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Vanessa Barker

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# Nordic Exceptionalism revisited: Explaining the paradox of a Janus-faced penal regime

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**Vanessa Barker**

Stockholm University, Sweden

## Abstract

Nordic penal regimes are Janus-faced: one side relatively mild and benign; the other intrusive, disciplining and oppressive. This paradox has not been fully grasped or explained by the Nordic Exceptionalism thesis which overstates the degree to which Nordic penal order is based on humaneness and social solidarity, an antidote to mass incarceration. This essay examines the split in the foundation of the Swedish welfare state: it simultaneously promotes individual well-being in the social sphere but enables intrusive deprivations of liberty and in some cases, violates the principles of human rights. The backbone of the welfare state, Folkhemmet, the People's Home, is at once demos, democratic and egalitarian and ethnos, a people by blood, exclusionary and essentialist. The lack of individual rights and an ethno-cultural conception of citizenship make certain categories of people such as criminal offenders, criminal aliens, drug offenders and perceived 'others', particularly foreign nationals, vulnerable to deprivation and exclusion.

## Keywords

Ethnicity, public criminology, punishment and society, social exclusion, welfare state

## Countervailing tendencies in a mild penal regime

In May 2011, the Justice Ombudsman of Sweden, Hans-Gunnar Axberger issued a searing report on the practices and policies of the Swedish Migration Board's

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### Corresponding author:

Vanessa Barker, Sociology Department, Stockholm University, Stockholm 10691, Sweden.

Email: [vanessa.barker@sociology.su.se](mailto:vanessa.barker@sociology.su.se)

detention centers for migrants. Following his internal investigation, the Justice Ombudsman (JO) criticized the Board for misapplying the law in ways that subjected foreigners to more intrusive deprivations than nationals (Axberger, 2011: Dnr 6090–2009, p. 2). Detailing routines that placed self-harming detainees in remand prisons locked in cells, placed detainees in prisons with convicted criminal offenders, relied on poorly trained hourly wage workers to make placement decisions, and made the default position the most restrictive, the JO argued that these practices were simply wrong in principle. It was wrong to place people with immigration violations in prison alongside suspected and convicted offenders. Drawing attention to the imprisonment of self-harming detainees, he called the practice distressing, *beklämmande*, and regrettable, *beklagligt*, a practice no one seemed to support but continued anyway. The treatment of detainees, according to the Justice Ombudsman, violated human rights and was an insult to personal dignity. It was an outrage, *en kränkning*, a particularly stinging criticism in a society based on the maintenance of personal dignity through equal treatment.

These practices coupled with the use of pre-trial detention in criminal cases, the common use of restrictions and isolation in pre-trial detention, the overrepresentation of foreign nationals in prison, the ‘return’ of failed asylum seekers, the deportation of criminal aliens, the deportation of children, the compulsory treatment of drug addicts and alcoholics, and the imprisonment of drug users are policy outcomes that do not neatly conform to the conventional view of Sweden as a reservoir of mild penal sanctioning and human rights protections. While Sweden does maintain relatively low imprisonment rates and relatively humane prison conditions as indicated by and central to the Nordic Exceptionalism (NE) thesis (Pratt, 2008; Pratt and Eriksson, 2012), it is clear there are a number of contemporary practices and policies that do not match the empirical description or normative underpinning of penal moderation. ‘Open prisons’, remarkable for their low level of security, inmate autonomy, and humaneness, figure prominently in the NE thesis as a barometer of Scandinavian progressivism, but in reality, this is not the norm as most inmates are housed in mid-level security units (Kriminalvården, 2012), which fits better with Swedish values of moderation, that is *lagom*, not too much and not too little. But perhaps more importantly, there are a number of practices that highlight the ‘pains of imprisonment’, that is, the disciplining and distressing nature of confinement, even in relatively mild penal regimes such as Sweden, Norway, Denmark, and Finland (Basberg Neumann, 2012; Mathiesen, 2012; Scharff Smith, 2012; Ugelvik and Dullum, 2012). Moreover, the detention and deportation of migrants, against the historical backdrop of large-scale forced sterilization of thousands of Swedish women, including ethnic minorities such as the Roma (Broberg and Hansen, 1996; Roth and Hertzberg, 2010) and forced quarantine of HIV/AIDS patients in the early 1980s (Baldwin, 2005), suggests the presence, if not a pattern, of human rights violations of those deemed unwanted or ‘undeserving’ (Åmark, 2001; Björkman, 2001), including at times foreign nationals (Axberger, 2011; Committee against Torture, 2008; Utskottets Överväganden, 2010/2011: SfU6), ethnic minorities (Roth and Hertzberg, 2010), and other kinds of perceived outsiders (Björkman, 2001; Trägårdh and Svedberg, 2012).

## A split in the Swedish welfare state

That said, none of these examples necessarily disqualify the NE thesis. But they are difficult to understand and explain given the thesis' partial reading of the Swedish welfare state. The Nordic Exceptionalism thesis claims that Scandinavian/Nordic countries (Sweden, Norway, Denmark, Iceland, Finland) maintain more humane and mild penal regimes because of their distinctive welfare states which are rooted in social cohesion, conformity and egalitarianism (Pratt and Eriksson, 2012). Strong cultures of equality, social solidarity, faith in social engineering, state expertise, and consensus politics, the thesis argues, decrease criminogenic conditions and moderate penal severity (see Green, 2008; Lappi-Seppälä, 2008).

From this view, the only way to explain the repressive examples would be to see them as a breakdown or retraction of the welfare state, the result of social change. But it would be a mistake to argue that new trends are replacing a more moderate tradition. This is not a story about the globalization of punitiveness (Brown, 2005), the spread of American neoliberalism (Wacquant, 2009), or converging cultures of control (Garland, 2001). Nordic penal order is Janus-faced, to invoke Wacquant's cogent image of the double-sided nature of the State: it is mild and harsh simultaneously. But to explain it, we need to deepen our analysis of the welfare state. Both mild and repressive elements coexist because of the duality of the Swedish welfare state—a duality that promotes individual well-being and autonomy in the social sphere while resisting individual rights in the legal sphere (Trägårdh and Svedberg, 2012). These factors are not mere 'social costs' associated with the welfare state, they are central to it. As Henrik Tham (1995) has explained, the Social Democratic Party has a long history of interventionist approaches to crime and other perceived social problems with the latest attempt to create a 'drug-free society' through the imprisonment and confinement of both users and dealers. These measures were not imposed from the outside but came from within.

The Nordic Exceptionalism thesis is fast becoming a social fact, that is, a taken for granted reality with a force of its own, as Magnus Hörnqvist (2012) explains. This is problematic he argues, since many Nordic prison researchers find the thesis hard to uphold, controversial, and normative as evidenced in the recent collection, *Penal Exceptionalism? Nordic Prison Policy and Practice* (Ugelvik and Dullum, 2012). Although many of the contributors in *Penal Exceptionalism?* are critical of the thesis, most mainly take issue with the characterization of penal outcomes but do not examine the welfare state itself, the driving force of the thesis (Scharff Smith, 2012, is an exception). As such, there is a gap in our understanding of the welfare state that has important implications for penal order. This essay seeks to fill that gap.

This essay has three goals:

- (1) It identifies two structural barriers in the Swedish welfare state—the lack of individual rights and an ethno-cultural conception of citizenship—that create conditions conducive to intrusive deprivations in the penal field, particularly for perceived outsiders such as foreign nationals and ethnic minorities.
- (2) By identifying these structural barriers in the welfare state, the essay then calls into question the progressive characterization of Swedish penal order based on

human dignity and social solidarity. It suggests we take more seriously the Janus-faced nature of the Swedish case.

- (3) It concludes by rethinking the degree to which welfare state generosity may or may not lead to mild penal sanctioning and suggests alternative and inclusionary mechanisms that can promote individual liberty.

A note on research strategy: this article examines the specific case of Sweden rather than the range of Nordic countries; this approach is used to keep the empirical detail concrete and focused. At the same time, despite important cultural, political, and social differences across the Nordic countries, Sweden is often portrayed as the exemplar of the *Nordic Model*, opening the possibilities for generalization across the region. The article seeks to develop an alternative but possibly complementary account of Swedish social control—one that focuses on legal rights and social classification vis-à-vis citizenship rather than on the more conventional state paternalism approach. State paternalism does not sufficiently identify the institutional mechanisms that make such infringements on rights possible and why it comes at perceived ‘others’ expense. A note on terminology: ‘the use of the terms repression’, ‘repressive uses of state power’, and ‘intrusive deprivations’ are meant to capture the infringement on individual rights, autonomy and self-governance as they operate through penal power in democratic societies which do not compare to the scale and intensity of repression under authoritarian regimes or the bloody suppression of civil liberties.

### **Folkhemmet: The People’s Home**

The Swedish welfare state is well known for its generosity and high standard of living; it is known for being universal (rather than means-tested), meaning, everyone has access to its social benefits regardless of income or socioeconomic status. Across the life course, from cradle to grave, everyone has access to health care, pension benefits, education, subsidized child care, unemployment and disability insurance, parental, family, and medical leave when needed. And as Esping-Andersen (1990), theorized, it is distinctive for its high degree of *de-commodification*, its high protection and state regulation against the ill-effects of the market. Individuals are protected against the vagaries of the market but they are also expected to contribute to the material well-being of the society, one of the most productive capitalist economies in the world. As Cavadino and Dignan (2006: 150) note, the Swedish welfare state is ‘comprehensive and egalitarian’ with ‘a high level of material security for all’.

Historically, the Swedish welfare state was designed as ‘The People’s Home,’ *Folkhemmet*, with a place for everyone. It promised security, *trygghet*, and well-being, which must have come as a welcome relief after a long and cruel 19th century of mass poverty, near starvation (in the countryside), mass emigration, delayed industrialization, and class conflict. Infused with the democratic and anti-elitist spirit of the popular movements, the People’s Home would be open to the folk, the ‘people’, inclusionary and universal, simultaneously merging the interests of factory workers with the poor but landed farmers and avoiding the more bourgeois conceit of the citizen (Trägårdh, 1997). In other words: ‘The good home does not consider anyone as privileged or unappreciated; it knows

no special favorites and no stepchildren ... [N]o one tries to gain advantage [at] another's expense, and the stronger do not suppress and plunder the weak', explained Swedish Prime Minister Per Albin Hansson (quoted in Pratt, 2008: 127). (For more on the history of the Swedish welfare state, see Marklund, 2009; Stråth, 1993.) The Swedish welfare state would be referred to affectionately as a 'home', inspiring feelings of warmth, trust, and fidelity, and would be managed by benevolent parents. Quoting Prime Minister Hansson once more: 'In a loving home exists equality, concern for others, cooperation and a helping hand' (Hansson quoted in Arnáson, 2008: 155). I suggest that this domestic metaphor for the State blurs a crucial distinction between state and civil society and in the process diminishes the political conception of citizenship: here the conception of an individual as a rights-bearer vis-à-vis the State is supplanted by the idea of an individual as compliant family member subject to the paternalism of the State qua family.

### Social solidarity vs individual autonomy

The Nordic Exceptionalism thesis claims that the underlying dynamic of this generous and universal welfare state is rooted in social solidarity and homogeneity, a reflection of strong group cohesion and similar ethnic and religious identification, especially Lutheranism. Social organization based on sameness and togetherness then provides the basis for strong redistributive welfare state since everyone contributes and everyone benefits and in the penal realm, more mild and less intense punishments (Pratt, 2008: 129). The NE thesis emphasizes the egalitarian nature of the social organization and cultural values. This is not contentious. But what is problematic is locating this egalitarian culture in a group-based society. Sweden is not a group-based society and seeing it as such makes it very difficult to grasp and explain its more repressive dimensions, internally directed.

Instead, the individual is the principal organizing factor of Swedish society. In a groundbreaking and highly acclaimed history of the Swedish welfare state, *Är Svensken Människa? Gemenskap och oberoende i det moderna Sverige [Is the Swede Human? Community and Autonomy in Modern Sweden]*, Henrik Berggren and Lars Trägårdh (2006, 2010) explain how individual autonomy is not only the driving force of the Swedish welfare state but the underlying moral logic of the society itself. Drawing on a wide range of social history and cultural analysis, they explain:

In fact, the official rhetoric about solidarity and social democracy notwithstanding, Sweden is not first and foremost a warm *Gemeinschaft* composed of altruists who are exceptionally caring or loving, but rather a hyper modern *Gesellschaft* of self-realising individuals who believe that a strong state *and* stable social norms will keep their neighbor out of both their lives and their backyards.

(Berggren and Trägårdh, 2010: 56, emphasis in original)

The Swedish welfare state is not a reflection of a close-knit community, a *Gemeinschaft*, with neighbors taking care of one another; it is instead a tool for individual emancipation from precisely this kind of dependency and close community life. Far from being driven by collectivist movements, Berggren and Trägårdh (2010) explain how the welfare state

rests on an older and possibly more potent cultural trope that resonated with the population: the free Swedish peasant, land-owner, independent, hard-working, enduring, and stoic. Deeply attached to independence and property rights, the yeoman farmer placed a high premium on autonomy, perceived as the highest virtue, especially in the unforgiving Nordic climate. Independent farmers (and not elites) effectively defeated attempts at collective ownership which were at stake in socialist reforms in the 1930s. To refer to Sweden as socialist is to fundamentally misunderstand the organization of the society itself; private property, regulated capitalism and entrepreneurship have produced one of the highest GDPs among the OECD countries. The resulting welfare state emancipated individuals from traditional forms of social organization and hierarchy: the family, the church, and charities (Berggren and Trägårdh, 2010). It freed individuals from dependency: wives from husbands, children from parents, elderly parents from grown children, and to a certain extent, employees from employers. A generous welfare state is perceived to be a 'necessary prerequisite to free citizens from demeaning and humbling dependence on one another' (Berggren and Trägårdh, 2010: 56). Likewise, Cavadino and Dignan (2006: 150, emphasis in original) identify the same underlying ethos in their analysis of Nordic Social Democracy:

It is (although this may sound strange to some ears) more *individualistic*—society is extremely important, but at the end of the day it is there to serve the needs of all its individual members, not the other way around.

Similarly, Garland (2012) remarks that societies with weak ties and high levels of individualism are likely to produce relatively mild penal sanctioning, countering claims about strong group cohesion often assumed in the Nordic cases.

In Sweden, equality vis-à-vis the welfare state is a tool to maintain individual autonomy and self-realization. Cavadino and Dignan connect this social democratic logic to Rawls' (1972) *Theory of Justice* whereby rational actors enter into the social contract more out of self-interest than collectivist sentiment or attachment. In the penal realm, mild penal sanctioning can then be re-interpreted as the upholding of individual dignity, the refusal to 'look[] down on anyone', as Prime Minister Hansson described the *People's Home* in 1928 (Hansson quoted in Pratt, 2008: 127). The way to uphold individual dignity in this context is to practice equal treatment, exemplified by 'just deserts' philosophy of punishment. Proportionality in the Swedish case can dampen excessive and arbitrary sanctions (Cavadino and Dignan, 2006: 151). Mild sanctioning in this context is driven by the demand to preserve individual dignity, a formative cultural value and principle of social organization, and is not necessarily a reflection of benevolence or great sympathy for other people, a type of mercy dynamic.

## **The People's Home: negative implications for rights**

By situating the individual in the center of the Swedish welfare state and moving away from group dynamics of social solidarity, we get a better sense of the fraught relationship between the individual and the State, a relationship which has serious implications for the use of the repressive power. As Trägårdh explains, the Swedish welfare

state liberated individuals from traditional dependencies, improved their material well-being and sense of security, yet, this alliance between the State and individual, *statist-individualism*, as he calls it, disempowered individuals against the State. Swedish historians Lundberg and Tydén (2010) have remarked on the same process: ‘the fundamental right of the individual to govern his or her own life was lost during the very same process’. We might think of this as a kind of Faustian bargain in which individuals gained autonomy in certain areas of social life and greatly improved their life-chances, but gave up individual rights claims as dependency on the State increased. It is a kind of ‘iron-cage’, to invoke Max Weber, in which Swedes built a welfare state to attain individual autonomy and material well-being but whose liberties were ultimately restricted by the same process.

Although the partially revised Nordic Exceptionalism thesis (Pratt and Eriksson, 2012) highlights the pressures of conformity and social control, it does not address the weak legal tradition of individual rights. By focusing on the individual as the organizing principle in Scandinavian societies rather than group dynamics, we can gain a better appreciation for the high stakes involved. State intrusion upon individual liberty involves a scale, intensity, and seriousness that go well beyond the social pressures to agree or conform to group norms.

In Sweden then, individual freedom is constructed *through* the State rather than conceived as freedom *from* the State, as in the British and American liberal traditions. It is critical to note that Sweden does not have a bill of rights or functional equivalent that protects individuals from the State. As Johan Karlsson Schaffer (2012) explains, all of the Nordic countries historically have been skeptical of constitutional protections of individual rights: individual rights were perceived to be an impediment to welfare state expansion and would be considered less legitimate than resolving conflicts through the much preferred social democratic process (Husa, 2011; Nergelius, 2008). Sweden does not actively practice Judicial Review in which an individual can challenge the constitutionality of the law or the violation of his or her fundamental rights through the high courts. Sweden relies more extensively on a Judicial Preview mechanism whereby a panel of appointed judges reviews the constitutionality of Parliamentary legislation (Bull, 2011). In addition, Schaffer Karlsson argues that the influential Scandinavian realism school challenged the role of natural law and metaphysics in legal thinking, rejecting the idea that individuals have ‘inalienable rights’, a move that further weakened the status and role of individual rights in the constitution. In a contemporary example of this resistance, Sweden has yet to incorporate the Convention on the Rights of the Child into Swedish domestic law despite being one of the Convention’s greatest advocates internationally (Schaffer Karlsson, 2012) and despite having one of the highest rates of child well-being in the world (Unicef, 2007). As legal scholar Agust Thor Arnáson (2008: 160) argues: ‘Efficient administration of state matters and pragmatic solutions do by no means justify weak constitutional human rights protection.’

What this means is that the State maintains ultimate power and authority to determine the public good and decides under what conditions the public good can override individual rights. As Arnáson (2008: 155) describes the Nordic model: ‘it can be described as a strong social democratic state, based on the idea of a sovereign parliament with little or no limitation of its power’. A recent rise of internationalism and European law in

Sweden modifies but does not discount this strong view (Nergelius, 2008). In this configuration, individual rights are more vulnerable and less protected even though civil and political rights are guaranteed in the Swedish Constitution (Instrument of Government, Chapter 2 Fundamental Rights and Freedoms). Individual rights are more conditional than absolute. Article 21 of the Swedish Constitution, 'Conditions for limiting rights and freedoms', stipulates the conditions under which citizens' rights can be suspended. Article 21 states:

The limitations referred to in Article 20 may be imposed only to satisfy a purpose acceptable in a democratic society. The limitation must never go beyond what is necessary with regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free shaping of opinion as one of the fundamentals of democracy. No limitation may be imposed solely on grounds of a political, religious, cultural or other such opinion.

(Instrument of Government, 2012: Article 21)

Limitations on rights can be imposed as long as they do not supersede what is considered 'necessary' and what is considered 'acceptable in a democratic society'. Even though power resides in the demos, the people, as represented by the majority in the Riksdag, this lack of specificity on constitutional restrictions leaves a high level of discretion to state authorities and the whims of the majority. What is acceptable at one time in place may not be acceptable in another. What is acceptable to social engineers (even those backed by popular support) may not be acceptable to the individuals or groups whose rights are limited. Article 25 goes on to state the limitations of the rights of foreign nationals with two of the 10 provisions explicitly restricting protections against the deprivation of liberty (Instrument of Government, 2012: Article 25). On a related point, anti-discrimination law and minority rights are less established in Sweden, introduced and consolidated as late as 2008 in the Discrimination Act, further illustrating a relatively weak legal structure for the protection let alone promotion of individual rights.

The limitation on individual rights in Sweden, as a structural feature of the welfare state—that is, as a building block for state action and interpretation—has had major consequences for public policy and the intrusive use of repressive state power against individuals. To understand how structural features exert causal force on public policy and penal order, it is useful to recall insights from historical institutionalism. Here historical traditions, practices, and institutions create certain channels of action and eliminate others; they create strong 'path dependencies' in which the legacies of past practices continue to exert pressure on contemporary policy (see Pierson, 1994). The institutional environment creates a kind of *habitus*, in Pierre Bourdieu's terms, a particular way of acting and thinking, an underlying logic or texture of the political field. What is imaginable, what is possible, what is considered acceptable in this particular context may be unthinkable in another. The historical institutional environment creates a repertoire of actions that are deemed legitimate and culturally resonate not only by state actors but by the population more generally who do not protest but support such activity because it makes sense to them and is perhaps more importantly, meaningful to them.

In terms of the legacy of intrusive deprivations in Sweden, the same state that guarantees individual autonomy in terms of material well-being is the same state that authorized the forced sterilization of thousands of Swedish women on a scale that paralleled Nazi Germany (Baldwin, 2005), that carried out one of the most restrictive and interventionist responses to the HIV/AIDS epidemic in the 1980s (Baldwin, 2005), and that continues to mandate treatment for alcoholics and drug addicts (Tham, 1998), all intrusions on individual liberty and personal dignity carried out in the name of public good (public health and public security).

Henrik Tham (1998, 2005) has extensively documented and explained a similar strain of intrusiveness in Swedish drug policy. Since the late 1960s, both the Social Democrats and Liberal Party have aggressively pursued a 'drug-free Sweden' by penalizing drug consumption and banning alternative 'harm reduction' approaches. Harking back to the Temperance Movement, Sweden's drug-free society stressed the principles of 'sobriety, self-discipline, and the improvement of one's life' (Tham, 2005: 70), authorizing the police to take urine and blood samples from drug users without their consent to realize this goal. Swedish prisons are literally filled with drug users who make up over 50 percent of the prison population (Kriminalvården, 2012). Comparatively, these figures are high, especially when we consider that Sweden includes drug consumption as a drug offense. Looking at the breakdown of comparative prison populations by drug offense available from 2008, Sweden and the other Nordic countries are on the high end of the scale with over 30 percent of the prison population made up of drug offenders (including possession, trafficking, production) as compared to England and Wales with 16 percent, the Netherlands at 20 percent, and Germany with 15 percent (Council of Europe, 2010). Sweden has a relatively smaller number of drug crimes reported to the police, 8000 drug crimes reported to the police in 2009, compared to 33,000 drug crimes reported in England and Wales or 18,000 drug crimes reported in the Netherlands (Eurostat, 2012: Table 7, p. 12). These discrepancies, controlling for population, suggest that Sweden has a more proactive and intrusive approach to drugs compared to similarly situated member states in the European Union.

Government officials have justified these intrusive practices as the most effective way to protect and vindicate the society that itself has been victimized by drugs. As Tham (2005: 70) explains, the drug-free society is the realization of a particular vision of the good society, the productive welfare state where everyone works, everyone contributes, and 'everyone has a right to dignity' even if that dignity must be forced onto them. These restrictive practices are not minor inconveniences for a few perceived outsiders but rather indicative of how power operates in this society more generally, and how it operates coercively but legitimately.

In the penal realm, it is the same state that relies extensively on pre-trial detention and isolation of suspected (and not yet tried or convicted) offenders, including juvenile offenders denied contact with their own parents; it is the same state that authorizes the taking of nonconsensual blood samples from detainees, relies on 'cage-like' dog-pens as exercise facilities for remand prisoners (a practice associated more with Supermax prisons in Pelican Bay, California than in Gothenburg, Sweden), and confines a proportion of immigration violators with suspected and convicted criminal offenders (Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2009).

And as noted at the outset, these are all practices that go against conventional portrayals of Sweden as the apogee of enlightened social policy, an image that Swedish elites actively have promoted around the globe for most of the 20th century (Nilsson, 2012). As Roddy Nilsson (2012) explains, leading Social Democrats in the 1930s such as Gunnar and Alva Myrdal, well known in the USA for their scholarship on race, population, and social policy, brandished the image of Sweden as having the most ‘modern, progressive, and effective’ welfare state, one to be admired and emulated. The Swedish Institute, a government agency, picked up this practice in the 1940s and continues today to promote the *Nordic Model*. In the 1960s and 1970s, penal elites such as Torsten Eriksson, an internationally recognized penal reformer, continued to advance Swedish progressivism by encouraging the adoption of key features of the Swedish prison system, namely its humaneness and openness, information further spread internationally by Thorsten Sellin (Nilsson, 2012). Likewise, Neil Kent (2012) explains how political elites such as Prime Minister Olof Palme cultivated an image of Sweden as an ‘ethical diplomat’ (2012: 45), a ‘social democratic utopia’ (2012: 59), a safe haven for human rights and progressive social welfare. And more recently in 2011, an independent but influential think tank, Global Utmaning, presented the *Nordic Way* at the World Economic Forum in Davos, Switzerland, as a guide and possible solution to European social and economic woes. Similarly, in early 2012, the Moderate led coalition government offered the *Nordic Way* as an antidote to growing European crises at the Northern Future Forum, a high level meeting of Ministers, including Prime Minister Cameron of Britain and Ministers from the Baltic regions, a promotional effort that has been translated into seven languages and reached countries outside the EU such as Israel and South Korea.

## Infringement on individual rights

A less well-known feature of Swedish penal practice, and one that is absent in the Nordic Exceptionalism thesis (and not mentioned in the *Nordic Model*), has been the scrutiny and criticism it has incurred from international oversight committees: the United Nations Committee against Torture and the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Less well publicized are human rights violations found by the European Court of Human Rights (ECHR). The ECHR has made 99 judgments on Sweden with over 50 percent of those decisions finding at least one violation of human rights, including three violations of inhuman and degrading treatment (European Court of Human Rights, 2012a: 2). These figures are much smaller than those of other high violator states such as Russia with over 1000 judgments and 94 percent violations. Yet, we should not easily dismiss their social significance as they indicate the contentiousness of individual human rights in Sweden, especially given that the ECHR has allocated 1940 cases involving Sweden to a judicial formation, a figure higher than France (952) or the United Kingdom (1552) (European Court of Human Rights, 2012b), both countries with substantially larger populations than Sweden’s 9 million, 63 and 65 million respectively.

In 2009, the Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (CPT) made its fifth visit to Sweden for an inspection of its places of confinement, including police custody, prison, remand prisons,

Migration Board detention centers, psychiatric facilities; and Homes for Young Persons. These visits are part of routine and periodic visits mandated by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; all signatories must submit to these inspections and allow the delegates open access to its institutions. In the CPT's 2009 report, sent to the Swedish Ministry of Foreign Affairs, the Committee noted several outstanding concerns about the 'ill-treatment' of persons in Swedish institutions. The delegation wrote:

[D]espite certain improvements made since the previous CPT visit in 2003, the findings from this visit indicate that the action taken in respect of a number of long-standing recommendations of the CPT still fails to meet the Committee's concerns, in particular, in the areas of legal safeguards against ill-treatment of persons in police custody, the imposition of restrictions on remand prisoners, the isolation of certain categories or sentenced prisoners, and the holding of immigration detainees in prisons.

(CPT, 2009: para. 6)

The report continues with a list of findings and a set of recommendations, including: the need for Swedish police to better 'integrate human rights concepts' (CPT, 2009: para. 11) during the arrest and questioning of suspects; the recommendation that Swedish authorities stop 'taking blood or other samples from detained persons without the latter's consent' (CPT, 2009: para. 13); guarantee detainees the right to a lawyer and to be informed about their rights; access to a doctor when in police custody; and in the case of juveniles, the right to have a lawyer or 'trusted person' present during police questioning as the Committee found juveniles in police custody were not informed of their rights and 'could be questioned without the presence of their parents, a social welfare representative or a lawyer' (CPT, 2009: para. 24). On the conditions of detention, the report highlights several concerns about the use of 'restrictions' and isolation in Swedish prisons despite the 'relaxed and quite positive' relationship between the staff and inmates (CPT, 2009: para. 33). Of particular concern was the 'impact of prolonged periods of isolation/segregation on the mental health of the inmates concerned', including symptoms of anxiety disorder, post-traumatic stress disorder, depression, agitation, self-harm, and risk of suicide (CPT, 2009: para. 37).

In regard to the use of restrictions on remand prisoners (including limitations on visits, contact, access to media material, family members, segregation and isolation for periods from 6 to 18 months), the Committee made similar remarks: 'The issue of restrictions imposed on remand prisoners has been central to the dialogue between the CPT and the Swedish authorities ever since the Committee's first visit to Sweden in 1991' (CPT, 2009: para. 35). The CPT makes a note that the same concern has been documented by the United Nations Committee against Torture on its 2008 visit. Yet, Sweden has yet to adopt or introduce any legislation or regulation on the use of restrictions even though restrictions are quite common: in 2009, 46 percent of remand prisons in Gothenburg, for example, were subject to some kind of restriction, including isolation, down from the 70 percent in March 2008 (CPT, 2009). Juveniles were also subject to restrictive conditions 'akin to isolation', marked as 'a draconian measure' by the delegation (CPT, 2009: para.

35). Restrictions, the report noted, 'should never be applied for the purpose of pressure to bear on persons remanded in custody' (CPT, 2009: para. 38).

To continue this catalogue, a few remarks about migration detention centers and the placement of immigration violators in remand prisons are necessary. In section 6 'Safeguards for persons detained under aliens legislation', the CPT (2009: para. 64) strongly states:

The CPT has already made its position on this matter clear in the past. In the Committee's view, a prison is by definition not an appropriate place in which to detain someone who is neither suspected nor convicted of a criminal offense. This is all the more so when the prison in question is not in a position to provide them with a suitable regime. In those cases where it is considered necessary to deprive persons of their liberty under aliens legislation, they should be accommodated in centres specifically designed for that purpose, which offer material conditions of detention and a regime appropriate to their legal status.

The Committee then states in bold-face type: 'The CPT recommends urgent steps be taken to ensure that persons detained under aliens legislation are not held on prison premises' (CPT, 2009: para. 64). Similarly, in its report on Sweden, the United Nations Committee against Torture (CAT) drew attention to the common place detention of pre-deportees, people who could be confined for an unlimited time period (unlike almost all other European Union member states). The UN Committee, paralleling the Swedish JO Ombudsman's criticism of the Migration Board (above), was especially concerned with the placement of self-harming detainees in remand prisons (CAT, 2008).

Peter Scharff Smith (2012), in one of the most critical essays on the NE thesis in *Penal Exceptionalism?*, tempers the well-known humane aspects of Scandinavian penal practice with the less well-known inhumane practices, practices that he explains have been central and distinctive to Nordic penal practice since the 19th century. With a focus on Denmark and the extensive use of pre-trial solitary confinement, which the State defends as a means to avoid collusion and interference with their investigation, he explains how this practice has effectively weakened if not violated the human rights of many of those subjected to such restrictions as documented by international review committees. Smith (2012: 54) refers to these practices as the 'anti-liberal social tendencies' indicative of the Nordic welfare states, calling attention to the dualism inherent in this kind of state/society. He goes on to claim that these social control tendencies are probably more relevant and more powerful than the assumed humaneness of Nordic penal practice, a factor that has been downplayed and not well understood in the comparative literature.

## **Universal but exclusionary welfare state, the roots of welfare nationalism**

What remains to be explained is how the Swedish welfare state functions as both a universal but exclusionary model. I argue that the weak individual rights tradition outlined above is further compounded by the partially exclusionary nature of the Swedish welfare state. For those individuals and social groups that are not fully incorporated into the

social, economic, and the political order, the Swedish welfare state can be inaccessible and punitive. Sweden retains a relatively high rate of foreign nationals in prison, foreign nationals make up 27 percent of the prison population (World Prison Brief, 2012), a figure higher than France or the UK, countries which have experienced long histories of ethnic conflict. The Swedish welfare state is fairly affluent and very generous and quite frankly a major accomplishment, if you belong to it. If you do not belong to it, Sweden can be a place made miserable by variegated social marginalization in core areas of social life: housing; employment; education; and criminal justice (Koopmans, 2010). For those with precarious status such as paperless migrants, whose presence on the territory is fast becoming criminalized, the Swedish welfare state, like the other Nordic welfare states, is becoming a place of forced deprivation, designed to illicit a quick exit from the country (Johansen, forthcoming; Khosravi, 2009; Weber and Bowling, 2008).

Sweden currently exhibits tendencies towards welfare-nationalism, a place where the welfare state must be preserved and made sustainable for those on the inside by limiting access from the outside. The structural barriers to belonging are quite high and hierarchical (rather than absolute), particularly for those deemed ‘other’, ‘undeserving’, or members of particular ethnic groups. In her comparative analysis of political economies and penal order, Nicola Lacey (2008) makes a similar observation that the coordinated economies of Northern Europe may be relatively mild toward insiders and more punitive toward outsiders. Although this essay has sought to complicate this view of absolute mildness in the Swedish case, Lacey’s insight is important. Moreover Leanne Weber (2012) argues against social democracy as an antidote to neoliberalism and its associated punitive penal order not because she rejects social democracy’s ideals of egalitarianism and retributive principles, but because it cannot accommodate the realities of global mobility and pressures toward denationalization; it is still rooted very much in nationalistic conceptions of membership and belonging that fail to protect nonmembers.

Earlier, I discussed the People’s Home, *Folkhemmet*, identified by historians as one of the most important founding principles of the Swedish welfare state. The welfare state was built upon the concept of the *folk*, the common people, a democratic impulse that defined rich and poor alike. The idea of the folk is democratic in spirit but also retains a more exclusionary element. The folk concept was preferred to the concept of *medborgare* or citizen (Trägårdh, 1997). But this move, I suggest, while naturalizing equality across social hierarchies de-politicized the nature of the State and its relationship to the individual. The welfare state is a ‘home’, a conceptualization that erases the political boundaries between state and society, between state and the individual. So rather than belonging to a shared political community based on political subjectivity and political contestation—that is, a civic conception of national belonging exemplified (although not always realized) in France or the USA—the folk concept foregrounds the people, an ethno-cultural view of national belonging. You are a member of the Swedish welfare state because you are part of a *people*, an ethnic group with shared experience, culture, language, and blood. *Jus sanguinis* is the main route to citizenship in Sweden (Migrationsverket, 2012). Although naturalization rates are relatively high in Sweden, the reality and legacy of ethnic belonging poses substantial obstacles for ethnic minorities to fully incorporate or fully belong to Swedish society. As economic historian, Jenny Andersson (2009: 240, emphasis in original) explains: ‘the very notion of People’s home contains important and still vital

allusions to an ethnic entity, the *folk*. Similarly, Carly Schall (2012), in her historical sociological account, identifies how the Swedish People's Home both celebrated democratic values and a national heritage based on familial blood ties. According to Prime Minister Per Albin Hansson at the founding of the People's Home: 'democracy is rooted not merely in the constitution, but also in our traditions and in the disposition of the folk' (Hansson quoted in Trägårdh, 2000: 14538). Here, democracy is *not merely in the constitution* but in the people. This configuration underscores the relatively weak position of the constitution (as the central organizing principal of democratic governance) and privileges the ethno-cultural view that democracy itself is intrinsic or ascribed in the character of the people. It essentializes democratic values (e.g. equality, freedom, tolerance, gender equality) locating them within the Swedish people—Swedes are just naturally democratic and egalitarian. By collapsing a people with democratic values, this ethno-cultural view of citizenship not only negates the historical reality in which democracy was fought for and won but in its ugliest variant further excludes perceived outsiders, portraying ethnic or cultural difference as somehow un-democratic, intolerant, and simply un-Swedish. If you do not belong to this ethno-cultural group and the legal channels to constitutional rights are blocked or underdeveloped, then this institutional arrangement creates a relatively weak social position vis-à-vis the State.

Why does this matter for penal order? This section has sought to identify a central mechanism by which foreign nationals and other ethnic minorities are left out of the welfare state: the principle of the folk as a structural barrier to incorporation. Weak incorporation can and often does lead to increased social control (e.g. criminalization, penalization), supporting a key insight in the sociology of punishment (Aas, 2011; Bosworth, 2012; Melossi, 2012; Solivetti, 2012; Wacquant, 1999). This aspect of the folk concept demarcates those who belong from those who do not, and as primary marker of membership and nonmembership in the polity, it may actually underpin other equally important structural barriers to incorporation, including labor market discrimination, housing segregation, and denial of voting rights. The organizing principle of the People's Home, the folk, and its negative impact on penal order (relatively high rates of foreign nationals in prison) is not the result of shifting political winds (although it is an intensifier) or an import from the neo-liberal west but is part of the deep structure of the society itself. The rise of welfare nationalism and its subsequent criminalization and penalization of 'others' resonates because it comes from within. As Andersson (2009) explains, welfare nationalism is a way to restore the essence of the People's Home, with its nostalgia and romantic longing for ethno-cultural belonging. This is necessary she explains because 'European integration and the Others that it brings with it is seen as a threat to the architecture and values of the Model, its collective agreements, wage bargaining ... [and to] Swedish self-image and identity' (Andersson, 2009: 241). Sweden is trying to hold on to its generous welfare state and recreate a particular image of itself. And like many other societies (USA, UK, Australia, France), Sweden is relying on criminalization to do so.

## Discussion: the limits of Nordic Exceptionalism

In their 'In defense of Scandinavian exceptionalism', John Pratt and Anna Eriksson (2012) explain the importance of studying and explaining cases like the Nordic countries

that practice penal moderation, especially when most criminology has focused on more general and punitive trends. It is critical to understand the presence of counter trends and by doing so provide a more accurate description and explanation of contemporary penal order in all its variation and complexity. Despite the increase in research on comparative penal sanctioning (Lacey, 2008; Nelken, 2010; Whitman, 2003), we still do not know enough about societies that develop and maintain more mild penal sanctioning. The NE thesis is a significant contribution to this collective endeavor.

In making their argument, the authors warn against the tendency in criminology for researchers to only look for the most severe penal practices and the most punitive penal trends, they warn against the gloom and doom of ‘catastrophic criminology’, invoking Pat O’Malley’s (2000) terminology. In some sense, the present essay is an example of the dystopia in criminology, rooting out repressive uses of state power even in one of the most humane and mild penal orders. The catalogue of potential human rights violations (even in Sweden) illustrates the tendency well. However, it is still a necessary exercise for two reasons: first, the causal dynamics of the Swedish welfare state based on individual autonomy but limited individual rights have not been fully appreciated in relation to penal order; and second, as public criminologists we cannot turn a blind eye to repression, especially as it sits side by side with progressive social ideals that are peacocked around the world by elites and academics, overshadowing the people restricted, excluded, or expelled by the *Nordic Way*.

What is gained by this exercise? What are we to make of the Nordic Exceptionalism thesis? How might we rethink the degree to which welfare state generosity does or does not lead to mild penal sanctioning? How might we rethink the role of social solidarity and mildness? Can we consider an alternative to social democracy for a more moderate or just penal sanctioning?

The pattern of human rights violations does not necessarily discount the relative leniency of the Swedish penal order but it does require us to think about the limits on its humaneness. We need to take more seriously its double-sided nature. We may need a less elegant term to capture the dual nature of the Swedish penal order: one that is both humane in certain respects and inhumane in others. This duality is not stratified by the type of offender or particular social group but can affect all offenders at different stages of the criminal justice system. For instance, consider that the same offender could be subject to isolation during pre-trial detention but later sentenced to a low level ‘open prison’. It is also important to note that the infringement upon individual rights does not seem to be driven by the desire or need to degrade or humiliate the offender as in the case of some forms of American punishment identified by James Whitman’s (2003) *Harsh Justice*; it is not this kind of inhumanity. We are not talking about Sheriff Joe Arpaio’s chain gangs de-based in the Arizona desert (Lynch, 2009). Nor are they rogue actions of a few staff members. Rather the infringement on rights is used as a deliberate mechanism of state control, discipline, and in some cases, coercion. It is the hyper-rationality of the State that leads to these impositions. The lack of garishness or vulgarity in these restrictions may be what keeps this kind of repression invisible or palatable to the public. The duality of the in/humanity must be taken into account if we are to properly understand and explain the Nordic cases, a conclusion also reached by Peter Scharff Smith (2012).

To understand this paradox in the penal realm, we need to revisit the dynamics of the Swedish welfare state. This essay has argued that a more individualistic reading of the welfare state enables us to see how individual autonomy was both gained and lost through the State. It is this iron-cage that is critical to grasp if we are to explain how individual rights are underdeveloped and vulnerable in a place like Sweden. In gaining material well-being and autonomy, individuals gave up certain legal protections against the State. This reading of the welfare state downplays the centrality of social solidarity as necessary to and for welfare state generosity and identifies a break in social solidarity: the foundation of the society is based on a fractured concept of the *folk*. The *folk*, *the people*, in its democratic form can promote social solidarity but in its ethno-cultural form, *a people*, folk can inhibit social solidarity across diverse ethnic groups. Societies without strong social solidarity but a strong sense of equality and democratic spirit can produce elements of a mild penal regime. Weak individual rights compounded by an ethno-cultural basis of belonging create the conditions that make individuals, particularly those cast as outsiders or 'others', vulnerable to intrusive uses of state power. What makes the Swedish variant of the *folk* particularly problematic is its conflation of civic virtues with ethnic identity, it essentializes democracy as Swedish. Cultural or ethnic difference becomes suspect, conflated with intolerance and inequality. An ethno-cultural conception of citizenship not only acts as a structural barrier to incorporation where weak incorporation tends to increase criminalization and penalization, but this essentialist construction spills over into the penal realm where crime committed by foreign nationals is portrayed not as social or moral deprivation but as confirmation of difference, un-Swedishness. Offenders then need to be properly re-socialized, re-trained as Swedes, punished, excluded or expelled. Criminal aliens are the largest group subject to deportation in Sweden (Migrationsverket, 2012; Westfelt, 2008). At its worst, an ethno-cultural conception of citizenship provides fodder for welfare nationalism, a protective and sometimes aggressive stance against outsiders that has brought far-right parties to power across Europe in recent elections, even in Sweden where the Sweden Democrats were elected to Parliament in 2009 on an anti-immigrant campaign that linked foreigners to crime. Although their impact on policy is marginal the party is gaining ground and taking working class voters away from the Social Democratic party.

Taken together, these structural features—essentialized civic virtue and the lack of procedural safeguards for individual rights and stronger anti-discrimination law (which would limit or prohibit states from acting out ethnic prejudices)—have major consequences for penal order: they create the conditions conducive to intrusive deprivations without providing much legal or social recourse. The duality of the welfare state at once can bring about individual autonomy and material well-being but infringes upon the rights and liberties of individuals. These features weaken the relative humaneness at the center of Nordic penal regimes.

This essay has important implications for how public criminologists understand the dynamics of the welfare state, how it is simultaneously universal but exclusionary. This is important because the Nordic cases and their associated social democracy are often put forward on normative grounds as best practices for penal moderation. But what this analysis suggests is that a polity that lacks procedural protections creates the conditions that make certain individuals vulnerable to intrusive deprivations and

violations of human dignity, often justified as a public good. These infringements tend to be submerged in most accounts of Nordic Exceptionalism but are nevertheless central to it. This analysis also suggests that a polity that emphasizes membership, particularly one rooted in an ethno-cultural conception, but lacks sufficient procedural protections will have difficulty incorporating foreign nationals and other new members and may instead come to rely on the criminal law and penal sanctioning to sort, classify, contain, or expel unwanted or undeserving 'others'. All democracies face this dilemma. Global mobility has increased the flow of people across borders but no democracy has guaranteed the rights to residency to any nonmember. How democracies incorporate new members is vital to their social, moral, and economic development. Social democracy, particularly as it is tinged by welfare nationalism, is not the solution to a more just and equal penal order. We may find more traction in alternative political forms such as deliberative democracy, a form of political association and debate that seeks to protect individual liberties and is based on inclusionary principles (see Loader and Sparks, 2012; Taslitz, 2012). Deliberative democracy may promote more mild penal sanctioning without excluding perceived outsiders and without infringing upon individual rights.

There are many features in the Nordic cases worth preserving and worth emulating but the social welfare state comes with its own set of limitations, exclusionary mechanisms, and barriers to human dignity that have not been fully understood in the penal field. This essay has sought to fill that gap.

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Vanessa Barker is Associate Professor of Sociology at Stockholm University. She is the author of *The Politics of Imprisonment* (2009) and is currently working on a comparative analysis of global mobility and penal order.