

# Aided by a Friendly Guide: Normativity as a Challenge for Nordic Criminal Law Science

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## Introduction

While *Power, Principle, and Progress: Kant and the Republican Philosophy of Nordic Criminal Law* (2024) aimed to develop a normative theory of Nordic criminal law, I did not expect it to completely solve the ever-present problem relating to the justification of criminal law and punishment. The history of this discussion suggests that this would indeed be a naïve aim for a book of this kind. Hopefully, however, the book has brought the discussion forward and spurred reflection about the nature of Nordic criminal law. In this MCLR+ forum on the book, a range of renowned Nordic scholars have offered their viewpoints on the book. I am grateful to my critics for providing me with this opportunity to elaborate and clarify some of the ideas and arguments explored in the book. In this reply, I will address the most central issues raised by the critics, topic by topic.

I

In Kant’s seminal work, *Critique of Pure Reason*, one finds the following passage:

Reason must subject itself to critique in all its undertakings, and cannot restrict the freedom of critique through any prohibition without damaging itself and drawing upon itself a disadvantageous suspicion. Now there is nothing so important because of its utility, nothing so holy, that it may be exempted from this searching review and inspection, which knows no respect for persons. The very existence of reason depends upon this freedom, which has no dictatorial authority, but whose claim is never anything more than the agreement of free citizens, each of whom must be able to express his reservations, indeed even his *veto*, without holding back.<sup>[1]</sup>

While perhaps not holy, ‘Nordic criminal law’ is central to the very identity of many Nordic criminal law scholars, and for good reason: it does

represent something of great value. But precisely the significance of this concept for Nordic criminal law scholars suggests that we must undertake a critique (in Kant's use of the term) to consider what we are actually talking about when talking about Nordic criminal law, and whether and how we may justify it. Nordic criminal law scholars, with our involvement in the Nordic criminal justice system and scientific pretensions, are certainly not exempt from this general intellectual obligation to subject that which is so dear to us to scrutiny, to find secure ground for the claims that we make.

It has been said that it is a sign of immaturity in a scientific discipline if it justifies itself by referring to the practical importance of what one does. The same applies if one relies too much on history, tradition and culture for such justification. Indeed, given its complexity—including a number of theoretical positions and practical solutions at different times in the various Nordic countries—the history of Nordic criminal law may not be capable of providing operational normative standards for us: the more we learn of its history, the more difficult it becomes to acquire a deeper understanding of it beyond some key ideas and slogans. It was at least my experience that not much historical investigation was needed to reach the point of uncertainty about what we actually are talking about to suggest that we instead should turn to a normative enterprise of the kind pursued in *Power, Principle, and Progress*. For that reason, my book did not go deeply into the historical evolution of Nordic criminal law. All I needed to show was a lack of elaboration and justification of it as a normative reference point for Nordic criminal law scholars. In the end, to provide the needed justification requires a different kind of exercise.

This, of course, is not at all to say that historical analysis is uninteresting or unimportant. Knowledge of history is valuable for its own sake, and it may also inform normative projects, for instance, by bringing up (again) viewpoints and arguments, as well as theoretical inconsistencies and pitfalls of the past. I would very much welcome further historical analysis and investigation of Nordic criminal law of the kind that Heikki Philajamäki offers in his comment.<sup>[2]</sup> In line with what has already been said, I even think that such an undertaking would help us to see the normative challenge more clearly. But, again, in the end, these are two different projects.

If not to history, tradition and culture, to what should we then turn to provide a normative justification? It is only by the power of reason and the principles that it produces that we can come to understand the deeper meaning of 'Nordic criminal law'. 'Reason?', some of the critics ask. 'What else?', I reply. It is hard to see how I could discuss even the validity of the viewpoints offered by the critics without presupposing that we have shared rational standards of argumentation and judgment. And yes, it is metaphysical. Where in the physical world do you expect to observe, for instance, the rules of logic and the principle of non-contradiction? Of

course, one could maintain—as advocated by Alf Ross, for instance—that normative propositions are beyond reason’s competence, hence splitting Kant’s account in two and throwing away its practical side. But it is not my position. Moreover, Nordic criminal law scholars, with their strong normative engagement, may well experience a certain cognitive dissonance (at least) if they opted to follow that track into emotivism, nihilism or some other non-cognitivist camp. It is, I believe, one of the unfortunate effects of the realist, pragmatist or whatever name we might give the period of Nordic legal thought that preceded ours, that we have become so uncertain about the constitutive premises for science as well as for law. Without (some conception of) reason, all is truly lost.

As to the relevance of Kant’s account of reason, in particular, I’m content to defer to far greater contemporary minds than myself.<sup>[3]</sup> But we can also turn to Kant himself, who in *Anthropology from a Pragmatic Point of View* restates the maxims of reason in the following way:

*Wisdom*, as the idea of a practical use of reason that conforms perfectly with the law, is no doubt too much to demand of human beings. But also, not even the slightest degree of wisdom can be poured into a man by others; rather he must bring it forth from himself. The precept for reaching it contains three leading maxims: (1) Think for oneself, (2) Think into the place of the other (in communication with human beings), (3) Always think consistently with oneself.<sup>[4]</sup>

It is worth noting here that, while Kant considers us to have a rational capacity, he does not think of this as a dictatorial authority, as the initial quote in this reply makes plain: reason does not provide us with once-and-for-all, self-evident, straightforward answers to the problems and act choices that we face. But our rational capacity challenges us to come up with solutions to these issues and, at the same time, provides us with the basic resources for doing so in a well-argued and systematic way. The same goes for Kant’s own philosophy. To me, Kant is like a friendly guide, leading us away from certain dangerous tracks and hazards into safe territory, and who, along the way, shares his insight, but then, confident in us having acquired the skills necessary to find our way, leaves it to us to complete our journey on our own. Hence, in response to Kimmo Nuotio’s question about the role of philosophy today,<sup>[5]</sup> my view is that it provides us with essential resources but does not finish the job for us. As criminal law scholars, we must ourselves account for the basic perspectives and principles from which we work.

In the foregoing remarks lies also the answer to the ‘Why Kant?’ question posed by more than one of the critics in this forum. Kant’s account of reason provides a stable platform for a well-argued political philosophy, which, as I try to show in the book, may also ground a philosophy of

criminal law (even if Kant himself did not succeed at this task). And I should stress that the book does not pretend to be a straightforward application of Kant's political philosophy—that would require a more competent Kant reader than me. My project has been more limited, that is, to bring out some key insights, principles and themes from Kant's political philosophy and with these construct a normative theory. But, I would like to add, as I show in chapter 9, that Kant's political philosophy also has an *applicational* dimension. The universal principles must be applied by us, which, as suggested, is no straightforward exercise. In the political sphere, in particular, it is dependent on the development of social life, culture and the level of enlightenment we have reached. Reason, at the same time, calls on us to pursue continuous improvement in this regard, as suggested by the long-term aim of what Kant calls the 'true republic'. This aspect of application and development makes turning to Kant in the Nordic context much less of a stretch than Philajamäki suggests. The universality of these principles, more generally, allows us to understand different criminal law orders (for instance), past and present, as different interpretations and applications of these principles, with strengths and weaknesses, from which we can learn across borders of time and space—as Nordic criminal law itself has done for a long time, in particular from Germany.

When some of the critics ask 'why not Hegel,' I reply 'why Hegel instead of Kant?' No doubt, Hegel's criminal law should be of interest to any criminal law theorist.<sup>[6]</sup> Also, from a historical perspective, clearly, Hegel has had an impact on Nordic law. But so has Kant, even if at a time when criminal law science had not developed into a project on its own. Historical impact is, anyway, not the same as being a good normative guide—Nuotio, for example, emphasizes the negative historical influence of von Liszt. This is not the place to compare the foundational philosophical qualities in Kant and Hegel. As I find that Kant provides the most stable philosophical basis, I see just as little need to address the question 'why not Hegel?' as that of 'why not Aristotle?', for instance. I leave it to the critics to justify why they would prefer to start with Hegel instead of Kant. Even if we begin with Kant, there of course may well be insights won by additional studies of other theorists, including Hegel.

## II

Marie Kagrell's close engagement with my book provides me with several welcome opportunities to elaborate and clarify my argument and broader aims.<sup>[7]</sup> To begin with, I disagree with Kagrell's suggestion that we should consider the three functions of criminal law that I present in chapter 8 as responding to the three questions Kagrell poses (what to punish, whom/when to punish, why punish). Actually, I set up the three functions partly to avoid this view, as I consider the retributive function to be an independent reason to punish that operates hand-in-hand with the preventive function in justifying punishment: Within this kind of freedom-

theory of criminal law, concern for external freedom requires us to respond to actual baseline violations as well as to avoid them in the future. But apart from that, I agree, for instance, on the value of further theorizing the doctrine of criminal responsibility, including the doctrine of self-defense.[8] Here, however, Kagrell may have interpreted my understanding of the principle of guilt too narrowly. I have a broader understanding of it than the narrow understanding of a requirement of a *willful* violation (or more precisely, the *dolus/culpa*-requirement), considering it instead as a general requirement that the offender *could and should* have acted differently.[9] I could have spelled this out more clearly (but see e.g. p. 249, n. 626); certainly, a more in-depth Nordic study of the principle of guilt and its implications would be highly interesting, as Linda Gröning's comment[10] also suggests.[11] However, this clarification hopefully explains the normative relevance of justifications such as self-defense to this theory, and more generally, the structure of the different categories in the doctrine of criminal responsibility.[12] So, I do not disagree with the view on self-defense that Kagrell offers; I, too, consider it primarily as a justification (see p. 251), and for the reasons Kagrell mentions. My reason for *also* mentioning the subject of self-defense in relation to the state's monopoly of power is that while such a right to self-defense should be recognized at a principled level, it still remains for the state to implement that right as a rule in positive law. In that regard, the scope and limits for self-defense are not self-evident—as Kagrell points out, they have shifted over time. In that regard, self-defense serves as a good example of how the state's monopoly of power is not a static phenomenon and certainly not a matter of the state usurping all power in society. A comparative perspective shows different applications as well.

What I easily admit is that the book is incomplete as a comprehensive philosophy of criminal law that delves deeply into issues such as self-defense as a justification as well as the questions emphasized by Katja Franko[13] and Linda Gröning. Regarding Franko's emphasis on the role of citizenship in the republican account of criminal law, she is quite right that this is a complex subject that deserves attention. In fact, Franko's excellent discussions of the tensions in contemporary Norwegian criminal law and its practice, also referred to in her comment, made me very cautious about saying too much in this regard. It has deep normative implications and touches on a host of topics, including issues relating to criminal jurisdiction and criminal law's relation to other legal (sanctioning) regimes, such as immigration law as well as international cooperation, for instance in the EU context—another issue raised by Nuotio. Similarly, Gröning points out the challenging issue of criminal accountability. I cannot claim to have straightforward answers to intricate problems such as these. On the contrary, as Gröning's discussion and research well show, we need intimate (empirical) knowledge of the world before we can hope to develop comprehensive solutions to such challenges within a broader normative framework—and to assess how our current practices correspond to that

normative framework. Nuotio mentions additional examples, such as environmental challenges and endangerment offenses. While the position I advocate might be labelled 'traditionalist' given its reference to criminal law classicism and Kant, this applies only to the level of *principle*, not to the level of *application* in contemporary society. Environmental challenges such as those we face were not at all an issue in 1797, for instance. Our task is to figure out how we can tackle these issues, including what role there is for criminal law in this regard, within the normative framework of justice. The answer is bound to be very complex.

What I would generally warn against, however, is to attempt to solve such problems only by reference to a 'local' normative framework. Rather, I maintain we need a comprehensive normative theory to account for the foundational viewpoints and the different 'maxims' that may be relevant in designing legal solutions for these issues. Only by a general philosophy of criminal law can we achieve a comprehensive overview of the different normative facets of these issues as regards criminal law. While I have not provided a complete account in the present book, I hope to have contributed some basic normative structures that may be further developed into a comprehensive normative philosophy of Nordic criminal law, including solutions to the challenging questions raised by the critics. As Franko indicates, there may also be other resources in Kant's philosophy, such as Kant's cosmopolitanism, for developing this normative framework.

### III

Many of the issues raised by Kimmo Nuotio are also issues where the starting points offered in the book could be developed further. For instance, I do think that the focus on individual right holders with original claims to external freedom, combined with our joint responsibility to move into the civil state, provides a basis for developing a sound conception of the role of the victim in a philosophy of criminal law. Even if this is not explicitly worked out in the book, I would still claim that Nuotio's concern about what he sees as the marginal role of the rights of the victim is misguided. On the contrary, the entire account is centered on the *individual's* right to external freedom and the state's corresponding deep responsibility to protect this right. For my part, stressing the public relevance of the normative baseline of the republic does not compete with concern for the victim, but provides the foundation for deep solidarity with it. In fact, for Kant, even the offender should recognize the wrong done to the victim and its broader implications, even for the offender himself, as suggested by the famous statement: 'whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.'<sup>[14]</sup> I cannot see how we may reasonably put more emphasis on the victim and

the wrong done to it than precisely by recognizing the specific victim as a another within the people who has been denied that respect which we all owe to each other, and for that reason make the state's criminal justice system intervene, primarily by addressing that specific violation. The utilitarian accounts have a much bigger problem here, I would say. (By the way, in Norway, at least, all criminal code offenses are subject to public prosecution, cf. the criminal procedure code of 1981 section 62a.) How to concretize this starting point in positive criminal law is again a complex issue that needs more analysis than what I have room for here.

More generally, Nuotio asks to which camp I now belong. Again, I would reply: to a republican freedom theory of criminal law, one that, to a large extent, explains and integrates the many lessons and strengths that previous more limited or one-sided theories have already highlighted. There were valuable insights in the rehabilitation movement, in the pragmatist movement as well as in the neoclassicism that emerged towards the end of the millennium. In this regard, the project is about how a Kantian grounding can facilitate a more comprehensive normative framework that allows us to recognize and make use of different aims and insights, each assigned their proper place, role and limits in a systematic theory.

Finally, one may, as Franko does, ask whether the theory I have offered can protect us against contemporary developments in criminal law—or if we instead have ended up with a dangerous theory under the influence of a dangerous dialogue partner in Kant, vulnerable to have its retributive aspect misused to produce (more) injustice when mixed into the turmoil of punitive emotions and other forces. To what extent the normative framework I have provided is 'critical' or not depends on what problems we see in contemporary criminal law when viewed through the lens of the resulting theory, and cannot be answered in a single stroke. But as the book suggests, I certainly share Franko's and others' concerns about current trends in Nordic criminal law. This is one of the reasons why I wrote the book. But the book does not come with a promise that it will hinder negative social, political and legal developments. Water often finds its way. For instance, the prevailing pragmatist views in the Nordics in the latter half of the 20th century could not stem the disturbing evolution of drug criminal law at that time. I do not think that any normative theory can boast to have the capacity to prevent such developments, even if I would consider a deontological theory the best bet in this respect. Nor do I think the republican theory developed in the book suffers from a greater risk of misuse than other theories. In contemporary criminal law, one must not search long to see how shallow utilitarian considerations motivate intrusive control systems, be it as punishment, as risk management, or as rehabilitation. Current developments in the Norwegian system of criminal sanctions illustrate this very well.[15]

A normative theory should not be overambitious in this regard. To return to one of the Kant quotes above, ‘not even the slightest degree of wisdom can be poured into a man by others; rather he must bring it forth from himself’—this applies in particular to us as a political community. An important aspect of Kant’s republican political philosophy is its combination of a principled normative framework and an emphasis on our responsibility to decide *what kind of society we want*, given our normative obligations to each other. As scholars, our task is primarily to provide knowledge and give normative advice in this process. Adapting a normative theory in its content to fit strategic considerations about how it can have the best effect in this or that political community, in view of punitive emotions and other contingencies, would easily end up like so many other legal policy enterprises: without proper foundations, direction and scientific credibility. [16]

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[1] Immanuel Kant, *Critique of pure reason* (1781/1787), English translation 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, A738/B766.

[2] Heikki Pihlajamäki, ‘[Nordic Criminal Law: Philosophy, History, and Comparison](#)’, MCLR+ (crimlrev.net) (Sept. 30, 2024).

[3] See Otfried Höffe, *Kant’s Critique of Pure Reason: The Foundation of Modern Philosophy*, Studies in German Idealism Volume 10, Dordrecht: Springer 2010.

[4] 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, at 307–308.

[5] Kimmo Nuotio, ‘[The End of Pragmatism: On Jacobsen’s Kantian reading of Nordic Criminal Law](#)’, MCLR+ (crimlrev.net) (Sept. 30, 2024).

[6] See also recent Hegel-inspired criminal law philosophies such as Alan Brudner, *Punishment and Freedom – A Liberal Theory of Penal Justice*, Oxford: Oxford University Press 2012.

[7] Marie Kagrell, ‘[The Normative Baseline and \(Freedom from\) Criminal Responsibility: Comments on Jørn Jacobsen’s Power, Principle, and Progress](#)’, MCLR+ (crimlrev.net) (Sept. 30, 2024).

[8] It is, however, probably fair to say that the set of Nordic doctrinal works on criminal responsibility is not fully as meager as Kagrell seems to suggest. Some more recent examples are Nicolaj Sivan Holst on omissions in Danish criminal law in *Strafbar passivitet*, Jurist- og Økonomforbundets Forlag, København 2015 and Katrine Holter on intent in Norwegian criminal law in *Hensikt og omkringliggende begreper i strafferetten*, Oslo: Karnov 2020.

[9] See also Linda Gröning, Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, 3 ed., Fagbokforlaget, Bergen 2023 p. 48.

[10] Linda Gröning, ‘A Normative Compass for Nordic Criminal Law: The Case of Unaccountable Offenders’, MCLR+ (crimlrev.net) (Sept. 30, 2024).

[11] For inspiration, see e.g. Arthur Kaufmann, *Das Schuldprinzip – Eine strafrechtlich-rechtsphilosophische Untersuchung*, Heidelberg: Carl Winter, 1961.

[12] See also, for a much more elaborated account of it, applied to Norwegian criminal law, in Gröning, Husabø and Jacobsen 2023.

[13] Katja Franko, ‘On Kant, Membership and Criminal Law: A Helpful or a Dangerous Dialogue Partner?’, MCLR+ (crimlrev.net) (Sept. 30, 2024).

[14] 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, 6: 332.

[15] See 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.

[16] See my discussion in Jørn Jacobsen, *Legal Reform Research – Groundworks for legal scholarship*, Oslo: Karnov 2022, see especially pp. 95-105 and 113-116.

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