A Normative Compass for Nordic Criminal Law: The Case of Unaccountable Offenders

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Linda Gröning*

Revitalization of Nordic Criminal Law as a Normative Project

Nordic criminal law has been subject to much discussion, which has often been related to its supposed specific character and features. Nordic exceptionalism is in this regard recognized world-over, encompassing views of Nordic criminal law as especially humane and welfare-oriented compared to the criminal law of many non-Nordic jurisdictions (e.g., Greve 2007; Träskman 2013; Pakes 2020; Crewe et al. 2023). At the same time, legal scholarship has until recently not involved any comprehensive discussion about the *normative justification* of the Nordic criminal law project.

Jørn Jacobsen's book, *Power, Principle, and Progress: Kant and the Republican Philosophy of Nordic Criminal Law* (Fagbokforlaget 2024), fills this gap. Drawing from Kantian republican theory, Jacobsen argues that we need a normative justification of the Nordic criminal law project and discusses what such an account may look like. In building this account, Jacobsen also outlines the essential normative features of Nordic criminal law. In doing so, he reminds us that there is a difference between the practical reality of Nordic criminal law and the normative ideal we should strive for. As many other scholars, Jacobsen is critical towards current tendencies in Nordic criminal law, such as overcriminalization and a focus on risk, asking, "*Is it not when you are lead astray that a compass is most important?*" (Jacobsen 2024, p. 315)

While we may find new paths when we think we are lost, I agree that Nordic criminal law needs a normative compass. At least, it is time to revitalize the discussion about the normative features of Nordic criminal law. I read Jacobsen's book as challenging us, especially Nordic criminal law scholars, to consider the current state of Nordic criminal law and its ideal manifestation. In response to this challenge, I will discuss the case of unaccountable offenders utilizing Jacobsen's account as a backdrop. I argue that this case provides a prism to discuss traits and challenges in

Nordic criminal law and that it illuminates the need for a normative theory of criminal law.

Humans as Rational Agents and Unaccountable Offenders as an Exception

Jacobsen states in his book that:

> The general recognition of human beings as [rational agents] means that responsibility is, *per se*, the default alternative in criminal law. But … [n]ot every agent that acts wrongly is to be blamed for their actions. (Jacobsen 2024, p. 251)

This statement captures the core assumption and premise of modern criminal law, Nordic criminal law included, that justifies why people can be held criminally accountable for their acts. Human beings possess the ability to understand and respect the justifications and preconditions that inform the penal code, and in turn to use these insights as a guide for action. I argue that it is even a constitutional—or with Jacobsen and Kant, a republican—rationale that humans have the capacity for freedom and reason in action (Gröning et al. 2022; Gröning 2024).

As Jacobsen states, the assumption of the accountable agent is not without exceptions, as not everyone that acts wrongly is to be blamed for their actions. Most legal orders have to this end rules and doctrines that concern a defendant's lack of capacity for responsible action and exempts some offenders with severe mental disorders and disabilities from criminal responsibility (see Mackay and Brookbanks 2022 for a comparative overview). In Anglo-American law, the "insanity defense" is well-known. In Nordic countries, doctrines about criminal unaccountability are not procedurally constructed as defenses, but have the character of excuses in the general structure of the criminal law. It is the prosecution, and not the defendant, that bears the burden of proof, and considering all available evidence, the court must determine the issue (Gröning 2022). In the following, I will stick to the term 'criminal unaccountability,' which resonates better than 'insanity' with Nordic legal terminology. I also find this term less stigmatizing considering how doctrines about criminal unaccountability are associated with psychiatric notions of mental disorders.

At any rate, as Jacobsen recognizes, doctrines about criminal unaccountability are fundamental (e.g., Yeo 2008; Morse 2016). Not only do they define the justifiable use of punishment, they also serve as key entry points for understanding the nature of responsibility (cf. Moore 1990) and how law, as a powerful social institution, defines deviancy (Hallevy 2015). Starting out from the default alternative of the rational and responsible agent, it is hence crucial how the exception of the unaccountable offender should be defined.

The Influential Anglo-American Approach and the Missing Nordic Approach

Given their fundamental character, criminal unaccountability doctrines and their practical consequences have been subject to much research and discussion in several disciplines, including law, philosophy, forensic psychiatry, neuroscience, and several of the social sciences (Adjorlolo et al. 2019; Zaluski 2021; Wishart & Berryessa 2023; Fovet et al. 2022; Løvgren et al. 2022).

In international legal discourse, the Anglo-American approach to criminal unaccountability has been highly influential. In fact, current legal discourse reflects to a significant extent a paradigmatic normative understanding of criminal unaccountability that has been framed mainly by Anglo-American law (Gröning et al. 2022). Within this common law paradigm, countries have modelled their unaccountability doctrines on a 'mixed model' that requires both that the actor suffered from a mental disorder and that this disorder influenced the commission of the crime (Mackay & Brookbanks 2022). Many Anglo-American jurisdictions have relatively similar legal rules, where typical criteria involve impairments in the capacity to understand and/or to control one's actions. Historically, it is noteworthy how the English *M'Naghten* rules from 1843 have influenced countries all around the globe (Mackay & Brookbanks 2022).

Compared to the scope of the Anglo-American literature and its significant influence on current legal discourse, distinctive Nordic approaches to criminal unaccountability have received relatively little attention—although Norwegian law gained considerable notoriety through the case concerning Anders Behring Breivik's killing of 77 people in Oslo and at Utøya in 2011. [1] Despite acknowledged commonalities among the Nordic countries, no 'Nordic paradigm' for dealing with this fundamental legal matter has emerged so far. While Jacobsen stresses the general need to develop normative underpinnings for Nordic criminal law, he has not provided any such proposal. I argue that we lack an articulated Nordic normative account of criminal unaccountability, and that we need to articulate such an account. Here, Jacobsen's book provides relevant perspectives and raises problems for further discussion and work.

The Different Nordic Solutions and the Basis for a Nordic Normative Account

The case of criminal unaccountability is interesting also because it seems to challenge Jacobsen's overall ambition of constructing a Nordic account of criminal law. At first glance, the Nordic legal solutions appear not only as different from each other, but as remarkably unique: Sweden has no unaccountability rules at all, but sentencing rules that allow for defendants with a mental disorder to be exempted from the ordinarily prescribed

punishment; Finland, contrary to all other Nordic and European countries, does not have any special criminal sanctions of compulsory preventive care for unaccountable offenders; Norway's unaccountability rule does not require a causal link between mental disorder and crime—as basically all other countries do; Denmark operates with a rule allowing for significant discretion and with a comparatively low threshold for unaccountability, but also has many different forms of dispositional measures for unaccountable offenders; and Iceland, on account of its small population size, operates with a system characterized by a low level of specialization (for different Nordic solutions, see e.g. Baumbach and Elholm 2020, p. 129; Putkonen & Vollm 2007; Gröning et al. 2020; Gröning 2022; Benett 2024). It may thus look like there is not any one Nordic criminal law approach, but several Nordic criminal law systems, dealing with the fundamental matter of criminal accountability. This raises questions of whether the prospect of a joint normative project is at all feasible—and whether it is desirable.

However, despite the differences of the Nordic legal solutions, I argue that there is a basis for articulating a normative Nordic account of criminal unaccountability, and that we should do so. Let me first outline what I consider the Nordic ideal. I will not go into all the details here, but only point to some basic traits in a Nordic approach to unaccountable offenders.

Most importantly, this approach emphasizes individual freedom and reason as the foundational principles for unaccountability. It recognizes the seriousness of declaring a defendant unaccountable, because doing so carries with it a disenfranchisement of that person—and therefore requires a relatively high threshold for doing so (Gröning 2024). At the same time, it balances the need to protect citizens against such disenfranchisement with the principle that it is deeply unfair to blame and punish some offenders because of their mental condition at the time of the act. To this end, Nordic law allows for more acquittals of unaccountable offenders than does Anglo-American law, which has been criticized by several scholars for having a far too narrow insanity defense. The Nordic emphasis on freedom also implies that unaccountable offenders should as a rule not be subjected to any criminal sanctions. Only when necessary to protect the life, health and freedom of others, can preventive interventions be justified.

In this conception of the unaccountable offender, the Nordic approach also points to a fault-based rationale relating to the incapacity to participate in our moral community—which aligns with the Kantian account that Jacobsen proposes. The decisive factor is the impact of the mental condition on the individual's practical reason in a given context and moment of action. Hence, there is no evident connection between legal concepts of criminal unaccountability and insanity and psychiatric notions of mental disorder. Having a psychiatric diagnosis is thus not sufficient for criminal unaccountability and, as a matter of principle, it is not even

necessary. The ideal Nordic approach here involves the view that mental disorders matter only in terms of legally relevant functional impairments. Cognitive impairments are relevant insofar as they affect one's ability of self-regulation and capacity of free and rational choices and actions. In practice, it is especially psychotic states of impaired reality understanding that are relevant, and interestingly enough a phenomenological concept of psychosis has been proposed by Nordic scholars—importantly by Joseph Parnas—who emphasizes impairments of one's intersubjective and social rationality (e.g. Parnas 2008). From a Kantian perspective, such a person may be regarded as unable to participate in or respond to our normative and republic community (cf. Jacobsen 2024, pp. 247–255).

In any case, while avoiding a stigmatizing link between the conception of the unaccountable, irrational and unfree offender, and psychiatric diagnoses, the Nordic ideal recognizes the central importance of understanding the needs of those suffering from such disorder. To this end, the Nordic ideal approach to criminal unaccountability consists in a humane welfare approach.While unaccountable offenders cannot be punished, they should still be taken care of in accordance with their rights and human dignity—preferably outside criminal law, and thorough voluntary treatment rather than compulsory interventions. Nordic law therefore invests in mental health care for those who require it, and not least in the integration and rehabilitation of unaccountable offenders, to restore their participation as rational agents in our community.

The Reality in Nordic Legal Systems

In sum, the Nordic ideal approach to criminal unaccountable offenders captures the key points that Jacobsen makes in his book about the Kantian rationale undergirding a humane, republican system of criminal law. But this is the ideal. Unfortunately, Nordic law seems to be somewhat lost without a compass in the big forest, threatened by the wild animals of paternalism and instrumentalism. Perhaps driven by its tradition of a pragmatic welfare approach, Nordic countries display worrisome tendencies in the increased use of criminal law to hospitalize mentally ill offenders. In Norway, for instance, we have recently witnessed a growing number of offenders who are considered unaccountable and/or are sentenced to special preventive criminal sanctions—moving away from the ideal of criminal law as *ultima ratio*.

Behind these tendencies lie paternalistic and instrumentalist justifications. The paternalistic justification is that there is a need to take care of offenders with mental disorders that do not get adequate treatment within the civil mental health system—often related to arguments about high thresholds for compulsory civil care, lack of care beds and therefore insufficient preventive mental health care resulting in more people with mental disorders committing crimes. The instrumentalist justification is

typically one about danger and risk, where we are increasingly willing to limit unaccountable offenders' liberty to feel safe. A special problem cutting across these challenges arises from normative constructs of the unaccountable and dangerous offenders that are associated with psychiatric constructs and diagnoses of mental disorders—without a sufficient knowledge basis (e.g., Gröning & Melle 2024). These troubling tendencies of Nordic unaccountability law seem to be part of a broader transformation in criminal law—from a backward-looking response to a committed crime to a forward-looking risk management tool to prevent crimes that have not yet been committed (e.g. Fornes & Gröning 2021; Jacobsen 2024, pp. 269–272).

While these worrying tendencies seems to be symptomatic of the present, pressures against the normative ideal of a rational and humane Nordic criminal law have a longer history. One example is Sweden's abolition of its unaccountability rules in 1965 based on arguments influenced by the positivist school that regarded criminal law as a societal tool for crime prevention through adequate treatment of offenders. Generally, the history of Nordic criminal law is the history of several normative viewpoints that compete with, but have not yet managed to dismantle, the long-standing ideal of a rational and humane Nordic criminal law. Jacobsen's book can in fact be viewed as a symptom that this ideal is now under profound pressure and needs to be restored.

Conclusion

The case of unaccountable offenders shows that Nordic lawyers and scholars need a normative compass. Jacobsen's book has reminded us why the normative project is important within Nordic criminal law and beyond, and has provided significant impulses for further discussions. One important task will be to look further into specific legal doctrines, as I have briefly investigated the key legal doctrine of criminal unaccountability in this commentary. The way forward should in this respect, in my view, include exploring how empirical understanding and knowledge about mental disorders (and other existing phenomena that our normative concepts relate to) could serve as a basis for developing a comprehensive, rational and humane, Nordic account of criminal unaccountability and appropriate responses to unaccountable offenders.

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* Faculty of Law, University of Bergen, Norway.

[1] The final judgment (TOSLO-2011-188627-24- RG-2012-1153) is available in English at https://lovdata.no/static/file/1282/toslo-2011-188627-24-eng.pdf.

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