

# On Kant, Membership and Criminal Law: A Helpful or a Dangerous Dialogue Partner?

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In the introduction to *Power, Principle, and Progress: Kant and the Republican Philosophy of Nordic Criminal Law* (2024), the author with his characteristic humility expects that I, as a criminologist, would end up being underappreciated and disappointed with the book. This has certainly not been the case. Jacobsen’s book was a pleasure to read. It is well written and, despite some heavy passages in German (where Google Translate can come in handy), easy to follow. As a criminologist, I particularly appreciated its direct engagement with the concept of power. Following Kant, Jacobsen analyzes power as ‘an intrinsic feature of the state as a legal order’, which is a somewhat unusual approach within Nordic legal scholarship.

The book offers a broad analysis and covers a wide range of subjects and disciplines, from philosophy of law and political theory to criminology and legal history. Consequently, it is impossible to do justice to the richness of its arguments in a short review. My comments will, therefore, focus on two sets of concerns: 1) Jacobsen’s heavy reliance on Kant, and 2) the book’s omission of Kant’s cosmopolitanism and silence on issues of membership.

## **A Helpful Dialogue Partner?**

The book is heavily indebted to Immanuel Kant whom Jacobsen describes as a ‘helpful dialogue partner’. Kant’s ideas lay important groundwork for the book’s arguments and help the author answer two sets of questions: why it is legitimate and necessary for states to punish, and to what purposes and functions punishment should be used. Jacobsen admits that to those well acquainted with Nordic criminal law scholarship Kant may seem a strange ally. Kant’s work certainly does not sit comfortably with a long tradition of central thinkers that have historically shaped Nordic thinking about punishment and criminal law. Although in many ways different, these authors have had in common a lack of regard for and engagement with retributivist perspectives. It may, therefore, come as a surprise to an outside observer that Jacobsen in his attempt to create

normative foundations of Nordic criminal law relies so heavily on Kant, who can be safely described as a retributivist. Although Jacobsen shows that just how 'hard core' Kant's retributivism turns out to be will depend to some extent on interpretation, it is nevertheless a brave project to openly sail under the retributivist flag. In the Nordic context, it might be almost described as revolutionary.

While, in principle, sympathetic to revolutionary projects, I am nevertheless left with the question: why Kant? As the author himself points out, grasping Kant's view of criminal law is challenging. Kant's writing on punishment is among the least developed aspects of his work. This alone raises the question about Kant's helpfulness as a dialogue partner. A more important objection is that Kant might in fact be a rather dangerous dialogue partner. This may be more relevant in some countries and political contexts than in others. However, I will proceed to suggest that also in Nordic countries promoting retributivist perspectives is increasingly a double-edged sword.

Jacobsen's book promotes a minimalist conception of criminal law where the law does not function as an instrument for resolving various social problems, but rather represents the baseline of state intervention into civil society. Due to the importance of public justice and the right to freedom, he places the retributive function of criminal law above its preventive function. Here lies perhaps the most radical aspect of Jacobsen's book, particularly in the Nordic context, where the state historically has been inclined to resort to punishment to solve pressing social problems, most notably those related to the use of illegal narcotics. In that respect, Kant can undoubtedly be considered a helpful dialogue partner in countering the Nordic over-reliance on crime prevention as the main justification for punishment.

Where Kant's heavy influence may be problematic is thus primarily not at the level of principle, but rather when faced with the sociological realities of the current climate of criminal justice policy. Nordic countries have been known not only for their pragmatic approach to criminal law (described by Jacobsen as lacking a clear compass). While perhaps weak at the level of principled reflection, the use of penal power has been anchored in norms and values that have been often implicit, but strongly consensual. These social norms, such as restraint, commitment to the welfare state, reintegration and social inclusion, have in practice functioned as a sort of compass and have resulted in considerable levels of penal parsimony. Nordic countries are known for their relatively humane prison conditions and small prison populations, short prison sentences and a general focus on reintegration. These traits—in scholarly literature referred to as 'Scandinavian exceptionalism'<sup>[1]</sup>—are today under serious pressure. We have seen developments towards more unbridled use of criminal law and penal power, which are often justified by retributive sentiments. In Norway, for example, the general sense of justice has been used as a justification for increasingly severe penalties for sexual offenses. The country has in

recent years extended the maximum penalty for terror offenses from 21 to 30 years. There has also been a tendency towards a more law and order-oriented approach in debates about immigration and organized crime, which play out differently in different Scandinavian countries, but nevertheless have many similarities.[2] John Todd-Kvam has described the punitive attitudes towards non-citizen offenders as ‘bordered penal populism’.[3]

One might argue that it is precisely such social conditions which call for a firmer normative grounding and principled reflection about the use of criminal law and penal power. Jørn Jacobsen’s book is, in that respect, extremely timely. However, the question whether a Kantian approach can lead to restraining punitive impulses (by appealing to disproportionality) or justifying them (by appealing to the public sense of justice), can probably best be answered by empirical inquiry. There is certainly a latent potential for (mis)use in the current Nordic criminal justice context. Due to its strong belief in reason and progress, Jacobsen’s book does not provide clear answers about how to meet the emotive aspects of punishment and how to counter them. Kant seems to be less helpful here since, as the author admits, his loathing for certain crimes comes strongly across in his work.

Jacobsen’s project of building a minimalist approach to criminal law rests on the capacity of the ‘good republic’ to self-regulate and limit its own punitive impulses. The book is built on a premise that this is possible. Following Kant, Jacobsen’s inclination is not to question the state but rather to trust state institutions (here, he is clearly a reformist rather than a revolutionary). The state is legitimate and deserves respect even if it does not fulfill the ideal of the true republic. He points out though that states which do not live up to this ideal are under the obligation to reform themselves to come closer to the republican ideals. And although the book stresses the importance of constitutional rights in limiting the power of the state, it does not really answer the question whether this is enough in cases where the state chooses to misuse it.

### **Beyond the Republic**

One of the defining traits of the book is its underlying belief in reason and progress, which also features in the title of the book. A simple word search of the manuscript shows that reason appears 285 times in the text. This is in stark contrast to terms such as boundaries and borders which do not feature in the book at all. Their absence is symptomatic of Jacobsen’s understanding of the republic, in which the nation state is accepted as its unquestioned representation. Such an approach is not unusual. In fact, it dominated much of the 20th century writing about justice. John Rawls’ influential *A Theory of Justice* was, as Nancy Fraser[4] points out, built on a notion of a self-sufficient and closed society, ‘which one entered only by birth and exited only by death’. Citizens of the republic are thus implicitly

citizens of the nation state (or, in the case of the Nordics, the welfare state).

Yet, questions of boundaries and exclusion lie at the heart of criminal law and are particularly prescient today. Non-citizen offenders constitute a considerable proportion of those being punished in the Nordic countries. I have argued elsewhere<sup>[5]</sup> that citizenship status is increasingly relevant in criminal law and criminal justice in terms of producing disparate rationalities, outcomes and systems of rights. As Lucia Zedner succinctly asked: is the criminal law only for citizens?<sup>[6]</sup> In answering the question, Kant could have served as a very helpful dialogue partner. The moral community envisaged in his writing is a universal moral community rather than one partitioned by boundaries. In addition to the moral aspects, Kant's ideas on the political, cultural and institutional dimensions of cosmopolitanism and world citizenship have received considerable scholarly attention and have inspired a vibrant philosophical debate. However, Kant's cosmopolitan vision is absent from this book. I am very sympathetic to Jacobsen's minimalist approach to criminal law. It is not only principled and well argued for, but also guided by deeply humanistic values. I can only hope that, when faced with increasingly emotive penal politics, it can place Nordic criminal law on a more secure normative footing. At the time of writing of this review, Norway is embroiled in intense public debates about immigrant juvenile crime and various types of punitive responses have been thrown on the table. The proposed measures are heavily inspired by developments in Denmark and Sweden. The debate shows why there is an urgent need to discuss the justifications of punishment, and the limits of the criminal law within the Nordic space. The case of immigrant offenders also exemplifies the tensions relating to questions of membership and boundaries of the republic inherent in Jacobsen's book, and in the Nordic debates about punishment.

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[1] Smith, P. S., & Ugelvik, T. (Eds.). (2017). *Scandinavian penal history, culture and prison practice: Embraced by the welfare state?*. Springer.

[2] Franko, K. (2019). *The crimmigrant other: Migration and penal power*. Routledge.

[3] Todd-Kvam, J. (2019). Bordered penal populism: When populism and Scandinavian exceptionalism meet. *Punishment & Society*, 21(3), 295-314.

[4] Fraser, N. (2008) *Scales of Justice: Reimagining Political Space in a Globalizing World*. Cambridge, UK: Polity Press; p. 39.

[5] Franko, K. (2023). On the relevance of citizenship in criminal law: Implications for proportionality, equality, and justice. *Bergen Journal of*

Criminal Law & Criminal Justice (BJCLCJ), 11(2), 1-26.

[6] Zedner, L. (2013). Is the criminal law only for citizens? A problem at the borders of punishment. *The borders of punishment: Migration, citizenship, and social exclusion*, 42.

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