured as follows: In 6.2, some general starting points about Kant's writings on criminal law and punishment are provided. In 6.3, we look at what has been a key problem in interpreting Kant, i.e., what he considers the aims of criminal law and punishment to be. As this is not easily discerned, in 6.4, we look closer at Kant's remarks on the right to punish and the concept of crime, to see if these help us capture Kant's approach to criminal law. In 6.5, the focus is on Kant's discussion of forms and amount of punishment. In 6.6, we look closer at Kant's discussion of the death penalty, an issue with which he seems to have been particularly concerned, and gather together some impression from the review of Kant's discussion of criminal law and punishment. As these sections aim to track Kant's different claims and remarks on the issue, (lengthy) quotations will be relatively frequent. The chapter ends in 6.7 with a view into German criminal law philosophy and how it has evolved after Kant, bringing us from Kant to contemporary criminal law philosophy.

6.2 Kant's discussion of criminal law and punishment: An overview

Kant mainly discusses criminal law and punishment as part of the *Rechtslehre* in *Metaphysics of Morals* (MM), in the part about public right. Here, Kant starts out with the 'Right to a state', which, after some initial observations, is followed by a section titled 'General Remarks'. This section concerns 'the effects with regard to rights that follow from the nature of the civil union'. Here, Kant discusses criminal law and punishment. Hence, Kant does not address punishment in the state of nature but considers the institution of punishment to emerge with the constitution of the state. In the state of nature, Kant only finds room for what he calls 'natural' punishment, in which 'vice punishes itself'.[416] We will reconnect to that observation below.

416 Kant (1797/1798) 6: 331.

This section of MM is organised into subsections A-E. Of these, the final section E – which is the one that concerns us – is the only one with a heading of its own, 'On the right to punish and to grant clemency'. This section, in turn, is divided into two parts, I and II, whereof I addresses the right to punish, and II is concerned with clemency. Part I is more extensive than part II – five pages, compared to only one for the second part. Clearly, however, the remarks on criminal law and punishment are not detailed, and as indicated above, they are mostly occupied with the death penalty.

Before we look further into the passages in MM on the right to punish, it should be stressed that this section of MM does not contain a full account of Kant's remarks on criminal law. There are also comments of relevance in other parts of MM, as well as in other parts of his writings, including the second critique, the *Critique of Practical Reason* (CPrR). Consider, for instance, this passage in MM, from section D, just before the right to punishment becomes the subject in section E:

> Certainly no human being in a state can be without any dignity, since he at least has the dignity of a citizen. The exception is someone who has lost it by his own *crime*, because of which, though he is kept alive, he is made a mere tool of another's choice (either of the state or of another citizen). … Even if he has become a *personal* subject by his crime, his subjection cannot be *inherited*, because he has incurred it only by his own guilt.[417]

This sets the tone for the apparently harsh view of criminals often ascribed to Kant: Crime implies the loss of all (or any) dignity, which, given Kant's general emphasis on the dignity of human beings, appears to be a quite strong statement.[418] The quote points out the availability of the criminal person as a means of society ('a mere tool for another'). At the same time, it also underscores the requirement of individual guilt for a citizen to face such a drastic consequence. But interpretive challenges quickly emerges. What Kant talks about here is primarily the loss of dignity of a citizen. Furthermore, it is not obvious that *all* criminals lose their dignity as citizens. Upon closer examination, all

417 Kant (1797/1798) 6: 330.

418 Similar statements are also found in other of Kant's work, see e.g., Kant (1793) 8: 292.

we can say for certain is that, according to this passage, Kant seems to think that some crimes, at least, result in the loss of the dignity of citizens in some form. Further challenges arise when we go into the core of Kant's discussion of criminal law in section E, which points us in direction of a complex account of criminal law and punishment.

When looking further into this, we should be mindful of the reservations made in 5.3 about the quality of MM in general. Such reservations may be particularly relevant to Kant's writings on criminal law and punishment. It is worth noting that many other topics addressed in MM, such as war, peace, and international law, had been discussed by Kant in publications prior to MM, which meant that they had also been subject to extensive interpretation and discussion, leading Kant sometimes to revise or at least develop his viewpoints. The reflections on criminal law and punishment were, for their part, seemingly his first attempts at writing about such issues, although he had addressed them in his lectures. Furthermore, Kant's repulsion towards crime seems sometimes to gain the upper hand here, contrary to the more sober reasoning in many other parts of his authorship. We should also keep in mind the state of criminal law scholarship at the time: understanding the state of the art and intellectual context that Kant related to, is often essential to understanding his argument.[419] While criminal law and punishment had been a long-standing subject for philosophy, including Enlightenment philosophy (as mentioned in 5.2, Montesquieu, for instance, paid much attention to this subject), at the time, there was nothing resembling modern criminal law philosophy and criminal law scholarship. The philosophy of criminal law was mostly, like in Kant's writings, a fragment of a larger argument, and criminal law scholarship was a fairly practical and casuistic enterprise.[420] This means that much of the later progress on concepts and principles in criminal law was not available to Kant.

419 See e.g., Maliks (2018) with regard to political philosophy.

420 See on the historical development of German criminal law science, e.g., Schaffstein (1986).

6.3 The aims of punishment: Retributive or not?

In the beginning of the previous section, we saw Kant describing the right to punish as a right that resides in the hands of the ruler, with authority to react to crimes. However, having such a right does not necessarily explain why one should make use of it. So, the question is: Should the right to punish be understood to imply a categorical duty to punish as well, or is – according to Kant – a supplementary justification required? This brings us straight to the core of the discussion of Kant's criminal law and whether this is a form of 'absolute' retributivism or a 'relative' view of criminal law and punishment oriented towards deterrence. But, as we will see, Kant himself seems to point us sometimes in one direction, sometimes in another, suggesting a more complex position on the aims of criminal law and punishment.

On this issue, we get some clues, for instance, when Kant goes on to speak of 'punishment by a court'. Here, the famous remarks appear, claiming that punishment by a court:

> … can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality. He must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises, in accordance with the Pharisaical saying, 'It is better for *one* man to die than an entire people to perish.' For if justice goes, there is no longer any value in human being's living on the earth.[421]

421 Kant (1797/1798) 6: 331–332.

Whereas the first part of this quote is open to the idea of (at least) a supplementary, consequential justification of the use of the right to punish, the latter – describing punishment as a categorical imperative, suggests a retributive view, where the right to punish also implies a duty to do so. At the same time, the alternative strategy, applied by the one who 'crawls through the windings of eudaimonism', but rejected by Kant, is noteworthy: it is not at all related to something we would understand as 'punishment'. We are speaking about strategies that 'release' the criminal from the deserved punishment or 'reduce it'. This is even clearer when we proceed to an example that Kant applies, which appears as the complete substitution of punishment for something else, beneficiary to society:

> What, therefore, should one think of the proposal to preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made on him and is lucky enough to survive them, so that in this way physicians learn something new of benefit to the commonwealth? A court would reject with contempt such a proposal from a medical college, for justice ceases to be justice if it can be bought for any price whatsoever.[422]

That one cannot *substitute punishment* for some other beneficial arrangement does not imply that (something that counts as) punishment cannot serve societal ends at all. On the contrary, parts of the previous quotation, such as 'not merely as a means', and 'drawing from his punishment something of use for himself or his fellow citizens', suggest that it can. At this point, it is also worth mentioning that in his lectures, Kant stressed the preventive effect of punishment. Here, for instance, he states: 'All punishments by authority are deterrent, either to deter the transgressor himself or to warn others by

422 Kant (1797/1798) 6: 332.

his example'.[423] But here, he also states that 'the punishments of a being who chastises actions in accordance with morality are retributive.'[424]

Then again, Kant's reasoning in the quotation above about the criminal sentenced to death seems to rely on punishment having some unique non-consequential features, which implies (at least) limits to what kinds of social benefits it can pursue. And, one should notice, in the preceding quote, the use of someone for societal benefits cannot even be used to *reduce* the punishment.

Passages in other works may seem to go even further in suggesting a strictly retributive view, such as the following quote from the CPrR:

> Finally there is in the idea of our practical reason something further that accompanies the transgression of a moral law, namely its *deserving punishment*. Now, becoming a partaker in happiness cannot be combined with the concept of a punishment as such. For, although he who punishes can at the same time have the kindly intention of directing the punishment to this end as well, yet it must first be justified in itself as punishment, that is, as mere harm, so that he who is punished, if it stopped there and he could see no kindness hidden behind this harshness, must himself admit that justice was done to him and that what was allotted to him was perfectly suited to this conduct. In every punishment as such there must first be justice, and this constitutes what is essential in this concept. Kindness can, indeed, be connected with it, but the one who deserves punishment for his conduct has not the least cause to count on this. Thus punishment is a physical harm that, even if it is not connected with moral wickedness

423 Kant (1784–1785b) 27: 286.

424 Kant (1784–1785b) 27: 286. The full passage reads: 'Punishment in general is the physical evil visited upon a person for moral evil. All punishments are either deterrent or retributive. Deterrent punishments are those which are pronounced merely to ensure that the evil shall not occur. Retributive punishments, however, are those pronounced because the evil has occurred. Punishments are therefore a means of either preventing the evil or chastising it. All punishments by authority are deterrent, either to deter the transgressor himself, or to warn others by his example. But the punishments of a being who chastises actions in accordance with morality are retributive.'

> as a *natural* consequence, would still have to be connected with it as a consequence in accordance with the principles of moral lawgiving.[425]

We should notice the claim in the first of the two quotations that '[i]n every punishment as such there must first be justice, and this constitutes what is essential in this concept'. But, punishment is there also explained as 'mere harm', and the quotations include several phrasings that seem to generate uncertainty about what Kant is actually saying here. The passage continues, and what Kant says here, is particularly difficult to discern:

> Now if every crime, even without regard to the physical consequence with respect to the agent, is of itself punishable – that is, forfeits happiness (at least in part) – it would obviously be absurd to say that the crime consisted just in his having brought a punishment upon himself and thereby infringed upon his own happiness (which, in accordance with the principle of self-love, would have to be the proper concept of all crime). The punishment would in this way be the ground for calling something a crime, and justice would have to consist instead in omitting all punishment and even warding off that which is natural; for then there would no longer be any wickedness in the action, since the harm that would otherwise follow upon it and on account of which alone the action would be called wicked would now be prevented. But to look upon all punishment and rewards as mere machinery in the hands of a higher power, serving only to put rational beings into activity toward their final purpose (happiness) is so patently a mechanism which does away with the freedom of their will that it need not detain us here.[426]

There are quite a few points to comment on in this quote, including questioning whether Kant's remarks here are valid not only for the ethical domain but also for law. Anyway, we cannot, based on these quotes, take it for granted that Kant adopts a strictly retributive position.

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425 Kant (1788) 5: 37.

426 Kant (1788) 5: 37–38.

However, an even stronger expression of (some kind of) retributive aspect of Kant's view of criminal law is the famous statement about 'blood guilt', which brings us back to the discussion of criminal law in MM. The 'blood guilt' statement is one of the most well-known passages in MM, often considered as the clearest expression of Kant's (hard-core) retributivism:

> – Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and dispersed throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.[427]

As the many discussions of and references to this passage illustrate, it is notoriously difficult to understand. Particularly the reference to 'blood guilt' seems, at first glance at least, as a kind of (unwarranted) intrusion of religion in Kant's otherwise 'secular' reasoning. But it can also be understood, as Krista K. Thomason claims, as a symbol of justice.[428] Here, it might also be helpful to keep in mind two fundamental aspects of Kant's normative system (we will get back to the troubles with the death penalty in that regard): the right to life and the security of rights. The violation of the right to life, which does away with the victim's ability to enjoy all other rights as well, implies such a fundamental insecurity for the remains of society that it must be reacted against. This is so even if the members of the community would disperse all over the world because justice is not local, but universal, and hence insecurity also applies universally.

Arguably, preserving the civil state and the justice it provides, is the ultimate aim, not the categorical retribution in itself, which seems clear from this interesting reservation Kant later makes on the same section:

427 Kant (1797/1798) 6: 333.
428 Thomason (2021).

> – If, however, the number of accomplices (*correi*) to such a deed is so great that the state, in order to have no such criminals in it, could soon find itself without subjects; and if the state still does not want to dissolve, that is, to pass over into the state of nature, which is far worse because there is no external justice at all in it (and if it especially does not want to dull the people's feeling by the spectacle of a slaughter-house), then the sovereign must also have it in his power, in this case of necessity (*causa necessitatis*), to assume the role of judge (to represent him) and pronounce a judgement that decrees for the criminals a sentence other than capital punishment, such as deportation, which still preserves the population. This cannot be done in accordance with public law but it can be done as an executive decree, that is by an act of the right of majesty which, as clemency, can be exercised only in individual cases.[429]

This passage shows Kant's deep concern with maintaining civil society and external justice: The sovereign should (at least have the possibility to) adjust the reasoning and reactions chosen in individual cases (assuming the role of the judge) in order to protect the state as a guarantee for external justice. In other words, justice should be done, but one should also protect the presuppositions for justice being done, i.e., the state. While Kant is not clear here, in view of the general aims of the state and the emphasis on securing and guaranteeing rights, one possible way to think of this, as I will return to, is to emphasise the importance of the state *as a protector and guarantor of rights*.

Summing up so far: The passages considered in this section suggest that Kant's writings convey a rather complex view, open to criminal law and punishment serving both retributive and preventive aims. Other issues that Kant discusses, such as the right to punish and the nature of crimes, the proper forms and amount of punishment, and the death penalty, point us in the same direction.

429 Kant (1797/1798) 6: 334.

6.4 The right to punish and the nature of crime

In section E part I, Kant describes the right to punish as 'the right a ruler has against a subject to inflict pain upon him because his having committed a crime'.[430] As Kant at this point has already clarified in the previous section D, the right to punish is part of the rights of 'the supreme commander'.[431] In section E part I, he goes on to point out that the head of the state cannot be punished, all that one can do is to 'withdraw from his dominion'.[432] At this point, it is also worth taking into account Kant's view on the relation between states. In his remarks about war, Kant makes it clear that a war between independent states cannot be 'a *punitive war*', the reason being that 'punishment occurs only in the relation of a superior (*imperantis*) to those subject to him (*subditum*), and states do not stand in that relation to each other'.[433] This is of importance, as it suggests that punishment conceptually presupposes a (public) *authority*. This, in turn, invites us to ask why authority is required for punishment and what this means for our understanding of punishment in itself. If, for instance, punishment was merely a means to achieve certain beneficial effects, it is hard to see why for instance state *X* should not be able to 'punish' another state, state *Y*, by means of warfare, for instance, for previous violations committed by state *Y* against state *X*, so as to deter future violations. The reason for punishment, according to Kant, not having a role in international relations is that institutions for decisive judgement in matters of right are lacking in such situations. This, as we have seen, is the core of the move from the state of nature to the civil state. Punishment, according to Kant, can only be part of the civil state. But this line of reasoning also indicates that punishment is not a mere tool to force citizens into conformity, but rather has what we can call an aspect of normative supremacy, which connects to Kant's overall political philosophical view of the state as guardian of external freedom, if needed by the use of its monopoly of force.

This discussion of punishment and sovereignty furthermore leads us to the notion of crime in Kant's conception of criminal law, which Kant goes directly on to address. What kinds of acts qualify as crime? From the quotes

430 Kant (1797/1798) 6: 331.
431 Kant (1797/1798) 6: 328.
432 Kant (1797/1798) 6: 331.
433 Kant (1797/1798) 6: 347.

from CPrR in the previous section, it seems that Kant would not embrace the view that the need for (applying) punishment should decide what should be considered as crimes, a view often ascribed to clear-cut utilitarian positions. In the MM, something that at first glance appears as a definition of crime is introduced: 'A transgression of public law that makes someone who commits it unfit to be a citizen is called a *crime* simply (*crimen*) but is also called a public crime (*crimen publicum*); so the first (private crime) is brought before a civil court, the latter before a criminal court.'[434] The first part of this passage may seem promising: It suggests that a 'crime' is an act that makes one 'unfit' to be a citizen. This may even be read as a criminalisation principle. What is required for making someone 'unfit' to be a citizen is, however, not very clear from the quotation. But the claim does cohere with the loss-of-dignity viewpoint which we saw in a passage earlier in MM, and which – by reasoning from the serious consequence – would apparently require some level of seriousness: it seems likely that not every trivial misdoing would result in a loss of dignity.

Kant's concept of crime, however, becomes more difficult to grasp when we move on to the latter part of this quotation where Kant distinguishes between public crimes and private crimes. The public crime is characterised by being brought before a 'criminal court', while the private crime is to be brought before a 'civil court'. This in effect makes the very notion of crime in Kant's writings problematic. The term 'private crime' may, first of all, seem challenging given Kant's insistence on the superior/subordinate relation as a prerequisite for punishment, but we should keep in mind that also in these cases it is the court that judges, so it is not a contradiction. In any case, the institutional system for the different crimes is not necessarily *defining* characteristics. Actually, the entire phrasing here is quite elusive, which supports Paul Natorp's claim (also referred to in the English translation) that at this point, something of Kant's manuscript that went into print may have gone missing.[435] If so, it may be very difficult to come to terms with Kant's view of these two forms of crimes and how they are to be defined.

Kant offers, however, examples that bring some clarity. Embezzlement and fraud in buying and selling, 'when committed in such a way that the other

434 Kant (1797/1798) 6: 331.

435 See footnote by editor of the Kant-translation referring to Natorp's claim about this.

could detect it', are used as examples of private crimes, while counterfeiting money or bills of exchange, theft, and robbery, illustrate public crimes, which 'endanger the commonwealth and not just an individual person'.[436] It is added that 'they' can in turn be distinguished by whether they arise from a mean character or a violent character, but it is not clear whether 'they' refers to the private/public or solely to the different examples of public crimes. Most likely this distinction between crimes arising from mean or violent character refers to public crime, as the new distinction follows directly on the examples of public crime.

Let us, however, return to the examples of public and private crimes. Do they have anything to tell us about the how this distinction is to be understood? Both seem to 'endanger' the individual, but public crimes also endanger the public. It is not clear from the examples why this applies (only) to acts such as those referred to as examples of public crimes. Still, a key difference can be detected in Kant's examples: the private crime examples are limited to cases where the violations are 'committed in such a way that the other could detect it'. At least if we understand 'detect' here as implying an opportunity to avert the crime, this suggests a kind of division of responsibilities: Where they are committed in a way that can be detected by the victim, the individual is the one who guards his or her rights, and, if needed, abstains from making the arrangement or contract. The victim is so to speak fooled, and so the shame is (partly) on him or her. Kant more generally considers us to have duties also towards ourselves in the political realm (the first of the duties of public justice is *honeste vive)*.[437] Members of the public could, then, claim that such a violation would not happen to them, or at least feel that they (should) have a certain control over whether they would be subject to, for instance, fraud. Acts that one cannot guard oneself against, on the other hand, are equally likely to afflict any one of us and therefore, they cause public insecurity. This interpretation could give some direction to Kant's argument and view of public crime. But, of course, it does not immediately appear as convincing and much

436 Kant (1797/1798) 6: 331.

437 The importance of *honeste vive*, the duty of rightful honour, in Kant's practical philosophy has been analysed and underlined by several commentators, see e.g., Brandt (2016).

more work is needed to provide a comprehensive account of Kant's view, not to mention a satisfactory concept of crime.

We will get further indications of Kant's view later on in the section when we enter into the reasoning on the forms and amount of punishment. However, as it is of relevance to the issue of the nature of crimes as well, let us introduce it already here:

> – But what does it mean to say, 'If you steal from someone, you steal from yourself'? Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.[438]

Most of all, this quotation underlines the importance for Kant of *security* of rights. What kind of criminalisation principle that could be drawn from this is, however, not clear. The example is one of the core issues of Kant's political philosophy: property rights. It is not clear how far we could extend this principle with regard to, for instance, other individual rights.

6.5 The forms and amount of punishment: Proportionality

A further issue for Kant is the proper kind and amount of punishment. The answer is, in very basic terms, the principle of equality, that is, whatever you inflict upon another, you inflict upon yourself:

> But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you

438 Kant (1797/1798) 6: 331.

> insult him, you insult yourself; if you strike him, you strike yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself.[439]

This general principle again shows Kant emphasis on justice in its most fundamental meaning. Then he adds:

> But only the *law of retribution* (*ius talionis*) – it being understood, of course, that this is applied by a court (not by your private judgement) – can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.[440]

Kant's argument thus appears to support a retributive reading: All other forms of considerations than the law of retribution would imply 'extraneous' considerations being mixed into the reasoning. However, this does not clarify how we can measure the normative demerit of the crime, a point which relates to the lack of precision on the nature of crime itself, which we will return to.

Kant does not see the forms of punishment as 'fixed'. Rather, he seems to indicate many different forms of punishment, depending on the crime, as exemplified by the forthcoming lengthy quote (which has already been rendered in parts above), where Kant discusses the implications of difference in social rank for punishment:

> – Now it would indeed seem that differences in social rank would not allow the principle of retribution, or like for like, but even when this is not possible in terms of the letter, the principle can always remain valid in terms of its effect if account is taken of the sensibilities of the upper classes. – A fine, for example, imposed for a verbal injury has no relation to the offence, for someone wealthy might indeed allow himself to indulge in a verbal insult on some occasion; yet the outrage he has done to someone's love of honour can still be quite similar to the hurt done to his pride if he is constrained by judgement and right not only to apologize publicly to

439 Kant (1797/1798) 6: 332.
440 Kant (1797/1798) 6: 332.

> the one he has insulted but also to kiss his hand, for instance, even though he is of a lower class. Similarly, someone of high standing given to violence could be condemned not only to apologize for striking an innocent citizen socially inferior to himself but also to undergo a solitary confinement involving hardship; in addition to the discomfort he undergoes, the offender's vanity would be painfully affected, so that through his shame like would be fittingly repaid with like. – But what does it mean to say, 'If you steal from someone, you steal from yourself'? Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property. He has nothing and can also acquire nothing; but he still wants to live, and this is now possible only if others provide for him. But since the state will not provide for him free of charge, he must let it have his powers for any kind of work it pleases (in convict or prison labor) and is reduced to the status of a slave for a certain time, or permanently if the state sees fit.[441]

If it concerns murder, the death penalty is the only alternative:

> – If, however, he has committed murder he must *die*. Here there is no substitute that will satisfy justice. There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer, although it must still be freed from any mistreatment that could make the humanity in the person suffering it into something abominable. – Even if a civil society were to be dissolved by the consent of all its members (e.g. if a people inhabiting an island decided to separate and disperse throughout the world) the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.[442]

441 Kant (1797/1798) 6: 332 – 333.
442 Kant (1797/1798) 6: 333.

In this discussion Kant observes that equality is not always possible 'in terms of the letter'; there can be cases where punishing like for like in strict terms would not work. In these cases, other forms of punishment can be more suitable, at least as long as we are not talking about the death penalty. Furthermore, what this lengthy passage also shows is that punishment is not only a matter of the crime committed, including against whom it is committed, but also a matter of where punishment is directed: It must, so to speak, have proper meaning not only for the punisher but also for the punished. This then suggests that punishment in Kant's account can properly be called a particular form of *normative interaction* where also the character of the punished is important. This view is also suggested by some of his remarks on the death penalty (to be further discussed in the next section):

> This fitting of punishment to the crime, which can occur only by a judge imposing the death sentence in accordance with the strict law of retribution, is shown by the fact that only by this is a sentence of death pronounced on every criminal in proportion to his *inner wickedness* (even when the crime is not murder but another crime against the state that can be paid for only by death). – Suppose that some (such as Balmerino and others) who took part in the recent Scottish rebellion believed that by their uprising they were only performing a duty they owed the House of Stuart, while others on the contrary were out for their private interests; and suppose that the judgement pronounced by the highest court had been that each is free to make the choice between death and convict labor. I say that in this case the man of honor would choose death, and a scoundrel convict labor. This comes along with the nature of the human mind; for the man of honor is acquainted with something that he values even more highly than life, namely *honor*, while the scoundrel considers it better to live in shame than not to live at all (*animam praeferre pudori. Iuven*). Since the man of honor is undeniably less deserving of punishment than the other, both would be punished quite proportionately if all like were sentence to death; the man of honor would be punished mildly in terms of his sensibilities and the scoundrel severely in terms of his. On the other hand, if both were sentenced to convict labor the man of honor would be punished too severely and the other too mildly for his vile action. And so here too, when sentence is pronounced on a number of criminals

> united in a plot, the best equalizer before justice is *death*. – Moreover, one has never heard of anyone who was sentenced to death for murder complaining that he was dealt with too severely and therefore wronged; everyone would laugh in his face if he said this. – If his complaint were justified it would have to be assumed that even though no wrong is done to the criminal in accordance with the law, the legislative authority of the state is still not authorized to inflict this kind of punishment and that, if it does so, it would be in contradiction with itself.[443]

Kant's point of a man of honour opting for death because he is 'acquainted with something that he values even more highly than life', shows how the meaning of punishment should be understood in reference (also) to what it means to the criminal who is punished and his status.

In general, the discussion of Kant's concept of punishment is a good illustration of the complex relationship between principle and application in Kant's political philosophy. The quoted example seems to go far into the application point of view, while the principle informing this application is not very clearly spelled out. Thus, it might be that Kant's argument can be reconstructed by bringing out the principles behind the applications, and, at other points, giving more space for the issue of application. This will be a central topic in the next chapter.

6.6 More on the death penalty

As already shown, much of Kant's reasoning on criminal law and punishment concerns the death penalty, which was widely debated at the time. While regarded as a more or less obvious part of the institution of criminal law and punishment, it had come to be questioned and was, for instance, subject to critique from Beccaria and the Enlightenment thinkers, leading to arguments of its abolishment.[444] Kant, however, was not among those advocating reform

443 Kant (1797/1798) 6: 332–333.

444 On Beccaria in the Nordics, see Björne (1995) pp. 317–326.

and abolishment of the death penalty.[445] On the contrary, we have already seen proof of Kant advocating the death penalty, underlining the strong retributive aspect of Kant's theory. Further supporting such as interpretation are the claims, for instance, that 'every murderer – anyone who commits murder, orders it, or is an accomplice in it – must suffer death; that is what justice, as the idea of judicial authority, wills in accordance with universal laws that are grounded a priori'.[446]

Kant's discussion of the death penalty makes up a central part of the entire section on criminal law and punishment. Beccaria is, as mentioned, the target of Kant's discussion.[447] First, Kant refers to Beccaria's argument:

> In opposition to this the Marchese Beccaria, moved by overly compassionate feelings of an affected humanity (*compassibilitas*), has put forward his assertion that any capital punishment is wrongful because it could not be contained in the original civil contract; for if it were, everyone in a people would have to have consented to lose his life in case he murdered someone else (in the people), whereas it is impossible for anyone to consent to this because no one can dispose of his own life.[448]

Kant's judgment of Beccaria's social contract argument is harsh:

> This is all sophistry and juristic trickery. No one suffers punishment because he has willed *it* but because he has willed a *punishable action*; for it is no punishment if what is done to someone is what he wills, and it's impossible *to will* to be punished. – Saying that I will to be punished if I murder someone is saying nothing more than that I subject myself together with everyone else to the laws, which will naturally also be penal laws if

445 As a consequence, in Denmark-Norway, Beccaria was criticised also by the Kant-devotee Schlegel, see 2.3. But Beccaria's viewpoints were rejected also by Ørsted, by reference to Feuerbach's theory of punishment, see Björne (1995) pp. 322–323 and Björne (1998) pp. 381–403, for a broader analysis of the discussion about the death penalty in the Nordics in the 1800's.

446 Kant (1797/1798) 6: 334.

447 The questions have however been raised whether Beccaria actually was against the death penalty, see Greco (2009) p. 71.

448 Kant (1797/1798) 6: 335.

> there are any criminals among the people. As a colegislator in dictating the *penal law*, I cannot possibly be the same person who, as a subject, is punished in accordance with the law; for as one who is punished, namely as a criminal, I cannot possibly have a voice in legislation (the legislator is holy). Consequently, when I draw up a penal law against myself as a criminal, it is pure reason in me (*homo noumenon),* legislating with regard to rights, which subjects me, as someone capable of crime and so as another person *(homo phaenomenon*), to the penal law, together with all others in a civil union. In other words, it is not the people (each individual in it) that dictates capital punishment but rather the court (public justice), and so another than the criminal; and the social contract contains no promise to let oneself be punished and so to dispose of oneself and one's life. For, if the authorization to punish had to be based on offender's *promise*, on his *willing* to let himself be punished, it would also have to be left to him to find himself punishable and criminal would be his own judge. – The chief point of error … in this sophistry consists in it confusing the criminal's own judgement (which must necessarily be ascribed to his *reason*) that he has to forfeit his life with a resolve on the part of his will to take his own life, and so in representing as united in one and the same person the judgement upon a right and the realization of that right.[449]

Once again one may speculate whether his loathing for acts such as murder, and people who commit them, made Kant move a bit too fast in his own argument. Even if Beccaria's argument should not hold, this is not necessarily sufficient to justify the use of death as punishment. Even if it is not the *homo phaenomenon*, i.e. the actual individual, but the rational *homo noumenon* who is to consider the justifiability of this kind of punishment, this does not exclude the possibility of the *homo noumenon* itself rejecting it. Kant's argument, then, seems to rely heavily on another premise, as mentioned above, that by committing a crime, the human being loses its dignity, and particularly so if the crime is murder. However, Kant does not really justify this view. Interestingly, also, Kant seems to recognise certain limitations to the death penalty even for murder, relating to the societal context from which the crimes arise. This

449 Kant (1797/1798) 6: 335.

seems to be a part of Kant's reasoning on criminal law and punishment that receives less attention. However, these passages are arguably quite powerful:

> There are, however, two crimes deserving of death, with regard to which it still remains doubtful whether *legislation* is also authorized to impose the death penalty. The feeling of honor leads to both, in one case the *honor of one's sex*, in the other *military honor,* and indeed true honor, which is incumbent as duty on each of these two classes of people. The one crime is a mother's *murder of a child* (*infanaticidium maternale*); the other is *murdering a fellow soldier* in a *duel* (*commilitonicidium*) – Legislation cannot remove the disgrace of an illegitimate birth any more than it can wipe away the stain of suspicion of cowardice from a subordinate officer who fails to respond to a humiliating affront with a force of his own rising above fear of death. So it seems that in these two cases people find themselves in the state of nature, and that these acts of *killing* (*homicidum*), which would then not have to be called murder (*homicidum dolosum*), are certainly punishable but cannot be punished with death by the supreme power. A child that comes into the world apart from marriage is born outside the law (for the law is marriage) and therefore outside the protection of the law. It has, as it were, stolen into the commonwealth (like contraband merchandise), so that the commonwealth can ignore its existence (since it was not right that it should have come to exist in this way), and can therefore also ignore its annihilation; and no decree can remove the mother's shame when it becomes known that she gave birth without being married. – So too, when a junior officer is insulted he sees himself constrained by the public opinion of the other members of his estate to obtain satisfaction for himself and, as in the state of nature, *punishment* of the offender not by law, taking him before a court, but by a *duel*, in which he exposes himself to death in order to prove his military courage, upon which the honor of his estate essentially rests. Even if the duel should involve *killing* his opponent, the killing that occurs in this fight which takes place in public and with the consent of both parties, though reluctantly, cannot strictly be called *murder* (*homocidium dolosum*).[450]

450 Kant (1797/1798) 6: 335–336.

Kant has thereby introduced two problematic cases for the criminal law, which need to be dealt with:

> – What, now, is to be laid down as right in both cases (coming under criminal justice)? – Here penal justice finds itself very much in quandary. Either it must declare by law that the concept of honor (which is here no illusion) counts for nothing and so punish with death, or else it must remove from the crime the capital punishment appropriate to it, and so be either cruel or indulgent.[451]

The problem is, in other words, that the social context and its idea of honour challenge the demands of justice *a priori*. Recognising the one would undermine the other, so either societal norms or rational norms would be breached. His solution is this:

> The knot can be undone in the following way: the categorical imperative of penal justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between incentives or honor in the people (subjectively) and the measures that are (objectively) suitable for its purposes. So the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people.[452]

So, what does Kant actually say here? One way to interpret him, and here we have to remember that he considers legislation *not* warranted to authorise death for these two crimes, is that he considers the social situation – 'barbarous and undeveloped as it is' – as pushing the citizen into a conflict with justice and therefore, the state, which is ultimately responsible for this situation and its reform. Therefore, the citizen cannot be fully held accountable.

Finally, it is worth noting Kant's use of the notion of 'state of nature' in the first of these three quotes. As we will return to, while the state of nature is left

451 Kant (1797/1798) 6: 336.

452 Kant (1797/1798) 6: 336–337.

behind on a broad scale upon entering into civil society, it may still be useful to think in terms of the individual finding themselves in state of nature-like situations, that is, where the state and its lawful force do not reach.

Approaching the end of our discussion of Kant's writings about criminal law: As suggested in the introduction to this chapter, Kant's discussion of criminal law cannot be said to be well elaborated or clear, and the best we can say about it is perhaps that it is very complex. Hence, one should not be surprised by the debate it has spurred. It seems clear that Kant does not provide us with a comprehensive criminal law philosophy. This does, however, not mean that the analysis in this chapter has been in vain: At least we have seen that Kant's view of criminal law is not easily discerned, which also implies that the rash rejection of it often seen in Nordic criminal law is dubious.[453] The broad rejection of Kant displayed in Nordic criminal law scholarship appears more as an ideological rejection of 'metaphysical retributivism' than as an informed assessment of Kant (or retributivism in general, for that matter). Also, despite its lacks, Kant's criminal law points out premises, perspectives, and challenges for a philosophy of criminal law.[454] His role in German criminal law science testifies to that.

6.7 After Kant: Some remarks on modern German criminal law philosophy

Before reconstructing a republican philosophy of criminal law, it seems pertinent to bring modern German criminal law science into our discussion. There are several reasons why we should do so (here): The German criminal law science has for some time now been deeply engaged in the justification of criminal law, which also provides a prominent background for the

453 See 2.5 above.

454 See also, e.g., Enderlein (1985) p. 327; 'Kant hat die Kernfrage jeder Straftheorie, die er selber aufgeworfen hat, nicht überzeugend beantwortet: Wie kann die Strafe dem Verbrecher gegenüber gerechtfertigt werden, ohne ihn zum Objekt gesellschaftlicher Nützlichkeitserwägungne [sic] herabzuwürdigen. Immerhin ist es Kant gelungen, diesem Problem eine vor ihm noch nie erreichte Schärfe zu verleihen. Darin liegt kein geringes Verdienst seiner Lehre von der Strafe im Staat.'

development of Nordic criminal law scholarship.[455] The German discussion offers several important viewpoints and premises which will be applied in the final chapters of this book. But there is also a reason relating to Kant that justifies the inclusion of the German discussion in this chapter: Much of this discussion can (in one perspective, at least) be read as responses to Kant's philosophy and viewpoints. As this is often made explicit, the German discussion shows the relevance of Kant to contemporary criminal law scholarship – contrary to the impression one may easily get from Nordic criminal law scholarship. However, only some brief remarks about German criminal law science may be offered here.[456]

German criminal law science after Kant has been framed by in particular two, somewhat different, contributors. One of them is Feuerbach, himself a core contributor to and figure in German criminal law science.[457] Starting out from Kant's philosophy, Feuerbach developed a highly influential deterrence theory where the purpose of criminal law was the deterring effect of the threat of punishment, combined with a consent from the offender to actually be punished for his crime (a necessary follow up on the threat itself). At the heart of Feuerbach's philosophy of criminal law was his sharp distinction between morality (i.e., ethics) and law, which must be seen in connection with his interpretation of Kant's *homo noumenon* and *homo phenomenon* as clearly demarcated domains.[458] Feuerbach influenced German criminal law

455 See 2.3–2.5 above.

456 The development of German philosophy of criminal law are often outlined by contributions to this discussion, as well as in legal historical works, such as Vormbaum (2009). Recently, the German discussion has also been outlined in some English texts, see e.g., Dubber (2005b) and Dubber (2006). Outlining the German discussion is challenging as central contributors, such as Liszt, are subject to a range of different interpretations and extensive debates in themselves. Also for that reason, the discussion here is limited to some fairly uncontroversial starting points and references to central works and outlines.

457 See e.g., Greco (2009) p. 32 and Hörnle (2014) p. 120: 'praised as one of the founding fathers of modern criminal law science'.

458 For Feuerbach's theory of criminal law and punishment, see in particular Feuerbach (1799/1800). See also the overview in Greco (2009) pp. 34–73, and for a comparison of Kant and Feuerbach, Brandt (2014). Furthermore, see Hilgendorf (2014) who plays down the 'Kantian' aspect of Feuerbach, emphasising instead the influence of French Enlightenment political philosophy.

and criminal law science in different ways, including through his own textbook on criminal law, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, as well as his legislative works, such as the Bavarian criminal code of 1813. Similarly to the influence of Feuerbach himself in Nordic criminal law scholarship, this code became highly influential and a model for e.g., the Norwegian criminal code of 1842.[459]

The other core contributor to German criminal law science is Hegel, who was not, as opposed to Feuerbach, a part of the discipline itself, but still became very influential within it. Hegel was critical of Feuerbach's viewpoints, describing it as lifting a stick to a dog, a violation of the dignity of rational beings.[460] Instead, Hegel advocated what has been known as a distinct retributive point of view where the offender even has the right to be punished.[461] Hegelian philosophy of criminal law came to dominate German criminal law science until the turn of the 20th century. Hegelian viewpoints were for instance advocated by Albert Friedrich Berner (1818–1907).

Viewpoints from both the two key contributors could be seen in the classical school of criminal law, with Adolf Merkel (1836–1896) as one central contributor.[462] Not only deterrence viewpoints, but also themes such as guilt, proportionality, and retribution were central to this classical school of law, which more generally can be seen as expressions of the *Rechtsstaats*-ideology that emerged with Kant. But its contributors also emphasised the authority of the state. Karl Binding, for instance, has been viewed as a 'Wortführer eines autoritären, obrigkeitsstaatlichen (Straf-)Rechtsverständnisses'.[463] But Binding's philosophy of criminal law is complex in this regard, founded on a general

459 See also 2.3 above. With regard to our interest in the normative foundation of Nordic criminal law, it may here be of relevance to add that Feuerbach's code is even considered as 'die Geburt liberalen, modernen und rationalen Strafrechts', see Koch et al. (2014), key words used by Nordic criminal law scholars to characterise Nordic criminal law.

460 Hegel (1821) § 99.

461 See Hegel (1821) § 99.

462 Merkel was also influential in the Nordics through the works of Hagerup, see 2.3 above.

463 For an overview of Binding's philosophy of criminal law, see e.g., Pawlik (2020), quotation from p. 113.

conception of law as 'Ordnung menschlicher Freiheit', with the aim of human freedom 'in höchst möglichem Umfange sicher zu stellen'.[464]

Modernity emerged, and with it positivism as the dominant theory of science, which generally starts out from a conception and recognition of theoretical reason, while rejecting practical reason and hence normativity – not unlike the way Ross and the Uppsala school split Kant's thinking in two and left aside his conception of practical reason.[465] In Germany, this development initiated the famous *Schulenstreit* in German criminal law science between the classical and modern (sometimes called positivistic or sociological) school of criminal law.[466] Liszt advocated a kind of threefold social defence utilitarianism, consisting of the rehabilitation of eligible offenders, deterrence of 'average' offenders, and incapacitation of dangerous offenders.[467]

Later, the so-called neo-Kantian school of criminal law made their mark, before Hans Welzel (1904–1977) gained influence through his phenomenology-inspired finalism, reconnecting to Pufendorf's natural law theory, however focused on the doctrine of criminal responsibility.[468] The enactment of Germany's *Grundgesetz* (1949) provided the discussion with a new, constitutional framing, leading to views of criminal law that, on the one hand, had to respect the basic rights in the constitution, with its principle of guilt and Kantian concept of the dignity of human beings, and on the other, were intended to serve social interests in preventing crime and protecting the public. In various ways, these perspectives found their way into criminal law scholarship.[469] In this post-war epoch, forms of 'unification theories', attempting to pay attention to different points of view, thereby came to play a significant role.[470] Also

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464 Binding (1916) p. 52, quoted from Pawlik (2020).

465 See 2.3 above.

466 See in this regard, e.g., Küpper (2003).

467 Of particular importance here was Liszt's 'Marburger Programm', see Liszt (1882).

468 See Welzel (1969). Regarding the 'neo-Kantian' school, see Ziemann (2009).

469 See for instance Jescheck/Weigend (1996) pp. 21–28 on the three 'Grundsätze der Kriminalpolitik'; 'der Schuldgrundsatz', 'der Grundsatz der Rechtsstaatlichkeit' and 'der Grundsatz der Humanität'.

470 See e.g., Küpper (2003) p. 54 claiming that '[d]ie überwiegende Auffassung in der Strafrechtswissenschaft neigt einer „Vereingungstheorie" zu, die möglichst alle Elemente in sich aufnehmen soll'. An overview and classification can be found e.g., in Montenbruch (2020) pp. 78–124.

central was the concept of positive general prevention gaining traction, as a response to Hegel's critique of Feuerbach's deterrence theory. To solve this problem, the focus turned towards the integration of social norms in terms of the citizen's recognition of the norms and hence respect for these.[471] This viewpoint, which has connections to the Nordic theory of positive general prevention, has had significant impact. But there are different forms of it, including Günther Jakob's functionalist point of view where the cognitive reaffirming of norms is a central tenet.[472]

Highly influential is also the teleological school of criminal law advocated by Claus Roxin, which emphasises a distinction between the deterrence aim of criminal law and the limits for criminal law. Similar viewpoints can be found in Greco's more recent reappraisal of Feuerbach.[473] Relatable to Roxin, but more principled in its approach were the contributions from the Frankfurt school of criminal law, including Winfried Hassemer and Wolfgang Naucke, the latter often engaged in Kant's philosophy.[474] Hassemer, notably, advocated ideas closely resembling those of Jareborg and his 'defensive criminal law' ideology, as mentioned above in Chapter 2, a key expression of Nordic criminal law.

Furthermore, there has also been a strong retributive branch of German criminal law science and even a 'Renaissance des Vergeltungsdenken'.[475] There are certainly several different retributive positions in this discussion,[476] but one branch of German retributive viewpoints, at least, is clearly influenced by Kantian viewpoints, including Michael Köhler's works.[477] In a similar vein, we find Pawlik's Hegelian freedom theory of criminal law ('eine freiheitstheoretisch reflektierte Strafbegründung'), seeing punishment as a retributive response to violations of the citizen's duty to participate ('Mitwirkungspflicht'): 'Ein Verbrechen zu begehen bedeutet danach, die Bürgerpflicht

471 See, for instance, Hörnle (2011) pp. 25–28 for a short overview.

472 See Jakobs (1992).

473 Greco (2009).

474 See e.g., Hassemer (2000) and Naucke (2000).

475 See Pawlik (2012) p. 87.

476 See also Hörnle (2011) p. 15 about what she describes as a problem in the German discussion; the strict identification with 'absolute' theories of criminal law with the views of Kant and Hegel.

477 See Köhler (1997) pp. 9 ff.

zu verletzen, an der Aufrechterhaltung des bestehenden *Zustandes rechtlich verfaßter Freiheitlichkeit* mitzuwirken, und die Strafe vergilt einen Bruch dieser Verpflichtung'.[478]

This leaves us with a contemporary German criminal law philosophy as a many-faceted and vivid discussion with a broad range of positions feeding into it, of relevance to the discussion in the following chapters. This discussion is in itself an objection to the claim that 'ideologies' of criminal law cannot be studied and rationally discussed, as argued by Greve in Nordic criminal law science, for instance.[479] Moreover, Kant remains a central and productive reference point for contributions to this tradition, suggesting that we are well advised not to put aside Kant, despite the challenges faced in this chapter with regard to interpreting his philosophy of criminal law.[480] Kantian influence may even be seen in the parts of German criminal law science that has been most closely connected to the Nordic discussion: the Frankfurt school of criminal law.[481]

Finally, one particularly important observation to be drawn from this discussion is the critique that can be directed towards attempts to juxtapose different rationales – in terms of combining consequentialist purposes and deontological limits to criminal law – without a proper explanation of their inner relation. As aptly pointed to by Pawlik's comment to Greco's theory of this kind:

> Diese Konzeption … ist auf den ersten Blick nicht ohne Eleganz. Der Preis, den sie von ihren Anhängern fordert, ist allerdings ebenfalls nicht gering. Er besteht in der Preisgabe des Anspruchs auf axiologische Geschlossenheit. …

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478 Pawlik (2012) p. 23, further elaborated by Pawlik at pp. 82 ff.

479 See 2.4 above.

480 See correspondingly in Germany, where Joachim Hruschka has challenged the basis for Ulrich Klug's '*Abschied von Kant und Hegel*', see respectively Klug (1968) and Hruschka (2010), and also the later exchange between Hruschka (2012) and Klaus Lüderssen in Lüderssen (2011) on this issue. See also e.g., Greco (2009), who considers a weakness in Feuerbach's criminal law philosophy that it fails to account for the importance of 'umstößlichen deontologischen, rechtsmoralischen Schranken' (p. 140), and at that point turns to Kant as reference for what Greco coins the '*Instrumentalisierungsverbot*' (pp. 160 ff.).

481 This I have discussed previously, see Jacobsen (2009a) pp. 493 ff.

> Die Forderung nach begründungstheoretischer Konsistenz einer Straftheorie entspringt nicht den ästhetischen Luxusbedürfnissen weltflüchtiger Theoretiker, sondern dem Respekt gegenüber den von der Verhängung einer Strafe betroffenen Delinquenten. … Wer einen der empfindlichsten Eingriffe dulden soll, die unsere Rechtsordnung kennt – die Strafe –, darf deshalb verlangen, daß ihm dafür eine Begründung gegeben wird, deren einer Teil nicht die Prämisse des anderen Teils dementiert.'[482]

Kant, on a more general level, also stressed the importance of providing a complete and coherent line of reasoning in science in particular:

> If a science is to be advanced, all difficulties must be *exposed* and we must even *search* for those, however well hidden, that lie in its way; for, every difficulty calls forth a remedy that cannot be found without science gaining either in extent or determinateness, so that even obstacles become means for promoting thoroughness of science. On the contrary, if the difficulties are purposely concealed or removed merely through palliatives, then sooner or later they break out in incurable troubles that bring science to ruin in a complete skepticism.[483]

This, then, also poses a challenge for Nordic criminal law scholarship and its pragmatic tradition for acknowledging the relevance of different considerations, without fully accounting for their relevance and inner relation. This, however, is not to say that a philosophy of criminal law cannot be complex. Actually, the discussion pertaining to Kant's criminal law as well as the recurring historical shifts in criminal law philosophy more generally, suggest that an adequate philosophy of criminal law would have to be complex.[484]

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482 Pawlik (2012) p. 86. See also e.g., Pawlik's critique of Roxin and 'die Knappheit, mit der er nach wie vor die Rechtsphilosophischen Grundlagen seiner Konzeption abhandelt. … Was ihnen indessen nicht selten fehlt, ist eine systematisch überzeugende Verzahnung ihrer einzelnen Teilkomponenten' (pp. 50–51).

483 Kant (1788) 5: 103.

484 See also Hörnle (2011) p. 60, concluding that '[e]ine Straftheorie, die mit einem *einzigen Grundgedanken* auskommt, kann nicht in überzeugender Weise entwickelt werden'.

Part IV

Republican foundations for Nordic criminal law

Building onto starting points from Kant's political philosophy, this part of the book reconstructs a republican criminal law and connects it to core ideas in the Nordic criminal law ideology. Chapter 7 and Chapter 8 provide an analysis of criminal law's aim, principles, and structure. Chapter 9 elaborates the reformist dimension of the republican criminal law.

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7

Constructing the republic and its criminal law

7.1 Aim and outline

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

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

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

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

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

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

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

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

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

488 See 6.7 above.

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

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

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

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

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

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

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

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

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

7.2 Some key Kantian themes to start out from

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

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

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

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

494 See 3.2 above.

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

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

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

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

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

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

495 Dubber (2008) p. 94.

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

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

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

496 See the discussion in Chapter 4 above.

497 See 5.6 above.

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

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

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

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

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

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

500 Anter (2020) p. 232.

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

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

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

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501 Weber (2013) p. 56.

502 Anter (2020) p. 229.

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

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

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

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

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

505 Anter (2020) p. 229.

506 Anter (2020) p. 228.

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

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

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

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

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

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

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

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

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

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

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

7.4 Principles for the republic's constitution

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

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

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

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

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

514 See 5.6 above.

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

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

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

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

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

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

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

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

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

518 See, however, 8.3.4 below.

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

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

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

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

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

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521 Andenæs (1996) pp. 9–10.

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

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

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

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

7.5 The legislator's responsibilities

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

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

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

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

524 See in particular 9.4 below.

525 See Ripstein (2009) pp. 232–266.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

529 See 5.5.

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

531 See complete quote in 8.5 above.

532 See complete quote in 8.5 above.

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

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

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

533 Full quote above in 6.6.

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

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

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

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

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

7.7 Criminal law's baseline function and its three layers

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

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

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

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

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

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

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

539 See 7.4 above.

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

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

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

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

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

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

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

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

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

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544 Duff (2018a) p. 146.

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

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

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

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

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546 Ripstein (2009) p. 318.

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

548 Pawlik (2012) p. 27,

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

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

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

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

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

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

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

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

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

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

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

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

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

554 Ripstein (2009) p. 313.

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

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

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

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

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

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

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

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

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

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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).

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9

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.

Part IV

Nordic Criminal Law: Past, Present, and Future?

This part of the book, consisting of Chapter 10, concludes the study by considering the relevance of the republican account of criminal law for Nordic criminal law, with regard to its past, present, and future.

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10

Wherefrom, Nordic criminal law, and where to?

10.1 Aim and outline

The discussion of Kant's political philosophy provided some key premises and themes for outlining a republican criminal law, resulting in a baseline conception of criminal law. Along the way, the analysis has engaged in several different research discourses, including Nordic criminal law scholarship and Kant's political philosophy. In this final chapter, I will try to wrap things up. I will start out by considering whether the view of criminal law advocated in this book is something that Kant could possibly have accepted (10.2). Furthermore, I will look at various reasons, historical as well as principled, for why Kant and Nordic criminal law may be a fairly good match, contrary to the standard view of Kant in Nordic criminal law (10.3). Finally, I will look at the contemporary developments of Nordic criminal law. Somewhat paradoxically, the normative foundations for Nordic criminal law developed in the previous pages may make it (more) clear to us that there are developments in Nordic criminal law that does not sit well with this kind of normative conception. Rather, one may claim, Kant – or this book reintroducing Kant to the Nordic criminal law context – comes (too) late to the party. There might have been a golden age for 'Nordic criminal law', but the developments after the millennium call for a much more sceptical view of criminal law – also in the Nordics. This suggestion invites us to reflect a bit on 'Nordic criminal

law' as a reality and as ideal, and what/how we should think about it and its relation to Nordic criminal law scholarship for the future (10.4).

10.2 Would Kant have approved?

To begin with, it should be stressed that it has not been suggested that the republican account of criminal law offered here corresponds to Kant's own view of criminal law. However, it may be of some interest to ask, merely as a conjectural exercise: To what extent would Kant have accepted the present conception of criminal law?

Here, I would like to stress one quotation from Kant's 'reflections' on the philosophy of right which I find particularly interesting (mindful, of course, of how easy it seems to be to find *something* in Kant's different remarks on criminal law to support a certain reading of it). This reflection is dated to somewhere between 1785 to 1795, and opens like this:

> *Justitia punitiva* {punitive justice} has as its aim: 1. To transform a subject from a bad to a better citizen; 2. to deter others through examples as warnings; 3. to eliminate those who cannot be improved from the commonwealth, be it through deportation, *exilium*, or death (or through prison).[758]

This first part of the quotation is actually quite remarkable: it sounds a lot like the positivistic conception of criminal law advocated by Liszt a century later.[759] This aligns with the claim that criminal law may include somewhat different aims, future-oriented aims included.[760] But, as also suggested in this book, these cannot merely be grouped together, but must be justified from one overarching aim of criminal law. Correspondingly, Kant does not stop with that remark, but adds:

758 Kant (2016) 19: 587, 8035 (the quoted text includes the curly brackets).
759 See 6.7 above.
760 See in particular Chapter 8 above.

> But all this is only political prudence. – The essential thing is the exercise of justice itself so that the constitution would be preserved.[761]

Viewing the *preservation of the constitution*, that is, the normative structure of the civil state, as the 'essential thing' fits well the republican baseline account provided in this book, again suggesting that the present conception of criminal law might at least reasonably be referred to as 'Kantian'. At the same time, the account offered here resonates less for instance to certain challenging aspects of Kant's philosophy of criminal law. But as shown in Chapter 7, Kant's philosophy of criminal law is not well worked out; furthermore, in Chapter 9 notably, his political philosophy also offers resources for us to understand why and how we can progress in this sense, at many points move beyond Kant and some of the viewpoints he seems to have held. Generally, as this book started out from and has sought to operationalise some foundational Kantian premises, it should at least not be in dire conflict with Kant's political philosophy.

10.3 Kant – a strange ally for Nordic criminal law?

Kant may seem a surprising figure to turn to for new normative foundations for Nordic criminal law and Nordic criminal law science. As discussed in the first part of this book, Chapters 1 and 2, the Nordic legal orders are perhaps most of all known for their pragmatic legal cultures, with strong emphasis on empirical facts as well as balanced considerations. To recapture the findings there: A core feature of Nordic criminal law has been a strong concern for state power and practical perspectives on the workings of the criminal justice system, often resulting in compromises with individual rights and a general scepticism to all natural law ideologies that restrict the state too much. Kant, for his part, is often considered as the opposite of this pragmatic style of thinking, as a prime example of the more 'intellectualistic' or theory-driven approach in German philosophy and legal science – an 'abstract',

761 Kant (2016) 19: 587. Notice, however, that there are further reflections about criminal law and punishment, see e.g., the reflections 8041 and 8042.

'metaphysical' view, towards which particularly Danish and Norwegian legal scholars have for long periods been very sceptical. In line with this, Nordic criminal law scholars have emphasised the consequential aims and aspects of criminal law: General deterrence and individual prevention have, as we have seen, had a strong influence on Nordic criminal law.[762] Kant, as noted, has traditionally been considered to represent quite a different take. Relatedly, Kant's 'bloodguilt' based call for the death-penalty has been taken as a classical expression of a desire to use a form of punishment that Nordic criminal law has long-since abandoned. Kant, in other words, has come to symbolise the opposite of the kind of 'rational and humane' criminal law that the Nordics have striven for – only Hegel has perhaps been considered as (a tad) worse. This turn away from Kant can clearly be seen in central figures to Nordic criminal law scholarship. In Norway, the seminal figure of Norwegian legal scholarship, Schweigaard, strongly rejected Kantian as well as Hegelian legal thought, a viewpoint that was held also by other contributors to this discipline. More recently, Jareborg seems not to have found much of value in Kant, instead turning to Wittgenstein and the philosophy of language, in particular. Even in the Nordic philosophy of law, central figures such as Ross, following Kelsen in recognising Kant's theoretical reason, but fully rejected the idea of practical reason and its role as foundation for a political and legal philosophy of the kind Kant advocated, a view shared by the Uppsala school.[763]

There are, however, as shown throughout this book, grounds for challenging this sweeping rejection of Kant's political philosophy and its relevance to Nordic criminal law. To begin with, there are historical reasons. Kant's philosophy did play a foundational role in the epoch leading up to the constitution of the contemporary legal orders and the *Rechtstaat* ideas upon which they – Nordic legal orders included – are clearly founded.[764] Several authors of this period clearly held Kantian views, which, for instance, were foundational for the first Norwegian criminal code after the enactment of the Constitution of 1814. The influence of the natural law epoch that Kant was a significant part of lasted longer in Norway, for instance, than what many

762 See 2.3, 2.4, and 8.4 above.

763 See 2.3 above.

764 On the evolution of the *Rechtsstaats*-ideology, see Šarčević (1996).

interpreters have claimed.[765] The criminal code enacted in 1842 was clearly inspired by German legal thought. Generally, Nordic criminal law relies on basic concepts and principles closely related to those of German criminal law, for instance concerning guilt. Furthermore, some of the scholars who have rejected Kant's legal and political theory, seem, after all, to have modified their views. The monumental Norwegian criminal law scholar Hagerup, while rejecting in his younger years Kantian 'metaphysics', inspired by, among others Liszt, later came to aim in the direction of Kant's general principle of law.[766] Hagerup is also very characteristic of the German influence on Nordic criminal law scholarship, most clearly seen in Finland. Kant is clearly formative of German criminal law and criminal law science, not only with regard to its views of the nature and justification of criminal law, but in its overall systematic and philosophically oriented approach.[767]

More generally, Kant, or at least, a reinterpretation of his view of criminal law, is not the hardcore, vengeful retributivist that he so often seems to have been considered in Nordic criminal law science. On the contrary, a republican account developed by reference to his political philosophy, may, as I have showed, explain and justify as well as work to interpret and understand many of the viewpoints central to Nordic criminal law. Many of the most important contributions to the discussion about Nordic criminal law, such as Jareborg's defensive criminal law, find support in the republican view of criminal law elaborated here. What I have described above as a 'baseline conception' of criminal law can be said to have important features in common with, for instance, Träskman's description of Jareborg's defensive criminal law:

> What Jareborg puts particular emphasis on is that criminal law does not have certain aims and that it should not be used for certain purposes. Criminal law's function is not primarily to solve any possible social problems that might exist in society, but to respond to unwanted behaviour in a *morally acceptable* way. Hence, the defensive model is, normatively speaking, in opposition to an offensive model emphasising criminal law's

765 See the thorough analysis of this recently provided in Kjølstad (2023).

766 See the discussion of Hagerup's criminal law theory in Jacobsen (2017c), see in particular p. 101 and p. 166.

767 See in particular 6.7 above.

> importance as a tool used almost technically for a particular social and political purpose, that is, to achieve certain political aims.[768]

Träskman's emphasis on a *normative* as opposed to an *instrumental* view of criminal law, resonates this baseline conception. The account offered here gives strong support to what has often been highlighted as the core principles of criminal law in the Nordic setting, that is, the principle of legality, the principle of guilt, the principle of proportionality, and the principle of humanity.[769] Emphasis on individual freedom, human dignity, and equality are all recognisable features from a Nordic point of view. Core underlying ideas in this regard, such as autonomy, have obvious references to Kant. Slogans such as 'rationality and humanity' could just as well be used for Kant's political philosophy as they can for Nordic criminal law. It stresses the importance of the criminal justice system. At the same time, still in line with traditional views of 'Nordic criminal law', state power should preferably be of the softer kind, of the kind welfare states provide, including favouring social integration over hard treatment and exclusion of criminals. The Nordic legal orders have also developed in accordance with its role as protector of the individual's right. Norway, for instance, has clearly taken steps in the direction of a more individual rights-oriented legal order, including the adoption of the ECHR and reform of the Constitution of 1814's catalogue of individual rights, to approximate the European convention. Kant may even be claimed to provide a fruitful basis for engaging with philosophical issues relating to sex and gender, which have played such an important role in Nordic criminal law science in recent decades.[770]

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768 Träskman (2013) p. 336.

769 See e.g., Ulväng (2009) p. 219.

770 For a Kantian exchange, see Varden (2020), providing a 'textually based, comprehensive Kantian theory of sex, love, and gender as embodied, social, ethical, and legal political reality' (p. xiv), addressing questions such as 'how we can reform our inherited, imperfect public institutions as we find them in our actual political societies so that these can better enable and protect rightful, sexual, loving, and/or gendered relations for each and for all' (p. 300). For contributions to Nordic criminal law science in regard to the role of feminism and gender perspectives, see e.g., Berglund (2007) and, on integration of feminist legal perspectives in Nordic criminal law science, Burman (2007).

To add another twist to this story, a further reason to think that there may be more to find in Kant for the Nordic legal scholars may be their Scottish connection. Scottish philosophy is most often related to Hume, whom Kant indeed took inspiration from, but still aimed to move beyond. But another branch of Scottish philosophy is what is sometimes coined 'Scottish common-sense realism', including amongst others Thomas Reid (1710–1796) and Adam Ferguson (1723–1816). 'Common sense' is indeed a notion that would appeal to Nordic legal scholars, who have often looked westwards, across the North Sea, for support for their pragmatism and societal orientation. There is, thus, some historical irony in the fact that Kant, too, looked in that direction. In a conversation with James Boswell, Kant stated 'that his grandfather had come from Scotland over a hundred years before and he attributed his own temperament to that Scottish ancestor'.[771] In the same way, according to interpretations, there are close affinities between for instance Reid and Kant.[772] This may suggest that there is more 'pragmatism' in Kant's philosophy than the dominant view in Nordic criminal law science suggests. Exploring this is however something that must be left to another occasion.

Complete equivalence, in the sense of seeing Kant's political philosophy as a blueprint for Nordic law today, criminal law included, should not be expected though, for different reasons. One of them is of course the fact that more than 200 years of societal change and development have occurred since Kant wrote the *Metaphysics of Morals*. Also, Kant's political philosophy was never meant to describe or represent something. Rather, it is a practical, normative project setting out the normative standards that can justify law. In the extension of this, a key feature of Kant's political philosophy is that it emphasises *our responsibility* for applying reason's principles to the society we live in, in order to uphold the civil state and move it closer to the true republic. In doing so, Kant's critical philosophy functions as a rational framework and as a starting point for us, regardless of how the world we are situated in looks like. This leads me to my final point.

771 See note at the very end of Murray (2008) p. 193.

772 For one comparison of Kant and Reid, establishing close connections between them, see Ameriks (2006) pp. 108–133.

10.4 On Nordic criminal law as ideal and reality

This book started out from a preconception of Nordic criminal law as something to be cherished and worth preserving. In line with this, it has sought to develop a normative justification for Nordic criminal law. However, Nordic criminal law scholars' favourable view of and concern for Nordic criminal law may be challenged as narrow-minded as well as naïve. Is Nordic criminal law really that praiseworthy, meriting scholarly engagement to preserve it? As Lappi-Seppälä puts it:

> The question – for us in the Nordic countries – is: Do we ourselves think that this all is true? Do we believe in the rationality and sensibility of our own policies? Are these practices as liberal and clever as some foreign commentators like to tell to the world? How have they been developed during the last few years, and how are they likely to develop in the future?[773]

There are reasons to be concerned in this regard. The standard of prisons, for instance, is often emphasised as a distinct feature of Nordic criminal law. But, as illustrated by the responses from Nordic criminologists to John Pratt's labelling it as 'exceptional' (or exceptionally good), this is not an uncontroversial view.[774] As Ugelvik and Dullum point out, 'Nordic prison researchers have traditionally been far less positive in their descriptions of prison conditions and penal policies, focusing more on the pains of imprisonment and the complex process of social marginalisation of which the penal system is part.[775] Actually, one could make a long list of aspects and developments in Nordic criminal law that deviate from the standard view of Nordic criminal law as 'rational and humane'. Nordic criminal law expands in different ways, and shows signs of moving away from its traditional, more limited character.[776] Developments in the system of criminal reactions, display worrying signs.[777] For some time now, broader trends influencing the criminal policy in the Nordic countries have shown clear populism and 'law and order'

773 Lappi-Seppälä (2012) p. 85.
774 See Pratt (2008) and Ugelvik/Dullum (2011).
775 Dullum/Ugelvik (2011) p. 1.
776 See e.g., Husabø (2003) on 'pre-active' criminal law.
777 See e.g., Jacobsen (2020).

tendencies. The intertwining of migration law and criminal law into what is called 'crimmigration' regulation described by Franko is another example.[778] Neoliberal pressure on welfare systems spills over into the criminal justice system and its institutions, including elements of privatisation and use of prisons abroad.[779]

Such developments leave us with sometimes quite bleak pictures of criminal law in the Nordic countries today. Peter Fransen and Peter Scharff Smith, for instance, describe the situation in Denmark in this way:

> As already touched upon, recent decades have witnessed a move towards tougher sentencing and penal populism in Denmark … This tendency gained ground in the late 1990s under a social democratic government and took off in earnest under several liberal-conservative governments from 2001 and onwards … As a result, sentences have been stiffened, the prison population has gone up, and prison conditions have become stricter and tougher. An illustrative example of this tendency is the explosion in the use of punitive solitary confinement in Danish prisons in recent years … At the same time, the focus on both rehabilitation and prisoner rights has abated. Importantly, these policies are a direct product of political initiatives that can only be characterized as penal populism. On top of this development anti-immigration policies have caused an expansion of penal practices towards migrants, which in itself has begun to change the Danish penal estate and its more or less exceptional prison practices …[780]

Trends and developments such as the drive towards the 'penal turn' and 'preventive justice', are, of course, not unique to the Nordic countries.[781] The important point is that the Nordics are not immune to these trends either. It

778 Franko (2020). See also e.g., Anderberg (2022) p. 103 on the future of Nordic criminal law co-operation in view of international counterterrorism legislation.

779 An example of the latter is Norway's use of the so-called Norgerhaven prison in the Netherlands, leading to critique from the Norwegian ombudsman, see Norgerhaven-fengsel-besøksrapport-2016.pdf (sivilombudet.no) (last accessed 19.10.22).

780 Fransen/Scharff Smith (2022) p. 54. See also, for instance, on the development in Swedish criminal policy, Anderberg/Martinsson/Svensson (2022).

781 See e.g., on preventive justice, Ashworth/Zedner (2014).

is clear that parts of contemporary Nordic criminal law do not sit well with its designation as 'exceptional'. On the contrary, as shown, current Nordic criminal law orders can be duly criticised, challenged, and accused of failing to live up to its own image. Nordic criminal law is not, or at least no longer is, a matter of *progress*, and perhaps not even of *principle*. This, it might be claimed, not only puts into question the basis for this book but makes it a dangerous project. It may result in a kind of rhetorical facade for criminal law orders that make it harder for us to see the realities out there, which perhaps amount to nothing more than yet another instance of mere state penal *power*.

This challenge invites a nuanced response. First of all, as Lappi-Seppälä points out, despite these developments, Nordic countries come out well when compared to the other parts of Europe.[782] So even if there are troublesome developments in Nordic criminal law this does not mean that it does not maintain important qualities that are worth preserving. Furthermore, we should be mindful not to be short-sighted when it comes to the historical progress in society as well as in criminal law.[783] Kant never envisioned a linear process progressing towards the true republic.[784] Rather, he depicted the progress of humankind as an inevitably long and bumpy ride. In this regard, we should keep in mind that even the most serious of setbacks may turn out to push us towards improving the republic. Some of the most important steps forward made in Europe during the previous century, were the result of gross injustice and even war – 'the source of all evil and corruption of morals'.[785] We should expect a bumpy ride for Nordic criminal law as well. While we should pay attention to trends and changes of the kind mentioned, we should not judge the long-term development by referencing only to the latest few decades. The principles of criminal law require application within different social context

782 Lappi-Seppälä (2012) p. 106.

783 See 9.3 above. See also e.g., Braithwaite (2022) p. 90, who 'in the broadest sense' concludes 'that Norbert Elias … and Steven Pinker … may be right that there has been a long-run trend towards reduced violence over the past millennium'.

784 See e.g., Møller (2021) p. 136: 'At no point does Kant claim that the historical development is a stable progression.' See here the discussions in Rorty/Schmidt (2009).

785 Kant (1798) 7: 85–86. While such historical events may turn out to have this outcome, Kant still stresses the importance of preventing war, and views this as the 'most important negative tool to promote progress' for Kant, see Møller (2021) p. 134.

and trends, resulting in frequent shifts and reappraisals.[786] In Kantian terms, as we have already touched upon in 5.9, it is not for us to judge today where we will end up. Instead, that is down to the choices we make as a political community in fulfilling our moral obligations to ourselves and each other.

There is an important lesson for Nordic criminal law science in this. It is easily thought that such negative developments call on us to become more detached, limiting ourselves to observing and explaining the developments in Nordic criminal law, but without normative engagement in the field. But that would indeed be a strange development in the field. Is it not when you are lead astray that a compass is most important? Concern for normative standards seems indeed most apt when this is most needed. Rather than undermining the normative project of this book, the contemporary development is actually a reason for it. Rather than thinking that the time has passed for 'Nordic criminal law' and normative engagement in Nordic criminal law scholarship, we should primarily think of it as forcing us to be more precise about two different meanings of 'Nordic criminal law'. The reality of Nordic criminal law is, one could say, the criminal law that we find in the Nordic countries today. But in another meaning, 'Nordic criminal law' can be understood as something akin to what Kant calls a *practical ideal*.

Kant distinguishes between practical *ideas* and practical *ideals*. The '*Idea* signifies, strictly speaking, a concept of reason'.[787] In our context, this would amount to the metaphysical ideas of right, ultimately the right to external freedom. The *ideal* signifies 'the representation of an individual being as adequate to an idea'.[788] The latter, for example, 'a wise man' who acts in conformity with the moral law, has 'practical power (as regulative principles) grounding the possibility of the perfection of certain actions'.[789] Nordic criminal law, then, as an ideal, would amount to a kind of model for criminal law, a visualisation of a 'wise' criminal law.[790] Interestingly, Träskman uses a quite similar term as

786 An example of this is the rehabilitation aspect of criminal law, within which the emphasis has shifted, see e.g., Nuotio (2007) p. 160.

787 Kant (1790) 5: 232.

788 Kant (1790) 5: 232.

789 Kant (1790) 5: 232.

790 As most other concepts in Kant's philosophy, there is a debate on the correct understanding of Kant here, see e.g., Englert (2022).

he questions the status of Nordic criminal law and whether it (only) amounts to 'a constructed ideal image'.[791]

In this latter sense, then, we can use 'Nordic criminal law' to combine and concretise a set of principled requirements as a representation of the idea of a republican criminal law, one that, given some historical features of the Nordic criminal law orders, allows us to evaluate our actual criminal law more concretely with reference to the principles of republican criminal law, and to guide us in our efforts to reform ourselves to a better approximate of the true republic. Practical ideals in this sense are clearly important for us, proof of which can be found precisely in the persistence of the (ideal of) Nordic criminal law. The worse the *reality* of Nordic criminal law becomes, the more important this ideal becomes as a normative reference point.

At the same time, we should be mindful that tying one's ideals so closely to who we *are* (that is, Nordics) comes indeed with the risk of confusing realities with ideals, that is; unduly conflating the realities with the ideals and *vice versa*. So, while the ideal of Nordic criminal law remains important and well-worth caring for, we may need to better connect this ideal more strongly to its underlying normative merits or rational *idea*, if one likes. This also aligns with the central viewpoint of this book – the foundations of the ideal of Nordic criminal law can be found in republican political philosophy, which we must turn to when seeking to elaborate, explain, and justify this ideal. This is not limited to a Nordic perspective, but instead basic universal normative standards for a 'rational and humane', and hence justifiable criminal law. This would also help us to see how we share a normative project with other legal orders and their strive to fulfil these standards, which are in no sense disregarded in other parts of the world. It would also help us address the challenge captured by Träskman's observation that it is not likely that the Nordic countries can maintain a coherent criminal policy and criminal justice system manifestly different from other states.[792] Rather, we can find common normative ground with others and even strengthen it in terms of ongoing developments of transnational criminal law, EU-criminal law, and

791 Träskman (2013) p. 333 (English expression quoted from the abstract).
792 Träskman (2013) p. 353.

even international criminal law.[793] The political philosophy of republicanism is not merely a good advice. Whatever historical starting point and position a state has, it is rationally *obliged* to secure power, principle, and progress towards the true republic. Kant shows us why.

793 See in this regard also, e.g., Nuotio (2007) p. 172 on the relevance of Nordic criminal law for the development of EU criminal law.

References

Agge/Thornstedt (1984) = Ivar Agge and Hans Thornstedt, *Straffrättens allmänna del*, Stockholm, Juristförlaget vid Stockholms universitet 1984.

Alaattinoğlu/Kainulainen/Niemi (2020) = Daniela Alaattinoğlu, Heini Kainulainen and Johanna Niemi, 'Rape in Finnish criminal law and process – A discussion on, and beyond, consent', *Bergen Journal of Criminal Law and Criminal Justice* 8 (2) 2020, pp. 33–53.

Allison (2006) = Henry E. Allison 'Kant on the freedom of the will', in Paul Guyer (ed.), *The Cambridge Companion to Kant*, Cambridge: Cambridge University Press 2006, pp. 381–415.

Ameriks (2006) = Karl Ameriks, *Kant and the Historical Turn: Philosophy as Critical Interpretation*, Oxford: OUP 2006.

Ameriks (2012) = Karl Ameriks, 'Kant, Human Nature, and History after Rousseau', in Karl Ameriks, *Kant's Elliptical Path*, Oxford: Oxford University Press 2012 pp. 28–45.

Andenæs (1974) = Johs. Andenæs, *Punishment and Deterrence*, Ann Arbor: The University of Michigan Press 1974.

Andenæs et al. (1979) = Johs. Andenæs, Georg Fr. Rieber-Mohn, L. J. Dorenfeldt and Olav T. Laake, *Kommentarer til Kriminalmeldingen*, Oslo: Grøndahl & Søn 1979.

Andenæs (1994) = Johs. Andenæs, *Straffen som problem*, Halden: Exil 1994.

Anderberg (2022) = Andreas Anderberg, 'Counterterrorism regulation in Nordic criminal law – a last common ground for Nordic crime policy co-operation?", *Juridisk Publikation* 2 (2022), pp. 91–103.

Anderberg/Martinsson/Svensson (2022) = Andreas Anderberg, Dennis Martinsson and Erik Svensson, *Teori och praktik: Straffrätt i omvandling*, Uppsala: Iustus 2022.

Andersson (2016) = Malou Andersson, *Grov fridskränkning och grov kvinnofridskränkning: fridskränkningsbrotten som rättslig konstruktion,* Uppsala: Iustus 2016.

Andersson/Høgestøl/Lie (2018) = Anna Andersson, Sofie A. E. Høgestøl and Anne Christine Lie (eds.), *Fremmedkrigere: forebygging, straffeforfølgning og rehabilitering i Skandinavia*, Oslo: Gyldendal juridisk 2018.

Andersson/Bladini (2021) = Wanna Svedberg Andersson and Moa Bladini, 'Autonomy and Beyond – Voluntariness in the Light of Lived Autonomy', *Retfærd* 3/4 2021, pp. 35–49.

Anners (1965) = Erik Anners, *Humanitet och rationalism: Studier i upplysningstidens strafflagsreformer, särskilt med hänsyn till Gustav III:s reformlagstiftning*, Lund: Nordiska bohandeln 1965.

Anttila (1975) = Inkeri Anttila, 'Incarceration for Crimes Never Committed, The Rise and Fall of Preventive Detention' (1975), quoted from Raimo Lahti and Patrick Törnudd (eds.), *Inkeri Anttila – Ad Ius Criminale Humanius, Essays in Criminology, Criminal Justice and Criminal Policy,* Helsinki: Finnish Lawyer's Association 2001, pp. 91–103.

Anttila (1976) = Inkeri Anttila, 'A New Trend in Criminal Law in Finland' (1976), quoted from Raimo Lahti and Patrick Törnudd (eds.), *Inkeri Anttila – Ad Ius Criminale*

Humanius, Essays in Criminology, Criminal Justice and Criminal Policy, Helsinki: Finnish Lawyer's Association 2001, pp. 177–186.

Anttila (1978) = Inkeri Anttila, 'Control without Repression?' (1978), quoted from Raimo Lahti and Patrick Törnudd (eds.), *Inkeri Anttila – Ad Ius Criminale Humanius, Essays in Criminology, Criminal Justice and Criminal Policy,* Helsinki: Finnish Lawyer's Association 2001, pp. 111–120.

Antilla (1986) = Inkeri Anttila, 'Trends in Criminal Law', quoted from Raimo Lahti and Patrick Törnudd (eds.), *Inkeri Anttila – Ad Ius Criminale Humanius, Essays in Criminology, Criminal Justice and Criminal Policy,* Helsinki: Finnish Lawyer's Association 2001, pp. 187–201.

Antilla (1990) = Inkeri Anttila, 'Talking with Cesare Beccaria' (1990), quoted from Raimo Lahti and Patrick Törnudd (eds.), *Inkeri Anttila – Ad Ius Criminale Humanius, Essays in Criminology, Criminal Justice and Criminal Policy,* Helsinki: Finnish Lawyer's Association 2001, pp. 59–61.

Anttila/Törnudd (1980) = Inkeri Anttila and Patrick Törnudd, 'Reasons for Punishment' (1980), quoted from Raimo Lahti and Patrick Törnudd (eds.), *Inkeri Anttila – Ad Ius Criminale Humanius, Essays in Criminology, Criminal Justice and Criminal Policy,* Helsinki: Finnish Lawyer's Association 2001, pp. 121–124.

Anttila/Törnudd (1992) = Inkeri Anttila and Patrick Törnudd, 'The Dynamics of the Finnish Criminal Code Reform', in Raimo Lahti and Kimmo Nuotio (eds), *Criminal Law Theory in Transition: Strafrechtstheorie im Umbruch,* Helsinki: Finnish Lawyer's Association 1992, pp. 11–26.

Anter (2020) = Andreas Anter, 'The Modern State and Its Monopoly on Violence', in Edith Hanke, Lawrence Scaff and Sam Whimster, *The Oxford Handbook of Max Weber*, Oxford: Oxford University Press 2020, pp. 226–236.

Alexy (2019) = Robert Alexy, 'Kant's Non-Positivistic Concept of Law', *Kantian Review* 24 (4) 2019, pp. 497–512.

Allan (2003) = T. R. S. Allan, *Constitutional Justice – A Liberal Theory of the Rule of Law*, Oxford: Oxford University Press 2003.

Arendt (2007) = Hannah Arendt, 'The Great Tradition: I. Law and Power', *Social Research – Hannah Arendt's Centenary: Political and Philosophical Perspectives*, Part I, 74 (3) 2007 pp. 713–726.

Arntzen (1996) = Sven Arntzen, 'Kant on Duty to Oneself and Resistance to Political Authority', *Journal of the History of Philosophy* 34 (3) 1996, pp. 409–424.

Arntzen (2020) = Sven Arntzen, *Fornuft – person – stat: Immanuel Kants rettsfilosofi og politiske filosofi*. Oslo, Vidarforlaget 2020.

Ashworth (2014) = Andrew Ashworth, *Positive Obligations in Criminal Law*, Oxford and Portland, Oregon: Hart 2014.

Ashworth/Zedner (2014) = Andrew Ashworth and Lucia Zedner, *Preventive Justice*, Oxford: Oxford University Press 2014.

Asp (1998) = Petter Asp, *EG:s sanktionsrätt: ett straffrättsligt perspektiv*, Uppsala: Iustus 1998.

Asp (2005) = Petter Asp, *Från tanke till gärning: Legitimationsfrågor rörande förfältsdelikt, del I*, Uppsala: Iustus 2005.

Asp (2010) = Petter Asp, *Sex och samtycke*, Uppsala: Iustus 2010.

Asp (2017) = Petter Asp, 'Extraterritorial Ambit and Extraterritorial Jurisdiction', in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds.), *Criminal Law and the Authority of the State*, Oxford and Portland, Oregon: Hart Publishing 2017, pp. 33–46.

Asp/Ulväng/Jareborg (2013) = Petter Asp, Magnus Ulväng and Nils Jareborg, *Kriminalrättens grunder*, 2nd edition, Uppsala: Iustus 2013.

Auglend (2018) = Ragnar Auglend, *Politiet i krig og ved okkupasjon: noen folkerettslige og nasjonalrettslige perspektiver*, Oslo: Gyldendal 2018.

Austin (1832) = John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* [1832], reprint. Indianapolis, 1998.

Backer (2018) = Inge Lorange Backer, *Styrket nordisk lovsamarbeid: Muligheter og utfordringer*, Rapport, Copenhagen: Nordisk ministerråd 2018.

Baumann (2011) = Elisabeth Baumann, *States in transition and the duty to prosecute international crimes – Alternatives under international law, with lessons from Afghanistan*, Bergen: University of Bergen 2011.

Baumbach (2014) = Trine Baumbach, *Strafferet og Menneskeret*, Copenhagen: Karnov 2014.

Beccaria (1764) = Cesare Beccaria, 'On Crime and Punishment' [1764], English translation in *Beccaria: On crimes and punishments and other writings, Cambridge texts in the History of Political Theory,* ed. Richard Bellamy, Cambridge: Cambridge University Press 1995.

Bennet (2022) = Tova Bennet, 'Criminal Law', in Michael Bogdan and Christoffer Wong (eds.), *Swedish Legal System*, 2nd edition. Stockholm: Norstedts Juridik 2022, pp. 144–185.

Berglund (2007) = Kerstin Berglund, *Straffrätt och kön*, Uppsala: Iustus 2007.

Bergsmo et al (2020) = Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.), *Power in International Criminal Justice*. Brussels: Torkel Opsahl Academic Epublisher 2020.

Bielefeldt (1997) = Heiner Bielefeldt, 'Autonomy and Republicanism: Immanuel Kant's Philosophy of Freedom', *Political Theory 25 (4)* 1997, pp. 524–558.

Billis/Knust/Rui (2022) = Emmanouil Billis, Nandor Knust and Jon Petter Rui (eds.), *Proportionality in Crime Control and Criminal Justice*, Oxford: Hart Publishing 2021.

Binding (1872) = Karl Binding, *Die Normen und Ihre Übertretung – Eine Untersuchung über die rechtmässige Handlung und die Arten des Delikts, Erster Band, Erste Abtheilung – Normen und Strafgesetze*, 3rd edition, Leipzig: Wilhelm Engelmann 1872.

Björne (1995) = Lars Björne, *Den nordiska rättsvetenskapens historia 1: Patrioter och institutionalister: tiden före år 1815*, Lund/Stockholm: Nerenius & Santérus förlag 1995.

Björne (1998) = Lars Björne, *Den nordiska rättsvetenskapens historia 2: Brytningstiden, 1815–1870*, Lund/Stockholm: Nerenius & Santérus förlag 1998.

Björne (2002) = Lars Björne, *Den nordiska rättsvetenskapens historia 3: Den konstruktiva riktningen: 1871–1910*, Lund/Stockholm: Nerenius & Santérus förlag 2002.

Björne (2007) = Lars Björne, *Den nordiska rättsvetenskapens historia 4: Realism och skandinavisk realism: 1911–1950*, Lund/Stockholm: Nerenius & Santérus förlag 2007.

Bohlander (2009) = Michael Bohlander, *Principles of German Criminal Law*, Oxford/Portland, Oregon: Hart Publishing 2009.

Bois-Pedain (2017) = Antje du Bois-Pedain, 'Punishment as an Inclusionary Practice', in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds.), *Criminal Law and the Authority of the State*, Oxford and Portland, Oregon: Hart Publishing 2017, pp. 199–227.

Bois-Pedain/Eldar (2022) = Antje du Bois-Pedain and Shachar Eldar (eds.), *Re-Reading Beccaria – On the Contemporary Significance of a Penal Classic,* Oxford: Hart Publishing 2022.

Bois-Pedain/Ulväng/Asp (2017) = Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds.), *Criminal Law and the Authority of the State*, Oxford and Portland, Oregon: Hart Publishing 2017.

Bouch (2019) = Johan Boucht, *The limits of asset confiscation: on the legitimacy of extended appropriation of criminal proceeds*, Oxford: Hart Publishing 2019.

Braithwaite/Pettit (2002) = John Braithwaite and Philip Pettit, *Not Just Deserts – A Republican Theory of Criminal Justice*, Oxford: Clarendon Press 2002.

Braithwaite (2022) = John Braithwaite, *Macrocriminology and Freedom,* Canberra: ANU Press 2022.

Brandt (2014) = Reinhard Brandt, 'Feuerbach und Kant – Anmerkungen zu ihrem Staats- und Strafrecht', in Arnd Koch, Michael Kubiciel, Martin Löhnig and Michael Pawlik (eds.), *Feuerbachs Bayerisches Strafgesetzbuch – Die Geburt liberalen, modernen und rationalen Strafrechts*, Tübingen: Mohr Siebeck 2014 pp. 171–190.

Brandt (2016) = Reinhard Brandt, 'Kants erste Rechtspflicht: ‚Sei ein rechtlicher Mensch (honeste vive)", *Die Marburger Gelehrten-Gesellschaft: Universitas Litterarum Nach 1968*, Volker Mammitzsch, et al. (eds.), Berlin: de Gruyter 2016, pp. 3–34.

Bratholm (1970) = Anders Bratholm, 'Norsk kriminalreform – historien om de forsømte gjerninger', in Anders Bratholm (ed.), *… du må ikke tåle – Seks innlegg om kriminalreform*, Oslo: Universitetsforlaget 1970, pp. 9–48.

Brettschneider (2011) = Corey Brettschneider, 'Rights within the Social Contract: Rousseau on Punishment', in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds.), *Law as Punishment/Law as Regulation*, Stanford: Stanford University Press 2011, pp. 50–76.

Brocker (2006) = Manfred Brocker, *Kant über Rechtsstaat und Demokratie*, Wiesbaden: VS Verlag für Sozialwissenschaften 2006.

Brooks (2003) = Thom Brooks, 'Kant's Theory of Punishment', *Utilitas* 15 (2) 2003, pp. 206–224.

Brownlee (2007) = Kimberley Brownlee, 'The communicative aspects of civil disobedience and lawful punishment', *Criminal Law and Philosophy* 1 (2) 2007, pp. 179–192.

Brudner (2011) = Alan Brudner, 'Constitutionalizing Self-Defence', *The University of Toronto Law Journal* 61 (4) 2011, pp. 867–897.

Burman (2007) = Monica Burman, 'Beyond Constructed Boundaries in Criminal Law Discourse', in Åsa Gunnarsson and Eva-Maria Svensson (eds.), *Exploiting the Limits of Law – Swedish Feminism and the Challenge to Pessimism*, London: Routledge 2007, pp. 89–104.

Byrd (1989) = B. Sharon Byrd, 'Kant's Theory of Punishment – Deterrence in its Threat, Retribution in its Execution', *Law and Philosophy* 8 (1989), pp. 151–200.

Byrd/Hruschka (2010) = B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right – A Commentary*, Cambridge: Cambridge University Press 2010.

Cameron (2017) = Iain Cameron, 'A Constitutional Perspective on the Criminalisation Process in Sweden', in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds.), *Criminal Law and the Authority of the State*, Oxford and Portland, Oregon: Hart Publishing 2017, pp. 111–132.

Cancio Meliá (2011) = Manuel Cancio Meliá, 'Terrorism and Criminal Law: The Dream of Prevention, the Nightmare of the Rule of Law', *New Criminal Law Review: An International and Interdisciplinary Journal* 14 (1) 2011, pp. 108–122.

Caruso (2021) = Gregg D. Caruso, *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice*, Cambridge: Cambridge University Press 2021.

Cassirer (1939) = Ernst Cassirer, *Axel Hägerström – en studie i samtida svensk filosofi*, 1939, Swedish translation, Stockholm: Thales 2005.

Chalmers/Leverick (2008) = James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law', *The Modern Law Review* 71 (2) (2008), pp. 217–246.

Chiao (2018) = Vincent Chiao, *Criminal Law in the Age of the Administrative State*, Oxford: Oxford University Press 2018.

Child/Duff (2018) = J. J. Child and Antony Duff, *Criminal Law Reform Now – Proposals and Critique*, London: Hart Publishing 2018.

Christensen (2022) = Mikkel Jarle Christensen, 'Defending the North and exporting its criminal justice: The reproduction of Nordic criminal justice cohesion in a global world', in Mikkel Jarle Christensen, Kjersti Lohne and Magnus Hörnqvist (eds.), *Nordic Criminal Justice in a Global Context – Practices and Promotion of Exceptionalism*, London and New York: Routledge 2022, pp. 23–38.

Christensen/Lohne/Hörnqvist (2022) = Mikkel Jarle Christensen, Kjersti Lohne and Magnus Hörnqvist (eds.), *Nordic Criminal Justice in a Global Context – Practices and Promotion of Exceptionalism*, London and New York: Routledge 2022.

Christie (1977) = Nils Christie, 'Conflict as Property', *The British Journal of Criminology* 17 (1) 1977, pp. 1–15.

Christie/Bruun (2003) = Nils Christie and Kettil Bruun, *Den gode fiende – narkotikapolitikk i Norden*, 3rd edition, Oslo: Universitetsforlaget 2003.

Corrado/Mathesius (2014) = Raymond Corrado and Jeffrey Mathesius, 'Developmental Psycho- Neurological Research Trends and Their Importance for Reassessing Key Decision-Making Assumptions for Children, Adolescents, and Young Adults in Juvenile/Youth and Adult Criminal Justice Systems', *Bergen Journal of Criminal Law and Criminal Justice* 2 (2) 2014, pp. 141–163.

Couto (2019) = Michel Coutu, *Max Weber's Interpretive Sociology of Law*, London: Routledge 2019.

Dagger (2011) = Richard Dagger, 'Republicanism and the Foundations of Criminal Law', in R. A. Duff and Stuart P. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford: Oxford University Press 2011, pp. 44–66.

Dahl (1957) = Robert A. Dahl, 'The Concept of Power', *Behavioral Science – Journal of the Society for General Systems Research* 2 (3) 1957, pp. 201–215.

Dreier (1996) = Horst Dreier (ed.), *Grundgesetz – Kommentar, Band I, Artikel 1–19*, Tübingen: Mohr Siebeck 1996.

Dubber (1998) = Markus Dirk Dubber, 'The Right to be Punished: Autonomy and Its Demise in Modern Penal Thought', *Law and History Review* 16 (1) 1998, pp. 113–146

Dubber (2004) = Markus Dirk Dubber, 'Toward a Constitutional Law of Crime and Punishment', *Hastings Law Journal* 55 (3) 2004, pp. 509–572.

Dubber (2005a) = Markus Dirk Dubber, *The Police Power – Patriarchy and the Foundations of American Government*, New York: Columbia University Press 2005.

Dubber (2005b) = Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal Law', *American Journal of Comparative Law* 53 (3) 2005, pp. 679–707.

Dubber (2006) = Markus Dirk Dubber, 'The Promise of German Criminal Law: A Science of Crime and Punishment' *German Law Journal* 6 (7) 2005, pp. 1049–1071.

Dubber (2008) = Markus Dirk Dubber, 'Criminal Police and Criminal Law in the *Rechtsstaat*', in Markus Dirk Dubber and Mariana Valverde (eds.), *Police and the Liberal State*, Stanford: Stanford Law Books 2008, pp. 92–109.

Dubber (2014) = Markus Dirk Dubber, 'Introduction: Grounding Criminal Law: Foundational Texts in Comparative-Historical Perspective', in Markus Dirk Dubber (ed.), *Foundational Texts in Modern Criminal Law*, Oxford: Oxford University Press 2014, pp. 1–22.

Dubber (2018) = Markus Dirk Dubber, *The Dual Penal State. The Crisis of Criminal Law in Comparative-Historical Perspective*, Oxford: Oxford University Press 2018.

Duff (1986) = Antony Duff, *Trials and Punishment*, Cambridge: Cambridge University Press 1986.

Duff (1990) = Antony Duff, *Intention, Agency & Criminal Liability – Philosophy of Action and the Criminal Law*, Oxford: Oxford University Press 1990.

Duff (1998) = Antony Duff, *Philosophy and the Criminal Law – Principle and Critique*, Cambridge: Cambridge University Press 1998.

Duff (2003) = Antony Duff, *Punishment, Communication, and Community*, Oxford: Oxford University Press 2003.

Duff (2005) = Antony Duff, 'Theorizing Criminal Law: a 25th Anniversary Essay', *Oxford Journal of Legal Studies* 25 (3) 2005, pp. 353–367.

Duff (2009) = Antony Duff, *Answering for Crime – Responsibility and Liability in the Criminal Law,* Oxford: Hart Publishing 2009.

Duff (2010a) = Antony Duff, 'A criminal law for citizens', *Theoretical criminology* 14 (3) 2010, pp. 293–309.

Duff (2010b) = Antony Duff, 'Towards a theory of criminal law?', *Proceedings of the Aristotelian Society, Supplementary Volumes* 84 2010, pp. 1–28.

Duff (2018a) = Antony Duff, *The Realm of Criminal Law*, Oxford: Oxford University Press 2018.

Duff (2018b) = Antony Duff, 'Criminal law and political community', *International journal of constitutional law* 16 (4) 2018, pp. 1251–1257.

Duff et al. (2004) = Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial: Volume 1 – Truth and Due Process*, Oxford: Oxford University Press 2004.

Duff et al. (2006) = Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial: Volume 2 – Judgement and Calling to Account*, Oxford: Hart Publishing 2006.

Duff et al. (2007) = Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial: Volume 3 – Towards a Normative Theory of the Criminal Trial*, Oxford: Hart Publishing 2007.

Dullum/Ugelvik (2012) = Jane Dullum and Thomas Ugelvik, 'Introduction: Exceptional prisons, exceptional societies?', in Thomas Ugelvik and Jane Dullum (eds), *Penal Exceptionalism? Nordic Prison Policy and Practice*, London/New York: Routledge 2012, pp. 1–10.

Duus-Otterström (2007) = Göran Duus-Otterström, *Punishment and Personal Responsibility,* Göteborg: Göteborg University 2007.

Duus-Otterström (2021) = Göran Duus-Otterström, 'Do Offenders Deserve Proportionate Punishments?', *Criminal Law and Philosophy* 15 (3) 2021, pp. 463–480.

Ekelöf (1942) = Per Olof Ekelöf, *Straffet, skadeståndet och vitet: en studie över de rättsliga sanktionernas verkningssätt,* Uppsala: A.-b. Lundequistska bokhandel 1942.

Eldar (2018) = Shachar Eldar, 'Criminal Law, Parental Authority, and the State', *Criminal Law and Philosophy* 12 (4) 2018, pp. 695–705.

Elholm (2002) = Thomas Elholm, *EU-svig: En studie i dansk strafferet*, Copenhagen: Jurist- og Økonomforbundets forlag 2002.

Elholm/Baumbach (2022) = Thomas Elholm and Trine Baumbach, *Strafferettens almindelige del – Det strafferetlige ansvar*, 2nd edition, Copenhagen: Jurist- og Økonomforbundets forlag 2022.

Elholm/Feldtmann (2014) = Thomas Elholm and Birgit Feldtmann, *Criminal Jurisdiction – A Nordic Perspective*, Copenhagen: Jurist- og Økonomforbundets forlag 2014.

Enderlein (1985) = Wolfgang Enderlein, 'Die Begründung der Strafe bei Kant', *Kant-Studien* 76 (3) 1985, pp. 303–327.

Eng (2007) = Svein Eng, *Rettsfilosofi*, Oslo: Universitetsforlaget 2007.

Englert (2022) = Alexander T. Englert, 'How a Kantian Ideal Can Be Practical', *Inquiry: An Interdisciplinary Journal of Philosophy* 2022, pp. 1–28.

Engstrom (2010) = Stephen Engstrom, 'Reason, desire, and the will', in Lara Denis (ed.), *Kant's Metaphysics of Morals – A Critical Guide*, Cambridge: Cambridge University Press 2010, pp. 28–50.

Eser/Fletcher/Cornils (1989) = Albin Eser, George P. Fletcher, Karin Cornils (eds.), *Justification and Excuse: Comparative Perspectives*, Vol 1, Freiburg 1989.

Evald (2010) = Jens Evald, *Alf Ross: et liv,* Copenhagen: Jurist- og Økonomforbundets forlag 2010.

Fang (2021) = Bo Fang, 'Kant's Political Philosophy as *ausübende Rechtslehre*', *Kant Yearbook* 13 (1) 2021, pp. 29–47.

Farmer (2016) = Lindsay Farmer, *Making the Modern Criminal Law – Criminalization and Civil Order*, Oxford: Oxford University Press 2016.

Feinberg (1987) = Joel Feiberg, *Harm to Others – The Moral Limits of the Criminal Law*, Volume One, Oxford/New York: Oxford University Press 1987.

Feinberg (1988) = Joel Feinberg, *Offense to Others – The Moral Limits of the Criminal Law*, Volume Two, Oxford/New York: Oxford University Press 1988.

Feinberg (1989) = Joel Feinberg, *Harm to Self – The Moral Limits of the Criminal Law*, Volume Three Oxford/New York: Oxford University Press 1989.

Feinberg (1990) = *Harmless Wrongdoing – The Moral Limits of the Criminal Law*, Volume Four, Oxford/New York: Oxford University Press 1990.

Feuerbach (1799/1800) = Paul Johann Anselm von Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* I [1799] – II [1800], Aaalen: Scientia 1966.

Fletcher (1987) = George P. Fletcher, 'Why Kant?", *Columbia Law Review* 87 (3) 1987, pp. 421–432.

Flikschuh (2000) = Katrin Flikschuh, *Kant and Modern Political Philosophy*, Cambridge: Cambridge University Press 2000.

Flaatten (2019) = Sverre Flaatten, *Høyesterett, straffen og tyveriene – Straffutmålingsbegrunnelser i etterkrigstiden*, Bergen: Fagbokforlaget 2019.

Flaatten/Heivoll (2014) = Sverre Flaatten and Geir Heivoll (eds.), *Straff, lov, historie: Historiske perspektiver på straffeloven 1902*, Oslo: Akademisk publisering 2014.

Fornes (2021) = Ingun Fornes, *Straff av barn – Frihetsstraffen og alternativene*, Oslo: Gyldendal 2021.

Franko (2020) = Katja Franko, *The Crimmigrant Other – Migration and Penal Power*, Abingdon: Routledge 2020.

Franko (2023) = Katja Franko, 'On the relevance of citizenship in criminal law: Implications for proportionality, equality, and justice', *Bergen Journal of Criminal Law and Criminal Justice* 11 (2) 2023, pp. 1–26.

Fransen/Scharff Smith (2022) = Peter Franssen and Peter Scharff Smith, 'Shaping Nordic Punishment: Penal exceptionalism and the correctional revolution at Ringe Prison in the 1970s', in Mikkel Jarle Christensen, Kjersti Lohne and Magnus Hörnqvist (eds.), *Nordic Criminal Justice in a Global Context – Practices and Promotion of Exceptionalism*, London and New York: Routledge 2022, pp. 39–58.

Fredwall/Heivoll (2022) = Terje Emil Fredwall and Geir Heivoll (eds.). *Straffens etikk*, Oslo: Scandinavian Academic Press 2022.

Frierson (2003) = Patrick R. Frierson, *Freedom and Anthropology in Kant's Moral Philosophy*, Cambridge: Cambridge University Press 2003.

Forsell (1987) = Bertil A. Frosell, 'Tugt og dadel – Nogle utviklingslinier i Carl Goos' strafferetlige tænkning', *Nordisk Tidsskrift for Kriminalvidenskab* 74 (2) 1987, pp. 152–166.

Frøberg (2010) = Thomas Frøberg, 'Prinsippstyring av strafferettspolitikken', *Kritisk Juss* 36 (1) 2010, pp. 38–63.

Frände (1989) = Dan Frände, *Den straffrättsliga legalitetsprincipen*, Ekenäs: Juridiska föreningens i Finland publikationsserie, 1989.

Frände (1990) = Dan Frände, 'Finlands främsta straffrättsforskare och den totalitära straffrätten', *Nordisk tidsskrift for kriminalvidenskab* 77 (4) 1990, pp. 243–259.

Frände (2004) = Dan Frände, *Allmän straffrätt*, Helsingfors: Forum Iuris 2004.

Fukuyama (2004) = Francis Fukuyama, *State Building – Governance and World Order in the 21st Century*, Ithaca, New York: Cornell University Press 2004.

Fukuyama (2012) = Francis Fukuyama, *The Origins of the Political Order – From Prehuman Times to the French Revolution*, London: Profile Books 2012.

Fukuyama (2022) = Francis Fukuyama, *Liberalism and its Discontents*, London: Profile Books 2022.

Garland (1990) = David Garland, *Punishment and Modern Society – A Study in Social Theory,* Chicago: The University of Chicago Press 1990.

Garde (2018) = Peter Garde, *Stephan Hurwitz: Professor, Kriminalist, Ombudsmand*, Aarhus: Aarhus University Press 2018.

Giertsen (1992) = Hedda Giertsen, 'Gir den nye kriminalmeldingen 'om bekjempelse av kriminalitet' noe nytt om myndighetenes kriminalpolitikk', *Lov og Rett,* 31 (8) 1992, pp. 478–488.

Goos (1882) = Carl Goos, *Den nordiske strafferet – Almindelig del, Nordisk Retsencyklopædi,* red. T.H. Aschehoug, K.J. Berg og A. F. Krieger, III: Strafferetten, Copenhagen: Gyldendalske Boghandels Forlag 1882.

Goos (1899) = Carl Goos, *Den nordiske strafferet – Speciel del, Nordisk Retsencyklopædi,* red. T.H. Aschehoug, K.J. Berg og A. F. Krieger, III: Strafferetten – Anden afdeling, Copenhagen: Gyldendalske Boghandels Forlag 1899.

Gording Stang (2011) = Elisabeth Gording Stang, 'Alle former for vold mot barn er forbudt – og straffbart?', *Kritisk Juss* 37 (3) 2011, pp. 155–177.

Green (1997) = Stuart P. Green, 'Why It's Crime to Tear the Tag Off Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', *Emory Law Journal* 46 (4) 1997, pp. 1533–1616.

Green (2020) = Stuart P. Green, *Criminalizing Sex – A Unified Liberal Theory*, Oxford: Oxford University Press 2020.

Greve (2002) = Vagn Greve, *Straffene*, 2. udgave. København: Jurist- og Økonomforbundets forlag 2002.

Greve (2004) = Vagn Greve, *Det strafferetlige ansvar*, 2. udgave. Copenhagen: Jurist- og Økonomforbundets forlag.

Greve (2005) = Vagn Greve, 'Sheep or wolves'*, European Journal of crime, criminal law, and criminal justice* 13 (4) 2005, pp. 515–532.

Gröning (2008) = Linda Gröning, *EU, staten och rätten att straffa: Problem och principer för EU:s straffrättsliga lagstiftning*, Stockholm: Santérus 2008.

Gröning (2013) = Linda Gröning, 'Straffgenomföring som en del av straffrättssystemet: Principförklaring av fängelsestraffets innehåll', *Tidsskrift for Rettsvitenskap* 126 (1) 2013, pp. 145–196.

Gröning (2014a) = Linda Gröning, 'Kriminell lavalder' – noen utgangspunkter', *Tidsskrift for strafferett* 14 (4) 2014, pp. 314–322.

Gröning (2014b) = Linda Gröning, 'Education for foreign inmates in Norwegian prisons: A legal and humanitarian perspective', *Bergen Journal of Criminal Law and Criminal Justice* 2 (2) 2014, pp. 164–188.

Gröning/Husabø/Jacobsen (2023) = Linda Gröning, Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, 3rd edition, Bergen: Fagbokforlaget 2023.

Gröning (2022) = Linda Gröning, 'Criminal Insanity in Norwegian Law', in Ronnie Mackay and Warren Brookbanks, *The Insanity Defence – International and Comparative Perspectives*, Oxford: Oxford University Press 2022, pp. 295–315.

Gröning/Jacobsen (2021) = Linda Gröning and Jørn Jacobsen, 'Styrket lovskrav – bare i Høyesterett? Et kritisk perspektiv på utviklingen i straffelovgivningen', Knut Bergsjø et al (eds.), *Med ære og samvittighet – Festskrift til Magnus Matningsdal*, Oslo: Gyldendal 2021, pp. 118–134.

Guyer (2016) = Paul Guyer, 'The Twofold Morality of *Recht*: Once More Unto the Breach', *Kant-Studien* 107 (1) 2016, pp. 34–63.

Guyer/Horstmann (2021) = Paul Guyer and Rolf-Peter Horstmann, 'Idealism', In *Stanford Encyclopedia of Philosophy* (last revision 2021), available at Idealism (Stanford Encyclopedia of Philosophy) (last accessed 08.12.23).

Habermas (1992) = Jürgen Habermas, *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main: Suhrkamp 1992.

Hagerup (1893) = Francis Hagerup, 'Nyere Strafferetsbevægelser', in Francis Hagerup (ed.), *Forhandlinger ved Den norske kriminalistforenings første møde i oktober 1892*, Kristiania: H. Aschehoug & Co, 1893.

Hagerup (1895) = Francis Hagerup (ed.), *Forhandlinger ved Den norske kriminalistforenings tredie møde i november 1894*, Kristiania: H. Aschehoug & Co, 1895.

Hagerup (1907) = Francis Hagerup, 'Det psykologiske Grundlag for Retten', *Tidsskrift for Retsvidenskab*, 20 1907, pp. 1–14.

Hagerup (1911) = Francis Hagerup, *Strafferettens almindelige del*, Kristiania: Aschehoug 1911.

Hamdorf (2022) = Kai Hamdorf, 'The Criminal Law's Person and Excuses', in Claes Lernestedt and Matt Matravers (eds), *The Criminal Law's Person*, Oxford: Hart Publishing 2022, pp. 33–50.

Hanna (2006) = Robert Hanna, *Rationality and Logic*, Cambridge, Massachusetts: MIT Press 2006.

Harel (2014) = Alon Harel, *Why Law Matters*, Oxford: Oxford University Press 2014.

Hart (1968) = Herbert L. A. Hart, *Punishment and Responsibility – Essays in the Philosophy of Law*, Oxford: Oxford University Press 1968.

Hart (1997) = Herbert L. A. Hart, *The Concept of Law*, second edition, Oxford: Oxford University Press 1997.

Hauge (1996) = Ragnar Hauge, *Straffens begrunnelser*, Oslo: Universitetsforlaget 1996.

Heckscher et al. (1980) = Sten Heckscher, Annika Snare, Hannu Takala and Jørn Vestergaard (eds.), *Straff och rättfärdighet – ny nordisk debatt*, Stockholm: P. A. Norstedt & Söners Förlag 1980.

Hefendehl/Hirsch/Wohlers (2003) = Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie – Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?,* Baden-Baden: Nomos 2003.

Hegel (1821) = G. W. F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, 1821, Reprint, Frankfurt am Main: Suhrkamp 1986.

Heivoll (2017) = Geir Heivoll, *Lovens lange arm? En studie av politibetjenters rolle som rettshåndhevere i den norske demokratiske rettsstaten*, Kristiansand: Universitetet i Agder 2017.

Hilgendorf (2013) = Eric Hilgendorf, 'Contemporary German Criminal Jurisprudence', *Peking University Law Journal*, 1 (1) 2013 pp. 181–195.

Hilgendorf (2014) = Eric Hilgendorf, 'Paul Johan Anselm von Feuerbach und die Rechtsphilosophie der Aufklärung', in Arnd Koch, Michael Kubiciel, Martin Löhnig and Michael Pawlik (eds.), *Feuerbachs Bayerisches Strafgesetzbuch – Die Geburt liberalen, modernen und rationalen Strafrechts*, Tübingen: Mohr Siebeck 2014, pp. 149–169.

Hill (2003) = Thomas E. Hill Jr., 'Treating Criminals as Ends in Themselves', *Jahrbuch für Rechts und Ethik*, 11 2003, pp. 17–36.

Hirsch (2001) = Andrew von Hirsch, *Proportionalitet och straffbestämning*, Uppsala: Iustus 2001.

Hirsch (2008) = Andrew von Hirsch, 'Should there be constitutional constraints against grossly proportionate punishments?", in Thomas Elholm, Petter Asp, Flemming Balvig, Birgit Feldtmann, Kimmo Nuotio og Asbjørn Strandbakken (eds.), *Ikke kun straf – Festskrift til Vagn Greve*, Copenhagen: Jurist- og Økonomforbundets forlag 2008, pp. 211–219.

Hirsch (2017) = Philipp-Alexander Hirsch, *Freiheit und Staatlichkeit bei Kant: die autonomietheoretische Begründung von Recht und Staat und das Widerstandsproblem, Kant-Studien (Vol. 194), Ergänzungshefte*, Berlin: De Gruyter 2017.

Hirsch et al. (1999) = Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney and P.-O. Wikström, *Criminal deterrence and Sentence Severity – An analysis of recent research,* Portland, Oregon: Hart Publishing 1999.

Hirsch/Jareborg (1987) = Andrew von Hirsch and Nils Jareborg, 'Straff och proportionalitet', *Nordisk Tidsskrift for Kriminalvidenskab* 74 (4) 1987, pp. 300–323.

Hirsch/Jareborg (1991) = Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis', *Oxford Journal of Legal Studies* 11 (1) 1991, pp. 1–38.

Hjelmeng/Jacobsen (2021) = Erling Hjelmeng and Jørn Jacobsen, 'Skyldkravet i konkurranseretten – mot et objektivt ansvar for systemsvikt?', *Tidsskrift for rettsvitenskap* 134 (1) 2021, pp. 3–45.

Hobbes (1651) = Thomas Hobbes, *Leviathan, or The Matter, Form, and Power of a Commonwealth Ecclesiastical,* (1651), quoted from reprint, ed. J.C.A. Gaskin, Oxford 1996,

Holmgren (2021) = Axel Holmgren, *Straffvärde – som rättslig konstruktion*, Uppsala: Iustus 2021.

Holter (2020) = Katrine Holter, *Hensikt – og omkringliggende begreper i strafferetten*, Oslo: Karnov 2020.

Holtman (1997) = Sarah Williams Holtman, 'Toward Social Reform: Kant's Penal Theory Reinterpreted', *Utilitas*, 9 (1) 1997, pp. 3–21.

Horder (2022) = Jeremy Horder, 'Criminal Law and Republican Liberty: Philip Pettit's Account', *Criminal Law and Philosophy* 16 (2022), pp. 193–213.

Hruschka (1986) = Joachim Hruschka, 'Imputation', *Brigham Young University Law Review*, (3) 1986, pp. 669–710.

Hruschka (2010) = Joachim Hruschka, 'Die „Verabschiedung" Kants durch Ulrich Klug im Jahre 1968', *Zeitschrift für die gesamte Strafrechtswissenschaft,* 122 (3), pp. 493–503.

Hruschka (2012) = Joachim Hruschka, 'Die Interpretation von Kants Strafrechtsphilosophie – eine Wissenschaft oder eine Ideologie? ', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 124 (1) 2021, pp. 232–235.

Hurwitz (1952) = Stephan Hurwitz, *Kriminalret – Almindelig del*, Copenhagen: Gad 1952.

Husa/Nuotio/Philajamäki (2007) = Jaakko Husa, Kimmo Nuotio, Heikki Pihlajamäki (eds.), *Nordic Law Between Tradition and Dynamism*, Antwerp: Intersentia 2007.

Husabø (1994) = Erling Johannes Husabø, *Rett til sjølvvalt livsavslutning?*, Oslo: Ad notam Gyldendal 1994

Husabø (2018) = Erling Johannes Husabø, *Terrorisme i norsk strafferett: ein analyse av straffelova kapittel 18*, Bergen: Fagbokforlaget 2018.

Husabø/Bruce (2009) = Erling Johannes Husabø and Ingvild Bruce, *Fighting terrorism through multilevel criminal legislation: Security Council Resolution 1373, the EU framework decision on combating terrorism and their implementation in Nordic, Dutch and German criminal law,* Leiden: Nijhoff 2009.

Husak (2004) = Douglas Husak, 'What Moral Philosophers Might Learn from Criminal Theorists', *Rutgers Law Journal*, 36 (1) 2004, pp. 191–198.

Husak (1992) = Douglas N. Husak, *Drugs and Rights*, Cambridge: Cambridge University Press 1992.

Husak (2007) = Douglas Husak, *Overcriminalization – The Limits of the Criminal Law*, Oxford: Oxford University Press 2007.

Høivik (2012) = Knut Høivik, *Foretaksstraff – En analyse av ansvarskonstruksjonen og dens historiske, rettspolitiske og moralske forutsetninger*, Oslo: Cappelen Damm 2012.

Häthén (1990) = Christian Häthén, *Straffrättsvetenskap och kriminalpolitik – De europeiska straffteorierna och deras betydelse för svensk strafflagsstiftning 1906–1931: Tre studier*, Lund: Lund University Press 1990.

Höffe (2006) = Otfried Höffe, *Kant's Cosmopolitan Theory of Law and Peace,* (Modern European Philosophy), English translation: Cambridge: Cambridge University Press 2006.

Höffe (2010) = Otfried Höffe, *Kant's Critique of Pure Reason: The Foundation of Modern Philosophy*, Studies in German Idealism Volume 10, Dordrecht: Springer 2010.

Hörnle (2014) = Tatjana Hörnle, 'PJA von Feuerbach and his Textbook of the Common Penal Law', Markus Dirk Dubber (ed.), *Foundational Texts in Modern Criminal Law*, Oxford: Oxford University Press 2014, pp. 119–140.

Hörnle (2016) = Tatjana Hörnle, 'Guilt and Choice in Criminal Law Theory – A Critical Assessment'. *Bergen Journal of Criminal Law and Criminal Justice* 4 (1) 2016, pp. 1–24.

James (2020) = David James, 'Crime, contract and humanity: Fichte's theory of punishment', *British Journal for the History of Philosophy* 30 (4) 2020, pp. 609–625.

Jacobsen (2004) = Jørn Jacobsen, 'Allmennprevensjon og straff', *Nordisk Tidsskrift for Kriminalvidenskab* 91 (4) 2004, pp. 311–320.

Jacobsen (2009a) = Jørn Jacobsen, *Fragment til forståing av den rettsstatlege strafferetten*, Bergen: Fagbokforlaget 2009.

Jacobsen (2009b) = Jørn Jacobsen, 'Fiksjon utan moral eller konstruksjon utan verdi? Om det ideologiske grunnlaget for straffansvar for juridiske personar', *Tidsskrift for strafferett* 9 (1) 2009, pp. 43–75.

Jacobsen (2010) = Jørn Jacobsen, 'The Methodology of the Norwegian Criminal Law Doctrine', Thomas Elholm et al. (ed.): *Liber amicarum et amicorum Karin Cornils – Glimt af nordisk straffrätt og straffeprosessrett*, Copenhagen: Jurist- og Økonomforbundets forlag 2010, pp. 243–266.

Jacobsen (2011a) = Jørn Jacobsen, 'Zur gegenwärtigen norwegischen Strafrechtsdogmatik: Andenæs und die Folgen', *Zeitschrift für die gesamte Strafrechtswissenschaft* 123 (3) 2011, pp. 609–632.

Jacobsen (2011b) = Jørn Jacobsen, 'Pufendorf og den europeiske strafferettsdoktrinen', in Ulrika Andersson, Christoffer Wong and Helén Örnemark Hansen (eds.), *Festskrift til Per Ole Träskman*, Lund: Norstedts Juridik 2011, s. 247–258

Jacobsen (2012) = Jørn Jacobsen, 'Eit grunnriss av ei strafferettsleg ansvarslære', *Tidsskrift for strafferett* 12 (1) 2012, pp. 6–26.

Jacobsen (2014) = Jørn Jacobsen, 'I selve Dybderne af den menneskelige Bevidsthed om Ret og Moral': Straffelova av 1902 og den tyske skulestriden', in Geir Heivoll and Sverre Flaatten (eds.): *'Straff, lov, historie' – Historiske perspektiver på straffeloven av 1902*, Oslo: Akademisk forlag 2014, pp. 44–85.

Jacobsen (2015) = Jørn Jacobsen, 'Vitskap og demokrati i strafferettsutviklinga', in Jan Fridthjof Bernt, Cathrine Holst and Steinar Stjernø (eds.), *Rett og politikk: nye perspektiver på demokratiets forutsetninger, utforming og grenser*, Oslo: Pax 2015, pp. 272–288.

Jacobsen (2017a) = Jørn Jacobsen, 'Constitutions and Criminal Law Reform', *Bergen Journal of Criminal Law and Criminal Justice* 5 (1) 2017, pp. 18–36.

Jacobsen (2017b) = Jørn Jacobsen, 'Konstitusjonelle dimensjonar ved den norske straffelovsreforma (1978–2015) ', *Tidskrift utgiven av Juridiska Föreningen i Finland – Festskrift till Dan Frände* (2–4) 2017, pp. 399–414.

Jacobsen (2017c) = Jørn Jacobsen, *Hagerup og den strafferettslige anvarslæra*, Bergen: Fagbokforlaget 2017.

Jacobsen (2017d) = Jørn Jacobsen, 'Gjensyn med kriminalretten?', in Geir Heivoll and Sverre Flaatten (eds.), *Rettslige overgangsformer: Politi- og kriminalrett i nordisk rettsutvikling*, Oslo: Akademisk forlag 2017, pp. 284–325.

Jacobsen (2019) = Jørn Jacobsen, *Valdtektsstraffebodet – Gjeldande rett og spørsmålet om reform*, Bergen: Fagbokforlaget 2019.

Jacobsen (2020) = Jørn Jacobsen, 'Is the Last Laugh on Liszt? On the Development of the Norwegian System of Criminal Sanctions', *Zeitschrift für die gesamte Strafrechtswissenschaft* 132 (1) 2020, pp. 223–249.

Jacobsen (2021a) = Jørn Jacobsen, 'Grunnlova § 93, historisk kommentar', in Ola Mestad and Dag Michalsen (eds.), *Grunnloven – Historisk kommentarutgave 1814–2016*, Oslo: Universitetsforlaget 2021, pp. 909–928.

Jacobsen (2021b) = Jørn Jacobsen, 'How Can Legal Doctrine be a Scientific Discipline? Methodological Groundworks for the Norwegian Criminal Law Doctrine', in Shin Matsuzawa and Kimmo Nuotio (eds.), *Methodology of Criminal Law Theory: Art, Politics or Science?,* Baden-Baden: Nomos/Hart Publishing (2021), pp. 105–128.

Jacobsen (2022a) = Jørn Jacobsen, 'Norsk strafferettstenking i bryting', in Geir Heivoll and Terje E. Fredwall (eds.), *Straffens etikk*, Oslo: Scandinavian Academic Press 2022, pp. 25–50.

Jacobsen (2022b) = Jørn Jacobsen, *Legal reform research – Groundworks for legal scholarship*, Oslo: Karnov 2022.

Jacobsen (2023a) = Jørn Jacobsen, 'What counts as progress in criminal law scholarship?', *Law and Method – Special Issue Progress in Legal Scholarship*, Marnix Snel, Sanne Taekema & Gijs van Dijck (eds.) 2023 pp. 1–14.

Jacobsen (2023b) = Jørn Jacobsen, 'Rusreforma som reguleringsutfordring' in Berte-Elen Reinertsen Konow, Hans Fredrik Marthinussen og Knut Einar Skodvin (eds.), *Fakultetsbyggjar, vestlending og verdsborgar – Festskrift til Ernst Nordtveit 70 år*, Oslo: Cappelen Damm Akademisk 2023, pp. 633–649.

Jacobsen (2023c) = Jørn Jacobsen, 'Norway', in Pedro Caeiro et al., *Elgar Encyclopedia of Crime and Criminal Justice*, forthcoming 2024, currently available at https://www.elgaronline.com/display/book/9781789902990/9781789902990.xml

Jacobsen/Skilbrei (2021) = Jørn Jacobsen and May-Len Skilbrei, 'Reforming the rape offence in Norwegian criminal law', *Bergen Journal of Criminal Law and Criminal Justice* 8 (2) 2020, pp. 78–94.

Jacobsen/Taslaman (2018) = Jørn Jacobsen and Selma Taslaman, 'The Norwegian Criminal Regulation of Drugs: An Overview and Some Principled Challenges', *Bergen Journal of Criminal Law and Criminal Justice* 6 (1) 2018, pp. 20–52.

Jacobsen/Westrum (2021) = Jørn Jacobsen and Victoria Westrum, 'Status report: A Norwegian decriminalisation of use and possession of drugs?', *Bergen Journal of Criminal Law and Criminal Justice* 9 (1) 2021, pp. 42–48.

Jacobsen/Westrum (2022) = Jørn Jacobsen and Victoria Westrum, 'New steps towards a Norwegian drug reform? Three recent Supreme Court cases concerning sentencing for drug crimes', *Bergen Journal of Criminal Law and Criminal Justice* 10 (1), pp. 57–64.

Jakobs (1985) = Günther Jakobs, 'Kriminalisering im Vorfeld einer Rechtsgutsverletzung', *Zeitschrift für die gesamte Strafrechtswissenschaft* 97 (4) 1985, pp. 751–785.

Jakobs (1991) = Günther Jakobs, 'Strafrecht –Allgemeiner Teil, Die Grundlagen und die Zurechnungslehre', second edition, Berlin: De Gruyter 1991.

Jareborg (1969) = Nils Jareborg, *Handling och uppsåt: en undersökning rörande doluslärans underlag*, Norstedt, Stockholm 1969.

Jareborg (1980) = Nils Jareborg, 'Kriminalisering', in Sten Hecksher et al. (eds.), *Straff och rättfärdighet – ny nordisk debatt*, Stockholm: P. A. Norstedt & Söners Förlag 1980, pp. 33–45.

Jareborg (1992) = Nils Jareborg, *Straffrättsideologiska fragment,* Uppsala: Iustus 1992.

Jareborg (1995) = Nils Jareborg, 'What Kind of Criminal Law Do We Want? ', in Annika Snare (ed), *Beware of Punishment: On the Utility and Futility of Criminal Law*, Oslo: Pax 1995, pp. 17–36.

Jareborg (1999) = Nils Jareborg, 'Alf Ross som straffrättsdogmatiker', *Nordisk Tidsskrift for Kriminalvidenskab* 86 (3) 1999, pp. 161–170.

Jareborg (2000a) = Nils Jareborg, 'Strafrecht und Ideologie (Kommentar)', in Albin Eser, Winfried Hassemer and Björn Burkhardt, Björn (eds.), *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende – Rückbesinnung und Ausblick,* München: Beck 2000, pp. 411–415.

Jareborg (2000b) = Nils Jareborg, 'Crime Ideologies', in Peter Wahlgren (ed.), *Legal theory, Scandinavian Studies in Criminal Law* (40) 2000, pp. 431–443.

Jareborg (2002) = Nils Jareborg, *Scraps of Penal Theory*, Uppsala: Iustus 2002.

Jareborg (2005) = Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)', *Ohio State Journal of Criminal Law* 2 (2) 2005, pp. 521–534.

Jescheck/Weigend (1996) = Hans Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts – Allgemeiner Teil*, 5., completely revised and expanded edition, Berlin: Duncker & Humblot 1996.

Johansen/Ugelvik/Franko Aas (2013) = Nicolay B. Johansen, Thomas Ugelvik and Katja Franko Aas (eds.), *Krimmigrasjon – Den nye kontrollen med de fremmede*, Oslo: Universitetsforlaget 2013.

Jung (1998) = Heike Jung, 'L´Etat et moi': Some Reflections on the Relationship between the Criminal Law and the State', *European Journal of Crime, Criminal Law and Criminal Justice* 6 1998, pp. 208–215.

Jung (2007) = Heike Jung, 'Use and abuses of criminal law responses to terrorism', Kimmo Nuotio (ed.), *Festschrift in Honour of Raimo Lahti*, Helsinki: Publications of the Faculty of Law Helsinki University 2007, pp. 97–109.

Jung/Müller-Dietz/Neumann 1991 = Heike Jung, Heinz Müller-Dietz and Ulfried Neumann (eds.), *Recht und Moral – Beiträge zu einer Standortbestimmung*, Baden-Baden: Nomos 1991.

Kamber (2013) = Simon Kamber, 'Psykisk syge lovovertrædere i et komparativt lys', *Nordisk Tidsskrift for Kriminalvidenskab* 100 (3) 2013, pp. 358–368.

Kant (1781/1787) = Immanuel Kant, *Critique of pure reason* (1781/1787), in Paul Guyer and Allen W. Wood (eds.), *The Cambridge Edition of the Works of Immanuel Kant: Critique of Pure Reason,* Cambridge: Cambridge University Press 1998.

Kant (1784a) = Immanuel Kant, *An answer to the question: What is enlightenment?* (1784), in Mary J. Gregor (ed.*), The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, Cambridge: Cambridge University Press 1996, pp. 11–22.

Kant (1784b) = Immanuel Kant, *Idea for a universal history with a cosmopolitan aim* (1784), in Robert B. Louden and Günther Zöller (eds.), *The Cambridge Edition of the Works of Immanuel Kant: Anthropology, History, and Education,* Cambridge: Cambridge University Press 2007, pp. 107–120.

Kant (1784–1785a) = Immanuel Kant, *Lecture of the winter semester 1784–1785, based on the transcription Mrongovius, Marienburg*, in Allen W. Wood and Robert B. Louden (eds.), *The Cambridge Edition of the Works of Immanuel Kant: Lectures on Anthropology*, Cambridge: Cambridge University Press 2012, pp. 335–509.

Kant (1784–1785b) = Immanuel Kant, *Moral philosophy lectures of the winter semester 1784–1785, based on the transcription Collins*, in Peter Heath and J.B. Schneewind (eds.), *The Cambridge Edition of the Works of Immanuel Kant: Lectures on Ethics*, Cambridge: Cambridge University Press 1997, pp. 37–222.

Kant (1785) = Immanuel Kant, *Groundwork of The metaphysics of morals* (1785), in Mary J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, Cambridge: Cambridge University Press 1996, pp. 41–108.

Kant (1786) = Immanuel Kant, *Conjectural beginning of human history* (1786), in Robert B. Louden and Günther Zöller (eds.), *The Cambridge Edition of the Works of Immanuel Kant: Anthropology, History, and Education*, Cambridge: Cambridge University Press 2007, pp. 160–175

Kant (1788) = Immanuel Kant, *Critique of practical reason* (1788), in Mary J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy,* Cambridge: Cambridge University Press 1996, pp. 137–271.

Kant (1790) = Immanuel Kant, *Critique of the power of judgment* (1790), in Paul Guyer (ed.), *The Cambridge Edition of the Works of Immanuel Kant: Critique of the Power of Judgment,* Cambridge: Cambridge University Press 2000.

Kant (1797/1798) = Immanuel Kant. *The metaphysics of morals* (1797/1798), in Mary J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy,* Cambridge: Cambridge University Press 1996, pp. 353–603.

Kant (1793) = Immanuel Kant, *On the common saying: That may be correct in theory, but it is of no use in practice* (1793), in Mary J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, Cambridge: Cambridge University Press 1996, pp. 273–309.

Kant (1798) = Immanuel Kant, *The conflict of the faculties* (1798), in Allen W. Wood and George di Giovanni (eds.), *The Cambridge Edition of the Works of Immanuel Kant: Religion and Rational Theology,* Cambridge: Cambridge University Press 1996, pp. 237–327.

Kant (1798/1800) = Immanuel Kant, *Anthropology from a pragmatic point of view* (1798/1800), in Robert B. Louden and Günther Zöller (eds.), *The Cambridge Edition of the Works of Immanuel Kant: Anthropology, History, and Education*, Cambridge: Cambridge University Press 2016, pp. 227–429.

Kant (1800) = Immanuel Kant, *The Jäsche logic* (1800), in J. Michael Young (ed.), *The Cambridge Edition of the Works of Immanuel Kant: Lectures on Logic,* Cambridge: Cambridge University Press 1992, pp. 517–640.

Kant (2016) = Immanuel Kant, *Lectures and Drafts on Political Philosophy*, in Frederick Rauscher (ed.), *The Cambridge Edition of the Works of Immanuel Kant*, Cambridge: Cambridge University Press 2016.

Kaufman (1999) = Andreas Kaufman, *Welfare in the Kantian State*, Oxford: Oxford University Press 1999.

Kettunen (2015) = Merita Kettunen, *Legitimizing the use of transnational criminal law – The European framework*, Helsinki: University of Helsinki 2015.

Kinander (2004) = Morten Kinander, *The view from within – An analysis and critique of descriptive jurisprudence*, Bergen: Fagbokforlaget 2004.

Kinander (2013) = Morten Kinander, 'Straffens begrep og begrunnelse i norsk rett – en kritikk', *Jussens Venner* 48 (3) 2013, pp. 155–192.

Kinberg (1935) = Olof Kinberg, *Basic Problems in Criminology,* Copenhagen: William Heinemann 1935.

Kjelby (2013) = Gert Johan Kjelby, *Mellom rett og plikt til straffeforfølgning: den relative etterforskings- og påtalepliktens rettslige rammer og rettslige utvikling i norsk straffeprosess*, Oslo: Cappelen Damm 2013.

Kjølstad (2023) = Marius Mikkel Kjølstad, 'Naturrett i Norge ca. 1814–1840. Også en historie.', *Tidsskrift for rettsvitenskap* 136 (1) 2023, pp. 3–89.

Klami (1986) = Hannu Tapani Klami, *A History of Finnish Legal Science – An Outline*, Oikeustiede – Jurisprudentia XIX, Vammala 1986.

Klug (1968) = Ulrich Klug, 'Abschied von Kant und Hegel', in Jürgen Baumann (ed.), *Programm für ein neues Strafgesetzbuch – Der Alternativ-Entwurf der Strafrechtslehrer*, Frankfurt am Main: Fischer Bücherei 1968, pp. 36–41.

Knust (2013) = Nandor Knust, *Strafrecht und Gacaca – Entwicklung eines pluralistischen Rechtsmodells am Beispiel des ruandischen Völkermordes*, Berlin: Duncker & Humblot.

Koch et al. (2014) = Arnd Koch, Michael Kubiciel, Martin Löhnig and Michael Pawlik (eds.), *Feuerbachs Bayerisches Strafgesetzbuch – Die Geburt liberalen, modernen und rationalen Strafrechts*, Tübingen: Mohr Siebeck 2014.

Koivukari 2020 = Kristiina Koivukari, *The crumbling narrative of modern European criminal justice*, Helsinki: University of Helsinki 2020.

Koivukari (2022) = Kristiina Koivukari, 'The role of the Nordic approach to criminal law and policy in the inter-legal world of law', *Nordisk Tidsskrift for Kriminalvidenskab* 109 (1) 2022, pp. 135–142.

Korkka-Knuts (2022) = Heli Korkka-Knuts, 'Behaviourally informed approach to corporate criminal law: Ethicality as efficiency', *Bergen Journal of Criminal Law and Criminal Justice* 10 (1) 2022, pp. 27–56.

Krey (1983) = Volker Krey, *Kein Strafe ohne Gesetz – Einführung in die Dogmengeschichte des Satzes 'nullum crimen, nulla poena sine lege*, Berlin: De Gruyter 1983.

Krunke/Thorarensen (2028) = Helle Krunke and Björg Thorarensen (eds.), *The Nordic Constitutions – A Comparative and Contextual Study,* Oxford: Hart Publishing 2018.

Kuehn (2001) = Manfred Kuehn, *Kant – A biography*, Cambridge: Cambridge University Press 2001.

Kuehn (2010) = Manfred Kuehn, 'Kant's *Metaphysics of Morals*: the history and the relevance of its deferral', in Lara Denis (ed.), *Kant's Metaphysics of Morals – A Critical Guide*, Cambridge: Cambridge University Press 2010, pp. 9–27.

Küpper (2003) = Georg Küpper, 'Richtiges Strafen: Fragestellungen zwischen Strafrechtsdogmatik und Rechtsphilosophie', *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* 11 2003, pp. 53–82.

Lacey (2016) = Nicola Lacey, *In Search of Criminal Responsibility – Ideas, Interests, and Institutions*, Oxford: Oxford University Press 2016.

Lacey (2019) = Nicola Lacey, 'Populism and the Rule of Law', *Annual Review of Law and Society* 15 2019, pp. 79–96.

Lahti (2000) = Raimo Lahti, 'Towards a Rational and Humane Criminal Policy: Trends in Scandinavian Penal Thinking', *Journal of Scandinavian Studies in Criminology and Crime Prevention* 1 (2) 2000, pp. 141–155.

Lahti (2017) = Raimo Lahti, 'Utvecklingslinjer i den finländska straffrättsvetenskapen från 1970-talet till 2010-talet', *Tidskrift utgiven av Juridiska Föreningen i Finland (Festskrift till Dan Frände)* 2–4 2017, pp. 529–546.

Lahti (2020) = Raimo Lahti, 'Multilayered criminal policy: The Finnish experience regarding the development of Europeanized criminal justice', *New Journal of European Criminal Law* 11 (1) 2020, pp. 7–19.

Lahti (2021) = Raimo Lahti, *Towards an Efficient, Just and Human Criminal Justice, Nordic Essays on Criminal Law, Criminology and Criminal Policy 1972–2020*, Helsinki: The Finnish Lawyer's Association 2021.

Langsted/Garde/Greve (2014) = Lars Bo Langsted, Peter Garde and Vagn Greve, *Criminal Law in Denmark*, fourth edition, Copenhagen: Jurist- og Økonomforbundets forlag 2004.

Lappi-Seppälä (2008) = Tapio Lappi-Seppälä, 'Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies', *Crime & Justice* 37 (1) 2008, pp. 313–387.

Lappi-Seppälä (2011) = Tapio Lappi-Seppälä, 'Nordic Youth Justice', *Crime & Justice* 40 (1) 2011, pp. 199–264.

Lappi-Seppälä (2012) = Tapio Lappi-Seppälä, 'Penal Policies in the Nordic Countries 1960–2010', *Journal of Scandinavian Studies in Criminology and Crime Prevention* 13 2012, pp. 85–111

Lappi-Seppälä (2016) = Tapio Lappi-Seppälä, 'Nordic Sentencing', *Crime & Justice* 45 (1) 2008, pp. 17–82.

Lappi-Seppälä (2019) = Tapio Lappi-Seppälä, 'Community Sanctions in the Nordic Countries', *Law and Contemporary Problems* 82 (1) 2019, pp. 17–50.

Lappi-Seppälä (2020) = Tapio Lappi-Seppälä, 'Humane Neoclassicism in Nordic Sentencing', in Michael Tonry (ed.), *Of one-eyed and toothless miscreants – Making the punishment fit the crime?*, Oxford: Oxford University Press 2020, pp. 209–235.

Lazarri (2001) = Alessandro Lazarri, 'Eine Fessel, die nicht schmertzt und nicht sehr hindert: Fichtes Begründung des Strafrechts nach den Prinzipien des Wissenschaftslehre', in Jean-Christoph Merle (ed.), *Johann Gottlieb Fichte – Grundlage des Naturrechts*, Berlin: Akademie Verlag 2001, pp. 173–186.

Lernestedt (2003) = Claes Lernestedt, *Kriminalisering – Problem och principer*, Stockholm: Iustus 2003.

Lernestedt/Matravers (2022) = Claes Lernestedt and Matt Matravers (eds.), *The Criminal Law's Person*, Oxford: Hart Publishing 2022.

Liszt (1882) = Franz von Liszt, 'Der Zweckgedanke im Strafrecht' (1882), in Franz von Liszt, *Strafrechtliche Aufsätze und Vorträge, Band 1: 1875 bis 1891*, Berlin: De Gruyter 1905 (reprint 1970), pp. 126–179.

Liszt (1919) = Franz von Liszt, *Lehrbuch des Deutschen Strafrechts*, 23. Aufl. (41.–43. Tausend) nach dem Tode des Verfassers besorgt von Eberhard Schmidt, Berlin: De Gruyter 1921 (reprint 2021).

Louden (2011) = Robert B. Louden, *Kant´s Human Being – Essays on His Theory of Human Nature*, Oxford: Oxford University Press 2011.

Lovett (2010) = Frank Lovett, *A General Theory of Domination and Justice*, Oxford: Oxford University Press 2010.

Ludwig (2015) = Bernd Ludwig, 'Sympathy for the Devil(s)? Personality and Legal Coercion in Kant's *Doctrine of Law*, *Jurisprudence* 6 (1) 2015, pp. 25–44.

Lukes (2005) = Steven Lukes, *Power: A Radical View*, London: Palgrave Macmillian 2005.

Lundstedt (1920) = Anders V. Lundstedt, *Föreläsningar över valda delar av obligationsrätten: 1: Principinledning: kritik av strafferättens grundåskådningar*, Uppsala: Norblads bokhandel 1920.

Lüderssen (2011) = Klaus Lüderssen, 'Präventionsorientierte Zurechnung – aktuelle Programme für die Strafverteidigung', *Strafverteidiger* 2011, pp. 377–380.

MacKinnon (2001) = Malcom H. MacKinnon, 'Max Weber's Disenchantment – Lineages of Kant and Channing', *Journal of Classical Criminology* 1 (3) 2001, pp. 329–351.

Maliks (2009) = Reidar Maliks, 'Prussian polis – Kant's democratic republicanism', *Philosophy & Social Criticism* 35 (4) 2009, 427–445.

Maliks (2014) = Reidar Maliks, *Kant's Politics in Context*, Oxford: Oxford University Press 2014.

Maliks (2022) = Reidar Maliks, *Kant and the French Revolution*, Cambridge: Cambridge University Press 2022.

Martinsson (2016) = Dennis Martinsson, *Om straffrättsvillfarelse*, Stockholm: Wolters Kluwer 2016.

Mathiesen (2015) = Thomas Mathiesen, *The Politics of Abolitionism Revisited*, London and New York: Routledge 2015.

Matikkala (2006) = Jussi Matikkala, 'Dolus nordicus', *Nordisk Tidsskrift for Kriminalvidenskab* 93 (2) 2006, pp. 127–139.

Matsuzawa/Nuotio (2022) = Shin Matsuzawa and Kimmo Nuotio, *Methodology of Criminal Law Theory – Art, Politics, or Science?*, Baden-Baden: Nomos/Hart 2022.

McCarty (2009) = Richard McCarty, *Kant's Theory of Action*, Oxford: Oxford University Press 2009.

Melander (2013) = Sakari Melander, 'Ultima ratio in European criminal law', *European Criminal Law Review* 3 (1) 2013, pp. 45–64.

Melander (2017) = Sakari Melander, 'Criminalization and its limitations – The Finnish Perspective', *Peking University Law Journal* 5 (1) 2017, pp. 51–75.

Melander (2023) = Sakari Melander, 'Preventive turn in criminal law', *Peking University Law Journal* 11 (1) 2023, pp. 11–23.

Merle (2000) = Jean-Christophe Merle, 'A Kantian Critique of Kant's Theory of Punishment', *Law and Philosophy* 19 (3) 2000, pp. 311–338.

Mestad (2013) = Ola Mestad (ed.), *Frihetens forskole – Professor Schlegel og eidsvollsmennenes læretid i København, Nye perspektiver på Grunnloven 1814–2014*, Oslo: Pax forlag 2013.

Michalsen (1997) = Dag Michalsen, 'Schweigaard og Lasson som straffe- og prosessrettslige forfattere – En sammenligning', *Tidsskrift for Rettsvitenskap* 110 (3) 1997, pp. 365–388.

Mill (1859) = John Stuart Mill, *On Liberty* [1859], reprint ed. Gertrude Himmelfarb, London: Penguin books 1985.

Montenbruck (2020) = Axel Montenbruck, *Deutsche Straftheorie I-IV. Lehrbuch in vier Teilen,* 4th revised and considerably expanded edition. Open access. Berlin: Der Freien Universität der Berlin 2020.

Moore (2010) = Michael S. Moore, *Placing Blame – A Theory of the Criminal Law*, Oxford: Oxford University Press 2010.

Mosbacher (2004) = Andreas Mosbacher, 'Kants präventive Straftheorie', *Archiv für Rechts- und Sozialphilosophie* 90 (2) 2004, pp. 210–225.

Murphy (1987) = Jeffrie G. Murphy, 'Does Kant Have a Theory of Punishment?', *Columbia Law Review* 87 (3) 1987, pp. 509–532.

Murray (2008) = Ronald King Murray (Lord Murray), 'The Origin of Immanuel Kant's Family Name', *Kantian Review* 13 (1) (2008), pp. 190–193.

Møller (2013) = Sofie C. Møller, 'The Court of Reason in Kant's Critique of Pure Reason', *Kant-Studien* 104 (3) 2013, pp. 301–320.

Møller (2020) = Sofie C. Møller, *Kant's Tribunal of Reason – Legal Metaphor and Normativity in the Critique of Pure Reason*, Cambridge: Cambridge University Press 2020.

Møller (2021) = Sofie Møller, 'Kant on Non-Linear Progress', *Etica & Politica / Ethics & Politics* 23 (2) 2021, pp. 127–147.

Naucke (1962) = Wolfgang Naucke, *Kant und die psychologische Zwangstheorie Feuerbachs,* Hamburg: Hansischer Gildenverlag, J. Heitmann 1962.

Nelson (1973) = Alvar Nelson, 'Sweden', *The American Journal of Comparative Law*, 21 (2) 1973, pp. 269–286.

Newhouse (2016) = M. E. Newhouse, 'Two Types of Legal Wrongdoing', *Legal theory*, 22 (1) 2016, pp. 59–75.

Newhouse (2019) = M. E. Newhouse, 'The legislative authority', *Kantian Review* 24 (4) 2019, pp. 531–553.

Niemi-Kiesiläinen (2001) = Johanna Niemi-Kiesiläinen, 'Criminal Law or Social Policy as Protection Against Violence', Kevät Nousiainen, Åsa Gunnarsson, Karin Lundström and Johanna Niemi-Kiesiläinen (eds.), *Responsible Selves*, London: Routledge 2001, pp. 289–309.

Nilsen (2022) = John Reidar Nilsen, 'Norwegian police law, crime prevention and its (need for more) democratic legitimacy', *Bergen Journal of Criminal Law and Criminal Justice* 10 (2) (2022), pp. 3–28.

Norrie (2001) = Alan Norrie, *Crime, Reason and History – A Critical Introduction to Criminal Law*, second edition, London: Butterworths 2001.

Nuotio (1999) = Kimmo Nuotio, 'Alf Ross som straffrättsfilosof', *Nordisk Tidsskrift for Kriminalvidenskab* 86 (3) 1999, pp. 171–193.

Nuotio (2006) = Kimmo Nuotio, 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law', *Journal of International Criminal Justice* 4 2006, pp. 998–1016.

Nuotio (2007) = Kimmo Nuotio, 'The Rationale of the Nordic Penal Policy Compared with the European Approach', *Festschrift in Honour of Raimo Lahti*, Helsinki: Publications of the Faculty of Law Helsinki University 2007, pp. 157–174.

Nuotio (2008) = Kimmo Nuotio 'The Ethics of Criminal Justice', in Thomas Elholm, Petter Asp, Flemming Balvig, Birgit Feldtmann, Kimmo Nuotio og Asbjørn Strandbakken (eds.), *Ikke kun straf – Festskrift til Vagn Greve*, Copenhagen: Jurist- og Økonomforbundets forlag 2008, pp. 492–505.

Nuotio (2023a) = Kimmo Nuotio, 'Holocaust Denial as Memory Criminal Law Seen Through the Nordic Lenses', *Bergen Journal of Criminal Law and Criminal Justice* 11 (1) 2023, pp. 1–29.

Nuotio (2023b) = 'Finland', in Pedro Caeiro et al., Elgar Encyclopedia of Crime and Criminal Justice, forthcoming 2024. forthcoming 2024, currently available at https://www.elgaronline.com/display/book/9781789902990/9781789902990.xml

Ohana (2014) = Daniel Ohana, 'Administrative penalties in the *Rechtsstaat:* On the emergence of the *Ordnungswidrigkeit* sanctioning system in postwar Germany', *University of Toronto Law Journal* 64 (2) 2014, pp. 243–290.

Olivecrona (1940) = Karl Olivecrona, *Om lagen och staten*, Copenhagen: Munksgaard 1940.

O'Neill (2015) = Onora O'Neill, *Constructing Authorities – Reason, Politics and Interpretation in Kant's Philosophy*, Cambridge: Cambridge University Press 2015.

Papendorf (2006) = Knut Papendorf, 'The Unfinished': Reflections on the Norwegian Prison Movement', *Acta Sociologica* 49 (2) 2006, pp. 127–137.

Pawlik (2012) = Michael Pawlik, *Des Unrecht des Bürgers*, Tübingen: Mohr Siebeck 2012.

Pawlik (2020) = Michael Pawlik, 'Bindings Beitrag zur Straftheorie', Michael Kubiciel, Martin Löhnig, Michael Pawlik, Carl-Friedrich Stuckenberg and Wolfgang Wohlers (eds.), *'Eine gewaltigen Erscheinung des positiven Rechts' – Karl Bindings Normen- und Strafrechtstheorie*, Tübingen: Mohr Siebeck 2020, pp. 109–142.

Peršak (2007) = Nina Peršak, *Criminalising Harmful Conduct – The Harm Principle, its Limits and Continental Counterparts*, New York: Springer 2007.

Pettit (1997) = Philip Pettit, *Republicanism – A Theory of Freedom and Government*, Oxford: Oxford University Press 1997.

Pettit (2012) = Philip Pettit, *On the People's Terms – A Republican Theory and Model of Democracy*, Cambridge: Cambridge University Press 2012.

Pettit (2013) = Philip Pettit, 'Two Republican Traditions', in Andreas Niederberger and Philip Schlink (eds.), *Republican Democracy – Liberty, Law and Politics,* Edinburgh: Edinburgh University Press 2013, pp. 169–204.

Pettit (2014) = Philip Pettit, *Just Freedom: A Moral Compass for a Complex World*, New York: W.W. Norton & Company 2014.

Pfordten (2007) = Dietmar von der Pfordten, 'Kants Rechtsbegriff', *Kant-Studien* 98 (4) 2007, pp. 431–442.

Pfordten (2015) = Dietmar von der Pfordten, 'On Kant's Concept of Law'. *Archiv für Rechts- und Sozialphilosophie* 101 (2) 2015, pp. 191–201.

Pinker (2020) = Steven Pinker, *The better angels of our nature – A history of violence and humanity*, London: Penguin books 2020.

Pratt (2008) = John Pratt, 'Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism', *The British Journal of Criminology* 48 (2) 2008, pp. 119–137.

Radbruch (1903) = Gustav Radbruch, *Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem – Zugleich einen Beitrag zur Lehre von der rechtswissenschaftliche Systematik*, Berlin: De Gruyter 1903.

Radkau (2013) = Joachim Radkau, *Max Weber – A Biography*, English translation, Cambridge: Polity Press 2013.

Rasmussen (2023) = Maria Rasmussen, *Provokation, affect och den straffrättsliga värderingen av våldsbrott*, Stockholm: Stockholms universitet 2023.

Rawls (1999) = John Rawls, *A Theory of Justice – Revised Edition*, Oxford: Oxford University Press 1999.

Rawls (2005) = John Rawls, *Political Liberalism. Expanded Edition,* Columbia: Columbia University Press 2005.

Renzikowski (2012) = Joachim Renzikowski, 'Strafrecht und Strafbegründung bei Rousseau', *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* 20 (2012), pp. 155–168

Ripstein (2004) = Arthur Ripstein, 'Authority and Coercion', *Philosophy and Public Affairs* 32 (1) 2004, pp. 2–35.

Ripstein (2009) = Arthur Ripstein, *Force and Freedom – Kant's Legal and Political Philosophy*, Cambridge, Massachusetts: Harvard University Press 2009.

Rodriguez-Blanco (2017) = Verónica Rodriguez-Blanco, 'Practical Reason in the Context of Law – What Kind of Mistake Does a Citizen Make When She Violates Legal Rules?', George Duke and Robert P. George (eds.), *The Cambridge Companion to Natural Law Jurisprudence*, Cambridge: Cambridge University Press 2017, pp. 159–186.

Rorty/Schmidt (2009) = Amélie Oksenberg Rorty and James Schmidt, *Kant's idea for a universal history with a cosmopolitan aim: a critical guide*, Cambridge: Cambridge University Press 2009.

Ross (1959) = Alf Ross, *On Law and Justice*, Berkeley and Los Angeles: University of California Press 1959.

Ross (1975) = Alf Ross, *On Guilt, Responsibility and Punishment*, London: Stevens & Sons Limited, 1975.

Rousseau (1761) = Jean-Jacques Rousseau, *The Social Contract and Discourses* [1761], English translation, London/Toronto: J. M. Dent, 1923.

Roxin (2006) = Claus Roxin, *Strafrecht – Allgemeiner Teil, Band I, Grundlagen – Der Aufbau der Verbrechenslehre*, 4th completely revised edition, München: C. H. Beck 2006.

Roxin/Greco (2020) = Claus Roxin and Luís Greco, *Strafrecht – Allgemeiner Teil, Band I: Grundlagen – Der Aufbau der Verbrechenslehre*, 5th completely revised edition, Berlin: C. H. Beck 2020.

Ryberg (2019) = Jesper Ryberg, 'Proportionality and the Seriousness of Crimes', in Michael Tonry (ed.), *Of one-eyed and toothless miscreants – Making the punishment fit the crime?*, Oxford: Oxford University Press 2019, pp. 51–75.

Ryberg (2021) = Jesper Ryberg, 'Retributivism and the (Lack of) Justification of Proportionality', *Criminal Law and Philosophy* 15 (2021), pp. 447–462.

Rørvik (2009) = Thor Inge Rørvik, 'Schweigaard og filosofien', in Ola Mestad (ed.), *Anton Martin Schweigaard – Professorpolitikeren*, Oslo: Akademisk publisering 2009, pp. 61–88.

Rørvik (2013a) = Thor Inge Rørvik, 'Niels Treschow, Christian Krohg og straffelovens grunnsetninger', Dag Michalsen and Hilde Sandvik (eds.), *Kodifikasjon og konstitusjon. Grunnloven § 94's krav til lovbøker i norsk historie*, Oslo: Pax 2013, pp. 85–108.

Rørvik (2013b) = Thor Inge Rørvik, 'Juristfilosofene – Den glemte integrasjonen av filosofi og rettsvitenskap i Danmark-Norge rundt 1800', in Ola Mestad (ed.), *Frihetens forskole – Professor Schlegel og eidsvollsmennenes læretid i København, Nye perspektiver på Grunnloven 1814–2014*, Oslo: Pax forlag 2013, pp. 155–178.

Sangero (2006) = Boaz Sangero, *Self-Defence in Criminal Law*, Oxford/Portland, Oregon: Hart Publishing 2006.

Šarčević (1996) = Edin Šarčević, *Der Rechtsstaat; Modernität und Universalitätsanspruch der klassischen Rechtsstaatstheorien – eine Bilanz der Rechtsstaatslehren zwischen aufgeklärtem Liberalismus und Nationalsozialismus*, Leipzig: Leipziger Universitätsverlag 1996.

Sarch (2019) = Alexander Sarch, *Criminally Ignorant – Why the Law Pretends We Know What We Don't*, Oxford: Oxford University Press 2018.

Schaffstein (1986) = Friedrich Schaffstein, *Die Allgemeinen Lehren vom Verbrechen in ihrer Entwicklung durch die Wissenschaft des gemeinen Strafrechts – Beiträge zur Strafrechtsentwicklung von der Carolina bis Carpzov* [1930–1932], Aalen: Scientia 1986.

Schünemann/von Hirsch/Jareborg (1996) = Bernd Schünemann, Andrew von Hirsch and Nils Jareborg (eds.), *Positive Generalprävention – Kritische Analysen im deutsch-englischen Dialog*, Uppsala Symposium 1996, Heidelberg: C.F. Müller Verlag 1996.

Schweigaard (1834) = A(nton Martin) Schweigaard, 'Betragtninger over Retsvidenskabens nærværende Tilstand i Tydskland', *Juridisk Tidsskrift* 1834, pp. 292–340.

Schweigaard (1835) = Anton Martin Schweigaard, 'Om den Tyske Filosofi', originally in French in *La France Littéraire* (1835), Norwegian translation in Oskar Jæger and Fredrik Stang (eds.), *Anton Martin Schweigaard, Ungdomsarbeider*, Kristiania: H. Aschehoug & Co. 1904, pp. 237–300.

Skilbrei/Holmström (2013) = May-Len Skilbrei and Charlotta Holmström, *Prostitution Policy in the Nordic Region – Ambiguous Sympathies*, London: Routledge 2013.

Skinner (1978) = Quentin Skinner, *The Foundations of Modern Political Thought – Volume One: The Renaissance,* Cambridge: Cambridge University Press 1978.

Skinner (1979) = Quentin Skinner, *The Foundations of Modern Political Thought – Volume Two: The Age of Reformation*, Cambridge: Cambridge University Press 1997.

Skinner (2008) = Quentin Skinner, *Hobbes and Republican Liberty*, Cambridge: Cambridge University Press 2008.

Slagstad (2001) = Rune Slagstad, *Rettens ironi*, Oslo: Pax 2001.

Smart (1989) = Carol Smart, *Feminism and the Power of Law*, London: Routledge 1989.

Snare (1996) = Annika Snare (ed), *Beware of Punishment: On the Utility and Futility of Criminal Law*, Oslo: Pax 1996.

Spurkland/Kierulf/Hansen (2023) = Kai Spurkland, Anine Kierulf and Ingjerd Hansen, *Hatkrim*, Oslo: Gyldendal 2023.

Stang Dahl (1994) = Tove Stang Dahl, *Pene piker haiker ikke – Artikler om kvinnerett, strafferett og velferdsstat*, Oslo: Universitetsforlaget, 1994.

Stenborre (2003) = Eva Stenborre, *Påföljdsbestämningen i Sverige och straffutmålningen i Norge: med en studie av rättsfall från Högsta domstolen og Höyesterett,* Lund: Lunds universitet 2003.

Stoyanova (2023) = Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights – Within and Beyond Boundaries*, Oxford: Oxford University Press 2023.

Stubberud (2004) = Jørgen A. Stubberud, 'En kritikk av Alf Ross' non-kognitivisme', *Tidsskrift for Rettsvitenskap* 117 (1–2) 2004 pp. 50–133.

Stubberud (2009) = Jørgen A. Stubberud, 'En 'nåtidslesning' av Schweigaards artikkel om den tyske rettsvidenskapen', in Ola Mestad (ed.), *Anton Martin Schweigaard – Professorpolitikeren*, Oslo: Akademisk publisering 2009, pp. 91–123.

Suominen (2011) = Annika Suominen, 'The Characteristics of Nordic Criminal Law in the Setting of EU Criminal Law', *European criminal law review* 1 (2) 2011, pp. 170–187.

Svensson (2016) = Erik Svensson, *Gärningsmannaskap vid fleras deltagande i brott,* Uppsala: Iustus 2016.

Tapani/Tolvanen (2016) = Jussi Tapani and Matti Tolvanen, *Straffrättens ansvarslära*, Helsingfors: Alma Talent 2016.

Tadros (2011) = Victor Tadros, *The Ends of Harm – The Moral Foundations of Criminal Law*, Oxford: Oxford University Press 2011.

Tadros (2016) = Victor Tadros, *Wrongs and Crimes*, Oxford: Oxford University Press 2016.

Takala (2005) = Hannu Takala, 'Nordic Cooperation in Criminal Policy and Crime Prevention', *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5 (2) 2005, pp. 131–147.

Tammenlehto (2023) = Laura Tammenlehto, *Justified Criminalization of IPR Infringements*, Joensuu: University of Eastern Finland 2023.

Tanguay-Renaud/Stribopoulos (2012) = François Tanguay-Renaud and James Stribopoulos (eds.), *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law*, Oxford and Portland, Oregon: Hart Publishing 2012.

Thomason (2021) = Krista K. Thomason, 'The Symbol of Justice: Bloodguilt in Kant', *Kantian Review* 26 (1) 2021, pp. 79–97.

Thorburn (2008) = Malcolm Thorburn, 'Justifications, Powers, and Authority', *The Yale Law Journal* 117 (6) 2008, pp. 1070–1130.

Thorburn (2011a) = Malcolm Thorburn, 'Criminal Law as Public Law', in Antony Duff and Stuart P. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford: Oxford University Press 2011, pp. 21–43.

Thorburn (2011b) = Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law', In Antony Duff et al. (eds.), *The Structures of Criminal Law*, Oxford: Oxford University Press 2013, pp. 85–105.

Thorburn (2017) = Malcolm Thorburn, 'Punishment and Public Authority', in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp, *Criminal Law and the Authority of the State*, Oxford and Portland, Oregon: Hart Publishing 2017, pp. 7–31.

Thorburn (2020) = Malcolm Thorburn, 'Criminal Punishment and the Right to Rule', *University of Toronto Law Review* 70 (Supplement 1) 2020, pp. 44–63.

Thorburn (2022) = Malcolm Thorburn, 'In Search of Criminal Law's Person', in Claes Lernestedt and Matt Matravers (eds), *The Criminal Law's Person*, Oxford: Hart Publishing 2022, pp. 99–117.

Thormundsson (1994) = Jonatan Thormundsson, 'Strafbegrebet i forhold til straffens målsætning og retfærdiggørelse', *Nordisk Tidsskrift for Kriminalvidenskab* 81 (1) 1994, pp. 88–98.

Thormundsson (1998) = Jonatan Thormundsson, *A Brief Outline of Icelandic Criminal Law*, Reykjavík 1998.

Tonry/Lappi-Seppälä (2011) = Michael Tonry and Tapio Lappi-Seppälä (eds.), *Crime and Justice in Scandinavia*, Chicago: The University of Chicago Press 2011.

Träskman (2002) = Per Ole Träskman, 'Strafflagen för Europeiska Unionen – Fakta och fiktion', *Svensk Juristtidning* (4) 2002, pp. 345–362

Träskman (2005a) = Per Ole Träskman, 'Drug Control and Drug Offences in the Nordic Countries: A Criminal Political Failure too often Interpreted as a Success', *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5 (2) 2005, pp. 236–256.

Träskman (2005b) = Per Ole Träskman, 'The Dragon's Egg – Drugs-Related Crime Control', in Annika Snare (ed.), Beware of Punishment – *On the Utility and Futility of Criminal Law*, Oslo: Pax 1995, pp. 147–172.

Träskman (2010) = Per Ole Träskman, 'De straffrättsliga principerna och Den europeiska människorättsdomstolens strävanden att realisera de positiva mänskliga rättigheterna', *Nordisk Tidsskrift for Kriminavidenskab* 97 (3) 2010, pp. 347–362.

Träskman (2013) = Per Ole Träskman, '"The Golden Age of Nordic Cooperation": Har de nordiska kronjuvelerna kommit på museum? – Den nordiska brottskontrollen: nutid, dåtid och framtid', *Nordisk Tidsskrift for Kriminavidenskab* 100 (3) 2013, pp. 333–355.

Tuori (2002) = Kaarlo Tuori, *Critical Legal Positivism*, London: Routledge 2002.

Tyler (2011) = Tom R. Tyler, 'Trust and Legitimacy: Policing in the USA and Europe', *European Journal of Criminology* 8 (4) 2011, pp. 254–266.

Ugelvik (2014) = Thomas Ugelvik, *Power and Resistance in Prisons: Doing time, doing freedom*, Hampshire: Palgrave 2014.

Ugelvik/Dullum (2011) = Thomas Ugelvik and Jane Dullum (eds.), *Penal Exceptionalism? Nordic Prison Policy and Practice*, London/New York: Routledge 2011.

Uleman (2004) = Jennifer K. Uleman, 'External Freedom in Kant's 'Rechtslehre': Political, Metaphysical', *Philosophy and Phenomenological Research* 68 (3) 2004, pp. 578–601.

Ulväng (2005) = Magnus Ulväng, *Påföljdskonkurrens: problem och principer*, Uppsala: Iustus 2005.

Ulväng (2008) = Magnus Ulväng 'Humanitetstendenser i straffsystemet', in Thomas Elholm, Petter Asp, Flemming Balvig, Birgit Feldtmann, Kimmo Nuotio og Asbjørn Strandbakken (eds.), *Ikke kun straf – Festskrift til Vagn Greve*, Copenhagen: Jurist- og Økonomforbundets forlag 2008, pp. 591–605.

Ulväng (2009) = Magnus Ulväng, 'Om straffrätt och principer', Petter Asp, Claes Lernestedt and Magnus Ulväng, *Katedralen – Tre texter om straffrätt*, Uppsala: Iustus 2009, pp. 149–262.

Valverde (2008) = Mariana Valverde, 'Police, Sovereignty, and Law – Foucaultian Reflections', in Markus D. Dubber and Mariana Valverde (eds.), *Police and the Liberal State*, Stanford: Stanford Law Books 2008, pp. 15–32.

Valle (1989) = Inger Louise Valle, *Dette står jeg for*, Oslo: Gyldendal Norsk Forlag 1989.

Varden (2020) = Helga Varden, *Sex, love, and gender – A Kantian Theory*, Oxford: Oxford University Press 2020.

Varden (2022) = Helga Varden, 'Kant's Four Political Conditions – Barbarism, Anarchy, Despotism, and Republic', *Norsk filosofisk tidsskrift* 57 (3–4) 2022, pp. 194–207.

Verdoner (2022) = Søren Verdoner, '"Omvendelsesterapi" rettet mod unge LGBT+-personer – en ny nordisk forbrydelse?', *Nordisk Tidsskrift for Kriminalvidenskab* 109 (4) 2022, pp. 442–457.

Vogt (1950) = Adler Vogt, *Bernhard Getz*, Oslo: Aschehoug 1950.

Vogt (2016) = David Chelsom Vogt, 'Med rett til å bli straffet – om Kant og Hegels teorier om straff som respekt for forbryteren', *Norsk filosofisk tidsskrift* 51 (3–4) 2016, pp. 148–162.

Vogt (2018) = David Chelsom Vogt, *Crime, Punishment, and Understanding Justice through Injustice*, Bergen: University of Bergen 2018.

Vogt (2021) = David Chelsom Vogt, 'The Natural Meaning of Crime and Punishment: Denying and Affirming Freedom', *Criminal Law and Philosophy* 17 2021, pp. 339–358.

Vormbaum (2009) = Thomas Vormbaum, *Einführung in die moderne Strafrechtsgeschichte*, Berlin: Springer 2009.

Wahlberg (2003) = Markus Wahlberg, *Den finska straffrättsvetenskapens födelse I – Calonius, Ehrström och den finska straffrättsvetenskapens födelse*, Helsingfors: Juridiska fakulteten vid Helsingfors universitet 2003.

Waldron (1996) = Jeremy Waldron, 'Kant's Legal Positivism', *Harvard Law Review* 109 (7) 1996 pp. 1535–1566.

Weber (2013) = Max Weber, *Economy and Society*, Volume 1, Guenther Roth and Claus Wittich (eds.), Berkely: California University Press.

Weigend (1988) = Thomas Weigend, 'The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law', *Revue Internationale de Droit Pénal* 59 1988, pp. 67–93.

Weinrib (2019) = Jacob Weinrib, 'The Principles of Constitutional Reform', *Kantian Review* 24 (4) 2019, pp. 631–651.

Welzel (1969) = Hans Welzel, *Das Deutsche Strafrecht – Eine systematische Darstellung*, Berlin: De Gruyter 1969.

Wertheimer (2003) = Alan Wertheimer, *Consent to Sexual Relations*, Cambridge: Cambridge University Press 2003.

Wessel-Aas/Fladmoe/Nadim (2016) = Jon Wessel-Aas, Audun Fladmoe and Marjan Nadim, *Hate speech, report 3: The boundary between freedom of speech and criminal law protection against hate speech – Report 2016:22*, Oslo: Norwegian Institute for Social Research 2016.

Wong (2004) = Christoffer Wong, *Criminal act, criminal jurisdiction and criminal justice*, Kraków: Polpress 2004.

Wood (1991) = Allen W. Wood, 'Unsociable Sociability: The Anthropological Basis of Kantian Ethics', *Philosophical Topics* 19 (1) 1991, pp. 325–351.

Wood (2003) = Allen W. Wood, 'Kant and the Problem of Human Nature', in Brian Jacobs and Patrick Kain (eds.), *Essays on Kant's Anthropology*, Cambridge: Cambridge University Press 2003, pp. 38–59.

Wood (2010) = Allen W. Wood 'Punishment, retribution, and the coercive enforcement of right', Lara Denis (ed.), *Kant's Metaphysics of Morals – A Critical Guide*, Cambridge: Cambridge University Press 2010, pp. 111–151.

Yankah (2008) = Ekow N. Yankah, 'The Force of Law: The Role of Coercion in Legal Norms', *University of Richmond Law Review* 42 (5) 2008, pp. 1195–1256.

Yankah (2012) = Ekow N. Yankah, 'Crime, Freedom and Civic Bonds: Arthur Ripstein's Force and Freedom: Kant's Legal and Political Philosophy'. *Criminal Law and Philosophy* 6 (2012), pp. 255–272.

Ziemann (2009) = Sasha Ziemann, *Neukantianisches Strafrechtsdenken – Die Philosophie des Südwestdeutschen Neukantianismus und ihre Rezeption in der Strafrechtswissenschaft des frühen 20. Jahrhunderts,* Baden-Baden: Nomos 2009.

Öberg (2011) = Jacob Öberg, 'EU Criminal Law, Democratic Legitimacy and Judicial Review of Union Criminal Law Legislation in the Wake of the Lisbon Treaty', *Tilburg Law Review* 16 (1) 2011, pp. 60–82.

Aall (2022) = Jørgen Aall, *Rettsstat og menneskerettigheter 1: en innføring i vernet om individets sivile og politiske rettigheter etter den norske forfatning og etter den europeiske menneskerettighetskonvensjon*, Bergen: Fagbokforlaget 2022.