

RESEARCH NOTE

Why Terrorism Researchers Should Care about Criminal Responsibility

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Criminal responsibility is a basic principle in holding individuals to account for criminal actions. Making exemptions to criminal responsibility when individuals cannot be held responsible for their actions is equally central, and most countries have frameworks allowing for such exemptions for reasons of serious mental health problems. However, despite the recent years' enormous interests in the possible links between individual 'mental health' and involvement in terrorism, the issue of criminal responsibility has apparently so far not been the subject of much interest in the field of terrorism research. This Research Note makes the simple point that criminal responsibility should be of particular interest to terrorism researchers, for two main reasons: the centrality of (political, religious, ideological) motivations for defining a crime as terrorism-related and the sometimes-difficult boundary-setting between such motivations and (psychotic) delusions; and the political nature of terrorism-related crimes.

Keywords: criminal responsibility, diminished responsibility, mental health, terrorism legislation, terrorism sentencing

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Introduction

This brief Research Note seeks to make the simple point that the issue of criminal responsibility should be of special interest to terrorism researchers. Strikingly, the recent years' enormous interest in the possible links between terrorism and perpetrators' "mental health" problems (defined in different ways or sometimes not defined at all) has so far not really led to much scholarly work examining where this potential connection—in the worst-case scenario—might end up: with someone with an apparently serious mental health disorder being charged for a terrorism-related offence, and there being subjected to a forensic assessment seeking to determine whether they could be held responsible for the act in question. In such a case, the issue of criminal responsibility, the forensic assessment involved, and the final determination on the matter by sentencers are likely to pose some particular challenges compared to non-terrorism-related cases. While a few studies on specific terrorism-related criminal cases have been conducted,¹ the topic has generally been absent from the scholarly radar of most terrorism research, leaving the topic to be dealt with in the main by professionals in the fields of law and psychology.²

In seeking to explain why terrorism researchers should care (more) about criminal responsibility, this Research Note will first outline the basics of the concept of 'criminal responsibility' and, most importantly, what most commonly qualifies as grounds for exemptions to individual criminal responsibility. This Research Note will then make a couple of points explaining why this issue poses some particular challenges in terrorism-related cases compared to non-terrorism-related ones, and why it should be of special interest to terrorism researchers as well as to counter-terrorism practitioners. The legal framework and practices of the UK and Norway will be used to concretise and exemplify the matter. While certainly different in their sizes, legal systems, and terrorism-related histories, these are both European countries outside the EU with only slightly different frameworks for criminal responsibility which together serve to expose some of the key issues at stake.

Criminal Responsibility and Exemptions to Mens Rea

Holding individuals responsible for their actions when they do harm in a way that violates the law is still a crucial concept of law, morality and security in terrorism-related cases as well as in other types of cases. In most legal systems, to simplify somewhat, this would usually mean to identify, arrest, prosecute, and sentence individuals who have provenly committed crimes. Doing so in a fair, just, judicious, and transparent way is a requirement for a functioning rule of law regime. It is also key to upholding public trust in core institutions of the state.

In legal terms, two elements are necessary for holding someone criminally responsible: the carrying out of a criminal, punishable act—that an offence has taken place—and a 'guilty mind', what is in legal parlance taken from Roman Law known as mens rea. The 'act' part is not difficult to understand: it involves an agent having committed an act (or having blameworthy failed to act) in a manner that violates the law. A criminal mind, meanwhile, can broadly speaking be said to involve intent to cause harm, break the law, or knowing or understanding or should have been able to know or understand that the act or omission was wrong, criminal, and/or harmful,

when it was committed. One could say that, according to the law, a criminal offence does not exist if you don't have both the act and a culpable mind. If damage of some kind has been caused by accident, there is no criminal responsibility, unless the accident was intended to happen or happened due to culpable negligence.

This Research Note is not concerned with the 'act' part of this definition of a criminal offence and criminal responsibility, but with the 'mind' part of it. To establish that a damaging or apparently criminal act has been committed tends to be quite straightforward. But to demonstrate that the act was committed with a criminal mind is usually more complicated. Often this is the question around which prosecutions are centred—with prosecutors trying to demonstrate not only that the defendant did commit the act, but also that they intended to cause harm, knew that the act would do harm, or should have been able to know this.

Most important for the present purposes is that the 'criminal mind' part of a legal process is where the key exemptions to criminal responsibility are centred. Because not punishing someone who is mentally not responsible for his or her actions is equally central for a functioning rule of law system, and for principles of justice, morality, and fairness. In other words, in most jurisdictions some people who demonstrably have committed the act of which they are accused can still be exempt from criminal responsibility if they do not meet the threshold for possessing a criminal mind. In such cases, the outcome could be that the defendant is not sent to prison, but instead to a different institution such as to a hospital for treatment—or that the defendant gets a reduced prison term, sometimes in combination with medical treatment. In some cases, exemptions to the principle of criminal responsibility can lead to a crime not being prosecuted at all. Especially in the UK context, there is strong scholarly literature on exemptions to principles of criminal responsibility at earlier stages of the legal process—notably around fitness to plead.³ However, the focus of this Research Note is on (exemptions to) criminal responsibility at the sentencing stage, and the special relevance of this issue at this stage to terrorism-related cases in particular.

The most straightforward and widely accepted exemption to criminal responsibility is age – or 'infancy' as it is sometimes referred to by legal practitioners and scholars. Most jurisdictions do not prosecute or sentence very young children the same way as they do adults, although the precise minimum age for criminal responsibility varies significantly between countries—and is in itself a topic of much controversy and debate.⁴ Although the issue of minimum age for criminal responsibility could be said to also be an issue of particular interest for the field of terrorism and counter-terrorism research, this 'infancy exemption' will not be discussed further here. Instead, the present focus is on the second main category for exempting individuals from criminal responsibility: 'mental health'—mental state, mental capacity; sometimes, but not always, involving mental disorder.

In both the jurisdictions of Norway and the UK (as well as in many others) a certain threshold for mental capacity needs to be met for holding an individual criminally responsible. The principle is in some ways the same as with infancy; if someone does not have the mental capacity for mens rea (possess a guilty mind), she or he cannot be held (fully) criminally responsible.

However, countries have different laws and practices as to how such distinctions and thresholds

are made and implemented in practice. Norway has three quite-specific criteria regarding who can qualify for such a “mental health exemption”.⁵ These are (i) a “severely deviant state of mind”, (previously referred to as “psychosis”—but the law removed this language in 2020);⁶ (ii) a “high-level” developmental disorder, with an IQ of below 60; (iii) a “strongly altered” consciousness—which should be involuntary and usually temporary, such as in cases of automatism or sleepwalking—but notably not when it involves self-intoxication. The UK, meanwhile, seemingly has a broader definition (but at the same time possibly a higher threshold for defendants to qualify—although space does not allow here for a full elaboration on this matter). Rather than formulating very-specific criteria as Norwegian law has done, the core question in the UK is “At the time of the offence, did the offender’s impairment or disorder impair their ability, to exercise appropriate judgement, to make rational choices, and to understand the nature and consequences of their actions?”⁷ In both Norway and the UK, forensic experts—psychologists and/or psychiatrists—are called upon to render their professional opinion on the defendant’s mental state at the time of the crime.⁸

Criminal Responsibility in Terrorism-Related Cases

This is a good point at which to explain why the mental health exemption to criminal responsibility is especially pertinent in terrorism-related cases. Two points in particular should be made. One has to do with what one could call the ‘psychological’ dimension both of the mental health exemption to criminal responsibility, and of terrorism, and the second point has to do with the legal positioning of terrorism cases, which seem to sometimes place terrorism defendants in a position where they might be exempt from the exemption on criminal responsibility.

To take the ‘psychological’ dimension first: the law frames the mental health exemption to criminal responsibility as a matter of not only law, but also of psychology and psychiatry—since it is asking for a forensic mental health assessment from qualified experts, who then set a diagnosis if they find it relevant. Strictly speaking, in the present systems in both Norway and the UK, the mental health experts are not asked to advise on the precise applicability of the law or directly discuss the relevance of a possible mental health exemption to criminal responsibility in individual cases; rather they are asked for their mental health expertise in relation to the condition of the defendant at the time of the offence. However, if these experts find that certain psychological or psychiatric conditions were present at the time of the act to an extent or intensity seemingly meeting the threshold for an exemption, the sentencers—judges and juries—are likely to give weight to the expert assessment and could come to the conclusion that the individual’s culpability and hence criminal responsibility was reduced or absent.

In practice, therefore, determinations around the applicability of the mental health exemption involve not only a legal assessment but a psychological and medical assessment by a mental health practitioner. That such an assessment is called upon, and usually given weight, in settling questions on criminal responsibility to some extent, removes the question of criminal responsibility from the domain of “pure law” and places it within the purview of psychology, psychiatry, and medicine.

To make this a bit more concrete: one common reason for defendants meeting a mental health

exemption to criminal responsibility is if they are psychotic. The centrality of psychosis to this question is illustrated by the fact that, as mentioned, Norwegian law until 2020 explicitly cited “psychosis” as the first basis for a criminal responsibility exemption for mental health reasons. The medical diagnostic manuals DSM-5 and ICD-11 define psychosis quite similarly, in terms of: “delusions, hallucinations, formal thought disorder, grossly disorganised or catatonic behaviour.”⁹ Of these, it could be especially worth citing the ICD-11 definition of delusions: “A belief that is demonstrably untrue or not shared by others, usually based on incorrect inference about external reality. The belief is firmly held with conviction and is not, or is only briefly, susceptible to modification by experience or evidence that contradicts it. The belief is not ordinarily accepted by other members or [sic] the person’s culture or subculture (i.e. it is not an article of religious faith).”¹⁰

For terrorism researchers, it might by now have become clear how terrorism-related cases might be particularly relevant and challenging with regard to issues of criminal responsibility—and especially tricky for judges and juries deciding on a possible mental health exemption based on the defendant possibly having delusions. Terrorist acts are, in law, in Norway, in the UK, and also elsewhere conventionally defined by their intentions to advance a political, religious, racial, or ideological cause, the intention to make authorities do something or omit doing something for political, religious, racial, or ideological reasons, and to aim to intimidate and scare the public.¹¹

In some cases, a defendant’s political, religious, racial, or ideological cause might indeed amount to a “demonstrably untrue belief...”, “held with a conviction” not “susceptible to modification”—that might seem “insane” to many, including to judges and juries. In such cases it might be difficult for sentencers who are not mental health experts to distinguish what is a psychiatric delusion and what is part of ideological convictions. And it could be difficult for forensic psychology or psychiatry professionals who are not experts on terrorism-related ideology, terminology, references, or presentation to settle precisely what could for instance be an “overvalued idea” and what could be a delusion. Indeed, in terrorism cases there seems to be a particular kind of risk that ideology could be being mistaken for psychotic delusions. Or perhaps even more so in the reverse: since terrorist actors themselves rarely want to be seen as mentally ill, and rarely themselves seek a mental health exemption—there could be an even greater risk that psychotic delusions are being mistaken for ideology. Clearly this could pose a significant problem to not only actual cases and prosecutions, but to the principle of criminal responsibility as such, as well as to perceptions of justice, fairness, trust in rule of law institutions. It could also very concretely represent a risk that the outcomes of trials and verdicts are later challenged and/or overturned since the issue at the time was not settled in an appropriate way.

It is worth underlining here the obvious points that delusions are not the only way a psychosis can present itself—other symptoms might be more important in individual cases, such as hallucinations or a thought disorder, defined as “involving the logical sequence and coherence of thought, typically manifest in speech ... and including flight of ideas, neologisms, and thought blocking.”¹² Furthermore, there are of course also many mental health conditions other than psychosis that could provide the ground for a mental health exemption to criminal responsibility. And highly significantly, someone with a psychotic delusion can also be ideologically

motivated—and delusions themselves can have an ideological content, and could again influence the content of terrorism-related ideology. However, psychosis with delusions remains a common ground for a mental health exemption to criminal responsibility, with several concrete cases demonstrating the challenge involved in drawing precise lines and distinctions.

The sometimes-difficult categorisation of a terrorism-related defendant's thought content as either ideological, psychotically delusional, or both became a central issue in the best-known case involving questions around a possible mental health exemption to criminal responsibility, namely the prosecution of Anders Behring Breivik after the 2011 terrorist attacks in Norway.¹³ In that case, initially, two court-appointed forensic psychiatrists having assessed the defendant found him to have suffered from paranoid schizophrenia at the time of the attacks. According to Norwegian law at the time, if this conclusion were to be followed by the court, Breivik would have been found not criminally responsible, and would have been sent to a hospital rather than to prison. These implications of this first diagnosis thus led to such an outcry from Norwegian media, politicians, and a number of other psychologists and psychiatrists, that the court extraordinarily chose to appoint a second team of experts to assess the defendant's mental state at the time of his attacks. When this second team found him to rather suffer from two personality disorders, the court took this on board and gave the defendant Norway's strictest prison sentence at the time. The question of whether Breivik's thoughts were (psychotically) delusional, ideological—or indeed both at the same time—became a core issue of contention in the case.

To turn to the second issue that places terrorism-related cases in a special category with regard to mental health exemptions to criminal responsibility: simply put, terrorism-related cases in Norway, the UK, and elsewhere, are legally categorised as more serious than non-terrorism-related crimes. The same act carried out with terrorist intent would normally carry a higher sentence than a similar, non-terrorism-related crime. This notably includes murder, where also having a terrorist intent would count as an aggravating circumstance carrying a higher sentence than a murder carried out, for instance, for purely interpersonal reasons. The historical, political, and legal background issues that have placed terrorism in this 'special category' between crime and national security could be the subject of an article of its own. It is at the same time a fact that a terrorist crime—both in its intentions and in its effects—would typically reach beyond the individuals immediately affected, and would have a wider societal, political, and security 'ambition' as well as resonance than a non-political crime. Acts of terrorism target and impact society, politics, and state security. Both authorities and the public would often be more interested—and would perceive to have a greater 'stake'—in terrorism cases and their resolution than in other forms of crime.

This is reflected in how terrorism cases are handled in the criminal justice system, and apparently also in how the mental health exemption is being applied in terrorism-related cases. Since terrorist crimes are placed in a special—and more serious—category than ordinary crimes, they are not only punished more severely but also seem to raise the threshold for applying the mental health exemption. In the UK, these aspects appear more formalised than in Norway. For instance, UK sentencing guidelines state explicitly that a court must—and this is regardless of any aspect of a defendant's mental health or any forensic assessment—deal with an offender suffering from a mental disorder in the manner it considers to be most appropriate under all

circumstances.¹⁴ One of the key elements that should be taken into account when possibly setting aside any or all aspects of a defendant's mental health, is that the sentence must reflect the seriousness of the offence. In practice then, the fact that terrorism cases are considered particularly serious criminal offences may then lead to the mental health exemption being set aside in terrorism-related cases exactly because they are cases of terrorism.¹⁵

While it would indeed seem reasonable to allow for some judgement to juries and judges in their weighing of this complicated issue, this also raises the questions of the fundamental purpose of the mental health exemption, as well as of the special legal, psychological, and security status of terrorism-related cases. Is the purpose of the mental health exemption to criminal responsibility to allow for sentencing to be scaled and adjusted to an individual's capacity to act responsibly and understand their own actions—and to get those suffering from serious mental illnesses into mental health treatment rather than imprisonment? If so, there would seem to be little reason to set a mental health disorder or impairment aside for reasons that have to do with the offence rather than the seriousness or intensity of the disorder or impairment. If instead, the mental health exemption exists to protect public trust and perceptions of justice and indirectly enforce national security, it would make more sense to scale the principle according to the nature of the offence.

Conclusion

The issue of “mental health exemptions” to criminal responsibility hence serves to illuminate both the “special status” of terrorism-related cases, and how terrorism-related cases bring forth particular challenges when settling questions around such possible mental health exemptions. It is also a field in which considerations around law, politics, psychology, and security—as well as justice, morality, medicine, and care—collide. How such cases are dealt with in practice can say much about how societies weigh these concerns and values against one another. This field of study should certainly be of much greater interest to terrorism researchers than it appears to have been thus far.

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Endnotes

1 A large number of these have focused on the criminal case following the 22 July 2011 attacks in Norway. See e.g. C. Leonard et al., “Breivik: Extreme Ideologist or Mentally Deranged?” 44th *Annual Meeting of the American Academy of Psychiatry and Law* (AAPL), San Diego, CA, October 2013; Max Taylor: “Do cases like that of Anders Breivik show that fanaticism is a form of madness? Yes.” *BMJ* 345 (2012): 4612, <https://doi.org/10.1136/bmj.e4612>; Tom Fahy, “Do cases like that of Anders Breivik show that fanaticism is a form of madness? No.” *BMJ* 345 (2012): 4647, <https://doi.org/10.1136/bmj.e4647>; Mislav Burazer, “The Breivik case and the comparative issues of criminal (in)sanity,” *ST Open* (2020): 1–38, <https://doi.org/10.48188/so.1.5>; Ingrid Melle, “The Breivik Case and What Psychiatrists can Learn From it,” *World Psychiatry* 12 (2013): 16–21, <https://pubmed.ncbi.nlm.nih.gov/23471788/>; C. Leonard et al., “The Case of Anders Behring Breivik – Language of a Lone Terrorist,” *Behavioural Science and the Law*, 32, pp. 408–422, 2014, <https://pubmed.ncbi.nlm.nih.gov/24756997/>; Tad Tietze: “The Breivik Controversy: politics, terrorism and psychiatry,” *Australian Psychiatry* 22, no. 4 (2014): 383–385, <https://doi.org/10.1177/1039856214537127>; Thair Rahman: “Anders Breivik: Extreme Beliefs Mistaken for Psychosis,” *Journal of American Academy of Psychiatry and the Law* 44 (2016): 28–35, <https://pubmed.ncbi.nlm.nih.gov/26944741/>.

2 See e.g. Matthew E. Ginther, “The Language of Mens Rea,” *Vanderbilt Law Review* 67, no. (2019); Nicholas Hallett, “Psychiatric Evidence in Diminished Responsibility,” *The Journal of Criminal Law* 82, no. 6 (2018); Patricia Cotti, “On the Path of Election and Martyrdom,” *Psychological Review*, 102, no. 4 (2015), and other references in this Research Note.

3 See Penelope Brown, “Unfitness to Plead in England and Wales: Historical Development and Temporary Dilemmas,” *Medicine Science and the Law* 59, no. 3 (2019); Penelope Brown et al., “Fitness to Plead: Development and Validation of a Standardised Assessment Instrument,” *PLOS One* 13, no. 4 (2018); Penelope Brown, “Modernising Fitness to Plead,” *Medicine Science and the Law* 59, no. 3 (2019).

4 See e.g. Aaron Brown and Anthony Charles, “The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach,” *Youth Justice* 21, no. 2 (2019); Anthony L. Pillay, “The Minimum Age of Criminal Responsibility, International Variation, and the Dual Systems Model in Neurodevelopment,” *Journal of Child & Adolescent Mental Health* 31, no. 3 (2019).

5 *Straffeloven* (Norwegian criminal law), https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_1-3#%C2%A720; and Proposition 154L (2016–2017), <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/>; accessed 25 September 2022.

6 On the recent change of the law on this point, see e.g. Linda Gröning, “Has Norway Abandoned its Medical Model? Thoughts About the Criminality Insanity Law Reform Post 22 July,” *Criminal Law Review* 2 (2021); Linda Gröning, et al., “Remodelling Criminal Insanity: Exploring Philosophical, Legal and Medical Premises of the Medical Models Used in Norwegian Law,” *International Journal of Law and Psychiatry* 81 (2002): 101776.

7 UK Sentencing Council, 2020, <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/>; effective from 1 October 2020; accessed 25 September 2022.

8 *Ibid.* Interestingly, the role of these experts is different in the two systems—but that is a topic for another Research Note.

9 ICD-11, <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/932028588>, accessed 25 September 2022.

10 *Ibid.*

11 Added emphasis, CPS: ‘Terrorism’, <http://www.cps.gov.uk/crime-info/terrorism>; *Straffeloven*, https://lovdata.no/dokument/NLO/lov/1902-05-22-10/KAPITTEL_2-7#%C2%A7147a%20; and <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/932028588>

12 ICD-11.

13 See Note 1, and the two forensic reports, https://www.vg.no/spesial/2011/22-juli/psykiatrisk_vurdering/, accessed on 25 October 2022.

14 See also the UK Sentencing Guidelines at <https://www.legislation.gov.uk/ukpga/2020/17/group/SECOND/part/4/chapter/2/enacted>.

15 Other forms of politically charged cases may raise similar issues; see e.g. Paul S. Applebaum: ‘Imposed Insanity Defenses and Political Crimes,’ *Law & Psychiatry* 64, no. 1 (January 2013), <https://pubmed.ncbi.nlm.nih.gov/23280453/>.

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