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

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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.