

# Mental Health Exemptions to Criminal Responsibility: Between law, medicine, politics and security

Rita Augestad Knudsen

Norwegian Institute of International Affairs NUPI, University of Oslo, Norway

Correspondence: [rak@nupi.no](mailto:rak@nupi.no)

ORCID: [0000-0002-3019-7276](https://orcid.org/0000-0002-3019-7276)

**Funding:** See Acknowledgements.

**Peer review:** This article has been subject to a double-anonymised peer review process.



**Copyright notice:** This article is issued under the terms of the **Creative Commons Attribution License**, which permits use and redistribution of the work provided that the original author and source are credited.

You must give appropriate credit (author attribution), provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use. You may not apply legal terms or technological measures that legally restrict others from doing anything the license permits.

<https://creativecommons.org/licenses/by/4.0/>

## Abstract

*Ill mental health is a key category for exempting individuals from criminal responsibility. Even in cases where a defendant has been found to have carried out the act, if mentally 'ill enough', the person could either be fully exempt from criminal responsibility and found not guilty – or be partially exempt and receive a reduced or special sentence on mental health grounds. Such outcomes might entail diversion into mental health treatment, sectioning – or release. In determining whether a mental health exemption is warranted in individual cases, ordinary practice is that psychologists or psychiatrists forensically assess the severity and nature of the accused's impairment or disorder. While this might seem like a straightforward medical-juridical procedure of establishing evidence, this article uses a modified 'genealogy of the present' to show how mental health exemptions to criminal responsibility involve significantly more complexity. Looking to Norway and the UK, this article highlights differences in frameworks and implementation, including on matters of burden and nature of proof, and on causality. The article uses as an example the particular category of terrorism-related cases to bring out some of the contingencies involved. By doing so, the article shows the tensions inherent to the principle and practice of mental health exemptions, and its location between law, medicine, politics and security.*

**Keywords:** criminal responsibility; insanity defence; terrorism; genealogy

Criminal responsibility – holding individuals who have committed crimes responsible for their actions – is key to the rule of law, and a cornerstone of countries' concrete sentencing guidelines. Conversely, *not* punishing individuals who are *not* criminally responsible is also central to upholding the rule of law, as well as to principles of justice and fairness. In most jurisdictions, certain categories of individuals are exempt from full criminal responsibility even if they are found to have carried out the act in question: Very young children are rarely punished on a par with most adults, nor are adult individuals with qualifying mental impairments or disorders. A similar form of reasoning is behind the 'infancy' and the 'mental health' exemptions to criminal responsibility: if someone demonstrably does not have the required mental capacity to understand or control their actions (or their consequences), their moral culpability and hence also legal responsibility is reduced. The legal upshot in such cases might be a reduction in or elimination of punishment, sometimes with voluntarily diversion into mental health treatment or involuntarily sectioning.

So far, the issue of mental health exemptions in criminal cases has been treated academically and in practice as a relatively straightforward issue of commissioning medical-psychological forensic assessments and adhering to the law in incorporating these into verdict and sentencing decisions. Looked at more closely, however, the issue appears considerably less simple at either the forensic assessment stage, and when incorporating assessments into decisions on individual offenders. This article starts with describing how two seemingly similar jurisdictions, Norway and the UK – both within Europe but outside the EU – operate with different frameworks for operationalising mental health exemptions to criminal responsibility. With different sizes, histories and criminal and threat landscapes, the two countries work well as comparative cases highlighting some of the contingences involved. In particular, the countries differ on issues of burdens and categories of proof, on the commissioning and challenging of forensic evidence, and on rules around proving the potentially *causal* role played by a mental health impairment or disorder.

After having outlined and compared these overall frameworks, the article proceeds to the example of terrorism-related cases in order to shed further light on the complexities involved. This category is chosen for two main reasons: First, crimes of terrorism are by law defined by the perpetrator's political/ideological/religious aims or 'mindset', possibly complicating delineations between such intentions and mental ill health; or between ('sane') ideology – however strange-seeming or unacceptable – and (mentally ill) 'fantasy', especially in cases when *both* ideology and illness could be involved. Moreover, terrorism cases are 'high stakes' due to their by definition targeting of a broader public or authorities, possible national security implications, and high associated public interest.

Although public opinion might be equally exercised by other cases involving similarly brutal acts, such as for instance cases involving paedophilia or sadism, terrorism implicates national security and politics in an even more direct and encompassing manner than cases of these kind. Terrorism-related cases involve making medical-psychological-legal assessments and decisions on possible mental health exemptions in highly 'charged' settings; possibly creating a tension between the needs to protect and treat mentally ill individuals, and to implement publics' sense of justice and accountability.

In seeking to 'complexify' the oft-taken for granted frameworks around mental health exemptions to criminal responsibility, this article is disciplinarily anchored in contemporary intellectual history, drawing upon a modified 'genealogy of the present' in investigating the discourse of relevant law, guidelines and practices.<sup>i</sup> This modified, present-day-oriented genealogy does not take the conventional genealogical route in seeking to establish the historical lineage of any ongoing discourse or practice. It also does not seek to explain *why* current practice emerged, or *why* it has turned out to be so complex-ridden. Instead, it complicates current conventional understandings and questions their taken-for-grantedness. This approach assumes that through studying discourse such as statutory regulations, laws, statements and practices – as both encapsulating and shaping the political, legal and societal realities of which they are part – the present state of affairs with regard to mental health exemptions to criminal responsibility will become less obvious or 'natural' (Dreyfus & Rabinow, 1983: 119; Kritzman, 1988: 262; Koskenniemi, 2005). Inspired also by part of the security studies literature, this approach is especially attentive to the implicit security dilemmas and tensions involved in weighing issues around individual agency and punishment in light of mental health related evidence (Bonditti et al., 2015).

While the primary focus of this article is to illuminate the overall issue of mental health exemptions to criminal responsibility, it also represents a novel contribution to the ever-burgeoning literature on the possible relationship between terrorism and mental health. The past few years' rapidly expanding body of research on this possible relationship has so far typically sought to clarify the *causal* role mental health issues may play in terrorism involvement.<sup>ii</sup> Haunted by this question of causality, scholars have interrogated different mental health issues as potential vulnerabilities and/or risks for terrorism involvement; though as of yet without clear answers. Unsurprisingly, similar questions have preoccupied counter-terrorism practitioners and the wider law enforcement space from early prevention to post-sentence rehabilitation, eager to adopt effective tools and methods.<sup>iii</sup> Some have raised questions as to the accompanying enlistment of psychologists and psychiatrists to counter-

terrorism-related roles, especially with regard to issues of medical ethics, confidentiality and information sharing.<sup>iv</sup>

However, in light of this now-sizeable literature on mental health and terrorism it is puzzling how little has thus far been said about the legal and judiciary aspects involved, in particular when individuals with mental health impairments or disorders are charged with a terrorism-related offence. To be sure, legal and forensic scholarship have insightfully dealt with their respective facets of the issue, but typically in relative disciplinary isolation and in particular with regard to specific, striking cases.<sup>v</sup> The complex, interdisciplinary and inter-institutional nature of the issue may be one reason; the topic stretches across law, forensic medicine - psychology and psychiatry - terrorism studies, criminology, as well as history, philosophy, political science, among other fields. Other reasons might be the sensitivities and confidentiality issues involved in criminal investigations, terrorism, forensic medicine, as well as warranted fears of stigmatisation of vulnerable individuals. A final issue could be related to countries' seemingly intricate legal-practical-medical-related landscapes of mental health exemptions to criminal responsibility, presenting a hurdle for non-legal/non-psychiatric scholars interested in the issue.

This article fills some of the gaps in our understandings of mental health exemptions to criminal responsibility and shows how the issue is both more complex and more interesting than it might appear; using two countries' jurisdictions and the specific category terrorism-related cases as vectors to break open the issue. It shows that some of what is fundamentally at stake is how to understand and deal with issues of mental health, responsibility, justice and security, in particular in a legal setting relying on expert advice when the public interest is high. Given the sparsity of broad-based interdisciplinary scholarship on the topic, the article starts with describing the general principle and practice of exemptions to criminal responsibility, using Norway and the UK as examples. However, rather than detailing case law or offer technical solutions to actual dilemmas, the article seeks to complicate the picture of criminal responsibility mental health exemptions. The remainder of the article turns to terrorism-related cases as arguably posing a particular challenge when deciding on mental health exemptions, working to bring further to light key complexities and tensions.

### **Understanding and Complexifying Criminal Responsibility**

In legal parlance, both *actus reus* and *mens rea* are generally necessary for holding an individual criminally responsible. *Actus reus* concerns the question of establishing whether a defendant has in fact carried out the act for which they are charged. Is there enough evidence to determine that the person 'did it'? If there is no or not sufficient evidence to say that the

individual has done the deed in question, they are not culpable and should not be held criminally responsible. Finding someone guilty and sentencing them under such circumstances would clearly contravene principles of justice and fairness, be a violation of the individual's human rights, and undermine the rule of law.

This article is broadly concerned with issues associated with the second half of establishing criminal responsibility, the area of *mens rea*. Because establishing actus reus and proving that a defendant has committed the act for which they are charged only goes part of the way in settling the question of criminal responsibility; in addition, it is necessary to show that it was done with a 'guilty mind'. *Mens rea* hence relates to the 'internal', 'intentional' and 'mind' dimensions of a crime. Connected to this larger domain of *mens rea* (while not necessarily formally impacting on *mens rea* as strictly defined) most jurisdictions allow for regulated exemptions to criminal responsibility, even when an individual has been found to have committed the act for which they are charged. Such exceptions are broadly speaking meant to accommodate for the possibility that not all individuals having committed an act have had the 'guilty mind' or psychological makeup required for being fully responsible for their actions. This is the case also for some of the exemptions to criminal responsibility formally categorised outside of the *mens rea* domain – for instance a finding of 'not guilty by reasons of insanity' in the UK context (**Crown Prosecution Service, 2019**).

Two basic categories for exemptions to criminal responsibility are 1) age and 2) mental disorder or impairment. While the focus here is on the latter, it is worth first briefly outlining the age category, as perhaps the most intuitively obvious ground for exemptions to criminal responsibility. The jurisdictions used as examples here, Norway and the UK, are not alone in having a minimum age for criminal responsibility (MACR), meaning an age limit below which children cannot be held criminally responsible. Across the world, such limits have overall been introduced with the intention of protecting children from being unjustly punished for actions they could not reasonably have been expected to control or understand the nature and/or consequences of. This is based on scientific knowledge of the brain's development and its gradual process of maturation, which provides the rationale for having a 'maturity threshold' for criminal responsibility corresponding to an age at which individuals' brains have acquired the capacity deemed necessary for being held liable.<sup>vi</sup>

It might seem intuitive that babies or toddlers should not be held criminally responsible by being prosecuted and incarcerated on par with adults, but there is no international agreement on the precise age below which children should be fully or partially exempt from criminal

responsibility. In the UK, the minimum age for criminal responsibility is 10 years, in Norway it is 15, whereas in the US state of South Carolina it is 6 years.<sup>vii</sup> The issue has been the subject of debate and concern worldwide, with some scholars and activists calling for raising the age of criminal responsibility, sometimes with reference to its discriminatory effects (Crofts, 2015). The issue involves human rights including the rights of the child – and concerns issues of law, science, morality and public opinion. That there may be an element of arbitrariness and/or politics at stake too might be indicated by the usually comparatively higher age for medical consent in the same jurisdictions, with 16 years being the general norm in Norway, the UK, and the USA alike (National Health Service, n.d.-a; Helsedirektoratet, n.d.).<sup>viii</sup>

Setting the issue of age to one side, this article's main focus is the other core category for exempting individuals from criminal responsibility, namely mental impairment or disorder. What follows is hence concentrated on the framing and practice of mental health exemptions to criminal responsibility with regard to 'adults' (those above the MACR), at the verdict and sentencing stage, and in cases where the individual has indeed committed the act for which they are charged. The basic premise for the two categories for exemption are the same; both the age and mental health exemptions are founded on an idea of a certain mental capacity, especially related to understanding and control, being required for holding someone criminally to account by prosecuting and punishing them. Notably, and as will be returned to, a *full* exemption from criminal responsibility and a finding of 'not guilty' on such grounds is only possible at the verdict stage – whereas a partial exemption resulting in a lesser sentence might be possible at the sentencing stage, that is, after a 'guilty' verdict.

Variably occurring in different countries and at different points of the law enforcement process as questions of fitness to plead, fitness to stand trial, diminished responsibility, criminal accountability, 'insanity' and 'guiltability', such frameworks and practices concern how to deal with issues of culpability, responsibility, guilt and *mens rea* in cases where someone has mental health problems. Although countries have different legal and operational frameworks for deciding on mental health exemptions to criminal responsibility, determining the nature and severity of the impairment or disorder is commonly key. This is certainly the case in Norway and the UK; in seeking out relevant knowledge, both these countries task forensic experts in psychology or psychiatry with carrying out assessments of the individual in question. In different ways and at different points of the process police, prosecutions, judges, and/or juries then receive, evaluate and take these expert assessments into account as they consider appropriate. Possible outcomes might be that an individual

ends up in prison with or without treatment, in hospital (voluntarily or involuntarily), or is being released and/or discharged. From a common-sense point of view, a mental health exemption seems intended to provide for a reasonable and fair treatment for individuals not fully able to understand or control their actions and who as such are not fully culpable or blameworthy.

### **General Frameworks: Mental health-based criminal responsibility exemptions in Norway and the UK**

Norway and the UK each have law and legal guidelines encompassing conditions and criteria regulating the possible exemption of an adult from criminal responsibility for mental health reasons when charged with a crime, even if found to have carried out the act in question. These guidelines and laws apply to different stages of the legal process, including at the charging stage, court stage, and when sentencers are to determine a sentence or reaction. As indicated, this article concentrates on the verdict and sentencing stage of cases in which adult individuals have been found to have carried out the act for which they are charged. In both Norway and the UK, at the verdict stage, the upshot of an exemption could be acquittal with medical follow-up or with discharge, and at the sentencing stage an exemption could entail a reduced sentence or other form of ‘special verdict’ or a combination sentence with or without a hospital order, sectioning or some form of medical treatment.

To start with the Norwegian context: Norwegian law quite briefly describes the conditions under which an individual should be granted a mental health exemption to criminal responsibility. In Norwegian legal parlance, this is a matter of not having ‘guilt-ability’ (*skyldevne*) – a phrase recently replacing the law’s previous wording of ‘accountability’ (*tilregnelighet*); and present law lists the following three criteria: having 1) a severely deviant state of mind 2) a strongly disturbed consciousness and/or 3) a high-level mental disability. In considering whether to make an exemption to criminal responsibility, the individual’s degree of (lack of) understanding of reality and ability to function should be given particular weight (**Straffeloven, 2005, §20**). Specifically, Criteria 2) could for instance involve someone acting during an epileptic attack, while sleepwalking, or while being catatonic or poisoned (but not as a consequence of voluntary intoxication), whereas criteria 3) would typically entail a developmental disorder, with a current limit of an IQ of below 60.

Criteria 1) of the three above – having a severely deviant state of mind – was until 2020 formulated in Norwegian law as ‘psychosis’: somewhat confusingly, with the legal meaning of this term being distinct from the medical term ‘psychosis’.<sup>ix</sup> In 2020, however, ‘psychosis’ was dropped

from the law's text and replaced with the present formulation as a result of a wide-reaching review of Norway's criminal responsibility legislation. The review had been initiated in the wake of the intense controversy surrounding the trial of Norway's 2011 terrorism attacks, to be returned to in brief below, where the perpetrator's mental state became a key point of contention. In particular, the question of whether he suffered from 'psychosis' or not at the time became especially disputed. Following on from the subsequent extensive review, the present-day formulation of the law entered into force in October 2020, with several additional changes (**NOU 2014: 10**).

Norway's present legal and practical framework for settling the question of a possible exemption to criminal responsibility dictates that if the court finds that a defendant meets either of the three criteria above, that person will be exempt from criminal responsibility and found not guilty despite having carried out the act in question. Put differently, if a defendant suffered from a condition at the time of the act that would fit into either of the three criteria above, the evidentiary standard for having established the person's guilt will be considered as not having been met. In this manner, Norway does not a priori assume 'sanity' on the part of a defendant in such cases – but places the burden of proof on showing that the defendant *was* 'sane' at the time and thus should be held criminally responsible.<sup>x</sup>

However, even if found not guilty and acquitted in court, the individual could still be sectioned, even indefinitely, on mental health grounds – if assessed to be a risk to themselves or others – or could be released altogether, possibly for voluntary treatment. Moreover, in cases where the evidentiary standard for establishing guilt *has* been met, and the defendant is deemed 'sane' overall, the person's mental health could still be relevant to their sentencing; Norway does allow for less intense mental health issues – approaching but not fully meeting the threshold for what is required for a full exemption – to function as mitigating circumstances in sentencing decisions (**Elden & Gröning, 2022**). If any such lower-level condition can be determined, the defendant would be exempt from *full* criminal responsibility and receive a reduced sentence.

In order to establish whether either of the three criteria in question applies to a specific case, the common procedure in Norway is for the court to appoint qualified experts in forensic psychology or psychiatry to carry out an assessment of the individual in question. This should be done in every case in which there is doubt as to the person's mental health status and on whether the evidentiary standard for proving 'sanity' and criminal responsibility can be met (**Straffeloven, 2005, §20; NOU 2014:10**). Such a 'full' forensic assessment usually follows on from a more limited



prejudicial assessment of the individual before the start of the trial – and is undertaken in cases where such a prejudicial assessment either found relevant mental health issues, or showed equivocality on whether such existed. Usually, the court appoints the forensic experts in a team of two, who work together in assessing the defendant and in producing a substantial forensic report describing the individual's state of mind and, if relevant, symptoms and diagnoses. The forensic experts then present their jointly authored report in court and are questioned by the respective sides and judges. While sometimes subjected to critical questioning, forensic experts are rarely sought undermined altogether in Norwegian trials; courts and sentencers tend to proceed on relying on their evidence as presented.

Notably, forensic experts in Norwegian trials are not by design asked to render an explicit opinion on whether one of the three exemption criteria above is met, nor on how the law may apply to the case. Instead, they are asked for their professional assessment of what diagnoses or symptoms might have been at play at the time of the act, in which ways and at what intensity. Crucially, moreover, the forensic experts are not asked to opine on whether the mental health impairment or disorder, if present, *caused* the individual to commit the act. Instead, the focus is on the severity of symptoms, their character and possible impact on functioning and cognition – rather than on the presence or absence of any causal link between a mental disorder or impairment and the action for which the person is charged.

While seemingly originating in similar principles, the UK seems to have a more complex and multifaceted framework for mental health exemptions to criminal responsibility than Norway, and a denser regulation for its implementation (**UK Sentencing Council, 2020**). Also in the UK, a defendant's mental disorder or impairment could mean a full or partial exemption to criminal responsibility at the verdict or sentencing stage, and might also have significant bearings on their treatment at earlier stages of the legal process.

Issues around representation appear especially central in the UK with, for instance, a more formalised practice around the appointment of Appropriate Adults from the arrest stage of a suspected criminal offence (**National Appropriate Adult Network, n.d.; Augestad Knudsen, 2021**). The UK also has related mechanisms for evaluating a defendant's fitness to plead and fitness to stand trial, which could result in a pausing of the legal process until the defendant is deemed fit, or a decision not to prosecute.<sup>xi</sup> In addition, the UK has distinct provisions for murder, allowing 'abnormality of mental functioning' to serve as a partial defence and ground for a criminal responsibility exemption (**UK Coroners and Justice**

**Act 2009** replacing the earlier formulation of ‘abnormality of mind’, **UK Public General Acts, 1964; UK Public General Acts, 1883; Crown Prosecution Service, 2019**). Should ‘abnormality of mental functioning’ be established in a murder case, the result might be a finding of ‘diminished responsibility’ for manslaughter rather than murder (**UK Public General Acts, 1957**). It is worth noting that UK terrorism legislation does not include a crime of terrorist murder, but a murder could still be an act of terrorism if it was carried out with terrorist intent. The UK system also has the option of finding someone (altogether) ‘not guilty by reason of insanity’ (which notably does not equate the absence of *mens rea*), which in the UK context seems to be a rare outcome for which the bar would be very high (**UK Public General Acts, 1883, Section 2; Crown Prosecution Service, 2019**).<sup>xii</sup>

Despite the size and complexity of the regulatory framework for mental health exemptions to criminal responsibility in the UK, at the sentencing stage the issue appears to boil down to the following: ‘at the time of the offence did the offender’s impairment or disorder impair their ability: to exercise appropriate judgement, to make rational choices, to understand the nature and consequences of their actions?’ (**UK Sentencing Council, 2020**). To aid in the answering of this question, the relevant UK sentencing guidelines list and explain a ‘brief’ but still fairly sizeable number of possibly relevant concrete diagnoses and conditions (**Ibid: Annex A**).

At first glance, this list seems divergent from the framework in Norway, and as contrasting both to Norway’s pre-2020 statutory underlining of ‘psychosis’ as of particular prominence, and its current formulation of ‘severely deviant state of mind’ – which also seemingly quite prominently evoke conditions involving psychosis.<sup>xiii</sup> Nonetheless, psychosis appears especially relevant in the UK context too: UK guidelines place ‘psychotic illnesses’ as first on their list of the many ‘disorders likely to be relevant in court’. And the same guidelines typologise disorders according to whether they are ‘psychotic’ or ‘non-psychotic’, also indicating the significance and perhaps frequency of such conditions figuring when deciding on a mental health exemption. The possible relevance of this for terrorism related cases will be returned to in brief below.

The UK’s long list of the impairments and disorders it considers potentially relevant to a criminal responsibility exemption could be interpreted to signify that a greater proportion of defendants would in fact meet this criteria in the UK than in Norway. UK practice also seems to have allowed for a greater range of conditions – including for instance arteriosclerosis (**Claims UK, 2023**) and adjustment disorder (**RCJ, 2017**) – to qualify as grounds for such exemptions than Norwegian precedence suggests. At the same time, however, the *threshold* for exemptions seems higher in the UK

than in Norway. At least since the establishment of the M’Naghten rules based on a landmark case from 1843 (e.g. **Kaplan 2023**), UK law has started from a presumption of sanity and has required strong evidence for exempting anyone from criminal responsibility on mental health grounds. Importantly, and in a contrast to the Norwegian system, this evidence needs to connect the mental disorder or impairment to the act in question, and convincingly show that the issue in some way caused the act. When considering the relevant forensic expert assessment, UK courts are encouraged to request information on ‘how the condition relates to the offences committed’ – a key contrast to the Norwegian system, where this is not in focus.<sup>xiv</sup> Moreover, UK law and guidelines make it clear that defendants in all cases must be dealt with in the manner the court finds most appropriate, with mental health impairments and disorders being only one out of several factors to be taken into account.

As a final point on the UK system, its adversarial nature might also be expected to impact on how determinations on mental health exemptions are being made in practice, and may in effect raise the bar even higher for actual exemptions. Whereas UK courts do have the power to commission forensic assessments, common practice is that the respective defence and prosecution teams separately commission different forensic experts who often come to contrasting conclusions as to the defendant’s ‘sanity’. In cases where the two sides’ forensic experts disagree, the most common dynamic is for the defence to argue for an exemption and the prosecution to argue against. After subjecting the two sides’ experts to critical questioning, sentencers must then decide who and what to rely on when determining a verdict and sentence. While this to some extent resembles the Norwegian system, mental health related forensic evidence there tends to become less of a ‘partisan’ bone of contention. The UK’s closer association between the defence and arguments in favour of a mental health exemption arguably also gives such an outcome a slight air of being a ‘let-out’ option, which might not tally with the reduction in quality of life potentially involved with having a mental health issue meeting the threshold for an exemption.

These descriptive outlines of Norway’s and the UK’s frameworks for making mental health exemptions to criminal responsibility do show that the two countries differ in several respects. They each have different setups and entry points for acquiring and introducing relevant forensic evidence, and dissimilar emplacements of the burden of proof. They also operate with diverging thresholds, standards and concretely listed conditions as possibly relevant for making a criminal responsibility exemption. The two countries’ practice also part ways on the key point on whether proving *causality* is needed for making a mental health exemption. And finally, an effect of the UK system seems to be to emplace

arguments in favour of making a mental health exemption closer to the defence side of a case.

It is not the purpose of this article to explain the emergence, history or wider implications of these differences, but rather to point out that the fact that they exist shows that deciding on criminal responsibility exemptions are not straightforward products of automatic or 'natural' processes of simply pinning down the right evidence, science or law. Rather than illuminating lineages or chronologies, the present-oriented genealogy of this article underlines that more seems to be involved in settling questions of criminal responsibility exemptions than purely medical-judicial technical-operational calculations. Nor, it seems, is the matter implemented as per a generalisable template. Rather, the relevant frameworks are maintained and enacted depending on the judgement of legislators, law enforcers, lawyers, and sentencers. The variations between Norway and the UK in this regard reveal differing conceptualisations of evidence and standards for not punishing mentally ill individuals as harshly as others. This again seems built on different ideas of what mental health impairments or disorders may mean, especially for individual agency, punishment, implementing the law and realising the public's sense of justice and fairness. While there is no scope here for a deeper conceptual or philosophical dive into these different practices, they certainly illuminate some of the contingencies at stake. The next section of this article will shed even further light on these and other complexities, with the help of the example of terrorism related cases.

### **Further Complexification: Mental health exemptions in terrorism-related cases**

Thus far, this article's complexifying of the often-taken for granted institution of mental health exemptions to criminal responsibility has painted an overall and generic picture: the formal frameworks and practices around such exemptions in Norway and the UK are the same regardless of the type of alleged crime in question. In line with this article's rooting in a modified genealogy of the present and interest in this practice's contingencies of today, this section will complicate the issue further by showing how determining mental health exemptions might be a special challenge in terrorism-related cases. By doing so, this section will illuminate some of the additional intricacies of the principle and practice of mental health exemptions as such. It bears repeating that the focus here is on the verdict and sentencing stage of cases where an adult defendant has been found to have carried out the act in question. While both Norway and the UK at this stage utilise the same frameworks for determining mental health exemptions in terrorism-related as in non-terrorism related cases, two distinct aspects of terrorism-related cases place them in a

category of particular interest. These aspects have to do with, first, the 'internal' and definitional dimension of terrorism, and second, such cases' 'external' role and status in society.

To take the 'internal' and definitional dimension first: Defining 'terrorism' has been an issue of controversy and dispute for scholarship and policy for decades,<sup>xv</sup> and it is not the aim here to either provide a thorough account of these debates, nor to propose any definition of its own. Instead, since this article looks to the practices and frameworks of Norway and the UK, it takes as its more narrow starting point these countries' legal definitions of terrorism. And in both countries, terrorism is defined by evoking specific intentions and aims on the part of the perpetrators. As such, the countries' understanding of such cases by definition ventures into some of the same areas of individual psychology and thinking that a mental health assessment would be expected to touch upon too.

More concretely, Norwegian law describe terrorism offences as ones committed with the intent (*forsett*) to disturb fundamental societal functions; to force authorities to act (or refrain from acting) in certain ways; or to create serious fear in a population (**Straffeloven, 2005, §147a**). The UK's dedicated Terrorism Act (TACT) defines terrorism offences as ones involving the use or threat of action which is 'designed to influence the government or an international governmental organisation, or to intimidate the public or a section of the public (...) for the purpose of advancing a political, religious, racial or ideological cause' (**UK Public General Acts, 2000**). Notably, Norwegian terrorism legislation could encompass terrorist murder, while the UK's TACT does not include murder. But someone found guilty of murder in the UK would still be considered and treated as a terrorist despite having been convicted under a different legislation, if the murder had a 'terrorist connection' and/or 'terrorist aims'. Such a connection and aims would then count as aggravating during a sentencing decision (**Crown Prosecution Service, n.d.**).

The law of both countries (and of several others as well as conventional academic definitions) thus define acts of terrorism as per their aims and intended effects. The centrality of pinning down intentions in such cases – and particularly the ways in which these reach and target beyond the specific offence and physical victims in question – binds terrorism offences up with a defendant's psychology and thinking. Assessing a defendant's mindset and motivations are clearly part of all prosecutions and gatherings of evidence, but in this way seems even more central in terrorism cases than with many other forms of crime. Indeed, the defendant's state, content and 'directionality' of mind appear core to the very categorisation of an offence as terrorism, and decisive in how such defendants are

handled from the point of arrest to possible sentence, imprisonment and post-release follow-up.

As described in the previous section, the law and guidelines of both Norway and the UK on mental health exemptions to criminal responsibility partly frame this around concepts of 'abnormality' and 'deviance'. To simplify somewhat, in order to meet the threshold for an exemption, a defendant's state of mind needs to have been sufficiently different from whatever would be understood to be 'non-deviant' or 'normal' in the context of the act. At the same time, the motivations required for the categorisation of an offence as 'terrorism' would typically in themselves be considered as 'abnormal': The aims and intentions required for an act to be classified as terrorism is precisely to force through changes to the 'normal', 'non-deviant' order of things. However, the 'abnormality' needed for an offence to be categorised as terrorism – acting with the aim of changing an existing order through criminal and often violent activity – would certainly *not* qualify for any exemption to criminal responsibility on mental health grounds. On the contrary, if such terrorist intent is revealed, the result would be a harsher sentence rather than an exemption. By contrast, 'deviance' or 'abnormality' resulting from a relevant mental impairment or disorder could mean that a defendant would qualify for an exemption to criminal responsibility resulting in a reduced sentence, medical treatment or an altogether acquittal.

One could thus say that there are two understandings of 'abnormality' at play in the prosecution and sentencing of terrorism offences with a possible mental health element. One having to do with the (political/ideological/religious) character of terrorism, and the other with a defendant's (psychiatric/psychological) mental health. Clearly delineating between these two different forms of 'abnormality of mind' hence lies at the core of making verdict and sentencing decisions in terrorism-related cases. Of course, such delineations would implicitly be a core mission of the forensic experts appointed to assess a defendant in a terrorism-related case. These should use their psychological/psychiatric expertise to assess the defendant in a way that sentencers would find useful when deciding on a verdict and sentence, including establishing the presence, nature and intensity of relevant symptoms, impairments or disorders. While certainly not being formulated in these terms, in terrorism cases this would in part mean to distil the mental health 'abnormality' required for a possible exemption to criminal responsibility from the political, ideological and/or religious 'abnormality' at the heart of involvement in terrorism.

In theory, this might seem to be a clear-cut distinction to both terrorism researchers and forensic experts; in practice, however, the picture might be blurrier. As mentioned above and elsewhere, psychotic illnesses have and have historically had particular prominence amongst disorders possibly relevant to a mental health exemption in both Norway and the UK (**Augestad Knudsen, 2023**). One key symptom of psychosis is delusions (**National Health Service, n.d.-b; Gaebel & Reed, 2012**). The UK's NHS describes a delusion as when 'a person has an unshakeable belief in something untrue', an understanding echoed in Norway's medical dictionary (**National Health Service, n.d.-b; Malt, 2023**). The standard international diagnostic manual ICD-11 adds further detail, describing a delusion as:

*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 the person's culture or subculture (i.e., it is not an article of religious faith).*

With regard to terrorism and terrorist intent, the first two sentences here might apply even to 'mentally well' terrorist offenders, as their terrorist-related beliefs would be seen as both untrue and rigidly held by those not sharing them. At the same time, someone could well be delusional, psychotic, severely mentally ill - *and* hold terrorist-related convictions that are not necessarily a product of their mental illness (alone), significantly complicating the matter. When assessing a defendant, forensic experts in psychology and psychiatry should not be expected to have updated knowledge of the nuances of terrorist-specific beliefs, jargon or mindsets that could ease making distinctions: Such understandable lack of up-to-date subject matter knowledge might make it a daunting task to distinguish between, for instance, rigidly held, untrue terrorist beliefs that are *not* related to or produced by psychosis – and rigidly held, untrue psychotic beliefs that have adopted or mimic terrorism-related terminology, ideas and aims. In cases of doubt, forensic experts might find supporting evidence in the presence or absence of *non-delusional* symptoms of psychosis, which could include hallucinations and/or disturbed thought, but even this may not conclusively settle the matter.

What is more, the third and final sentence of the ICD-11 definition, on the belief not being shared by relevant others, may make the matter even more intricate for forensic psychiatrists/psychologists without expertise in the spread and nature of terrorist lingo or networks. Without such knowledge, it could be tricky to establish whether apparently outlandish language or manners of speaking propagated by a defendant are

neologisms, delusions, and/or shared by a terrorism-related subculture. Indeed, similar difficulties could arise from the reverse disciplinary angle: Terrorism experts following terrorism related court cases might recognise a defendant's statements, language and modes of arguing as terrorism-related and *on that basis* and without expertise in forensic psychiatry conclude that the person must be non-psychotic. However, a defendant might well be able to present terrorism-related thinking in a coherent and recognisable manner and *still* be delusional and/or psychotic: Terrorism-related thinking and arguments might be produced by psychosis even while seeming coherent – or could coexist alongside (delusional or non-delusional) psychosis without necessarily resulting from it.

Perhaps the internationally most well-known case in which these issues played out in practice was in the trial in Norway following on from the terrorism attacks of July 2011. In that case, the defendant's mental health, and the possibility of an exemption from criminal responsibility became the subject of intense disagreement (Kolås, 2018). Significantly for the present purposes, the perpetrator was initially assessed by a conventionally court-appointed pair of forensic psychiatrists, who concluded that he suffered from paranoid schizophrenia (VG, 2011b). According to Norwegian law at the time, such a diagnosis would by itself meet the threshold for an exemption to criminal responsibility and would, if accepted by the court, have resulted in a 'not guilty' verdict. However, this forensic assessment – and the psychiatrists behind it – immediately received intense criticism. A poll from the time showed that a large part of the public felt it would violate their sense of justice if an exemption was made on mental health grounds (VG, 2011a). Most of the media agreed, and the Norwegian Prime Minister stated that it would be 'easier' if the perpetrator was found guilty and sentenced, with no mental health exemption (Aftenposten, 2012; TV2, 2011). Terrorism experts effectively claimed that the psychiatrists' diagnosis revealed a lack of knowledge of terrorist ideology and subculture: Many shared the perpetrator's beliefs and terminology, hence he was not delusional nor psychotic.<sup>xvi</sup>

Extraordinarily for the Norwegian context, the court then appointed a second pair of forensic experts, which found that the perpetrator did not meet the threshold for an exemption. Instead, according to the second forensic report, the defendant suffered from dissocial and narcissistic personality disorders (VG, 2011b). In effect, this posited his 'abnormality' as resulting from terrorism related beliefs - and not from psychosis. Deciding on a verdict and sentence, the court ignored the first report, relied on the second, and settled on a guilty verdict with the law's harshest prison sentence with no criminal responsibility exemption. Throughout the case, the defendant had been eager to present himself as mentally well and his actions as motivated by ideology rather than 'madness'



(Applebaum, 2013). His defence had argued accordingly, while the prosecution interestingly proceeded on the basis of the first forensic report's diagnosis of schizophrenia and hence had called for an exemption on mental health grounds. This notably contrasted with a 2019 Norwegian terrorism-related trial, concerning a mosque attack and the murder of the defendant's adopted sister: In that case, the defence team argued for a mental health exemption against the defendant's wishes, while the prosecution refuted that he 'qualified' for an exemption.<sup>xvii</sup> Also in that case, no exemption was made and the law's strictest sentence was imposed.

The 2011 perpetrator's mental health resurfaced in his 2022 parole hearing, when several experts expressed concern over what to them appeared to be a psychotic prisoner left without adequate medical treatment (Vårt Land, 2022; Foss, 2022; Nettavisen, 2022). The 2019 perpetrator was later hospitalised with severe psychosis, upon which his lawyer requested a reopening of the case (NRK 2023).

The 2011 Norwegian case in particular represents an interesting contrast to a terrorism-related case from the UK, namely the one following on from the murder of Lee Rigby in 2013. During that trial, the mental health of one of the two defendants became an issue, although primarily with regard to his fitness to participate in the legal process rather than with regard to a possible exemption to criminal responsibility. In that case's final sentencing remarks, the judge cited a 'pre-existing and ongoing mental condition' on the part of that defendant as an established fact, which later developments suggest would have been a diagnosis of paranoid schizophrenia (Judiciary of England and Wales, 2014; Glass, 2019). This was the same diagnosis which became so controversial in the 2011 case in Norway, and which, if the court and judge had accepted it, would have provided the basis for a full exemption to criminal responsibility. In the Lee Rigby case in the UK, however, the court's acknowledgement of such a serious condition 'merely' resulted in a reduced sentence of 45 years rather than life imprisonment (as was given to the other defendant in the case).

The 2011 Norwegian case is also well suited to bring forth some of the extra, terrorism-related complexities associated with deciding on mental health exemptions to criminal responsibility, which serves to further highlight the contingencies inherent to such exemptions overall. For one, the case underlines the sometimes complicated and intensely charged distinction-making between delusions and ideology – between 'abnormal mental functioning' and 'abnormal ideology' – as shown in part through the strong reactions to the first report's diagnosis of schizophrenia. Indeed, an unstated premise here appears to have been that landing on

such a diagnosis with a mental health exemption in that case would have been a 'too easy way out' for the defendant; to let him 'get off' with a not guilty verdict for such mental health reasons would not satisfy the general public's need for accountability, no matter how severe and debilitating his condition might be.<sup>xviii</sup> As mentioned above, it might well be that the adversarial nature of the UK legal system, with the party-based appointing and questioning of forensic experts – might contain a 'structural bias' in the same direction, positioning a mental health exemption as a 'let-out'.

All this is relevant to the second, 'external' dimension of why terrorism related cases may be a special challenge with regard to mental health exemptions to criminal responsibility, affirming the far-from-straightforward nature of the concept as such. This has to do with terrorism's 'external' status, in wider society as well as in law and in relation to other crimes, with dedicated frameworks positing terrorism as a particular sphere of criminality, politics and security. While the public and the law certainly reacts harshly against other types of crimes too – including ones involving children and unusual cruelty – terrorism involves politics, national security as well as separate legal regimes in a manner that in some ways make such crimes 'especially distinct'.

This special status of terrorism would appear to figure when sentencers 'weigh' the possibility of a mental health exemption against other considerations at the end of a terrorism-related trial. Because even after forensic evidence in a case has established the nature and intensity of a mental health issue, such evidence would still have to be interpreted by sentencers and balanced against other principles. In this context, if there is evidence of a serious mental health impairment or disorder, this would point towards an exemption, and often argued for by the defence. Meanwhile, other principles might be placed at the other end of the scales, as aggravating rather than mitigating, typically emphasised by the prosecution (**Straffeloven, 2005, §78; UK Sentencing Council, 2020**). In both Norway and the UK, questions around the nature of the offence, degree of harm, issues of intentions, recklessness, negligence and knowledge, as well as proportionality and risk are all formally relevant to decisions at the sentencing stage, as are less formalised principles of trust in the rule of law, along with national security implications (**Straffeloven, 2005, §5**). UK law states explicitly that a court must handle also cases involving mental health issues in the manner it considers to be most appropriate in all the circumstances (**UK Public General Act, 2020, Chapter 2**).

Importantly, in terrorism-related cases, the very categorisation of a case as terrorism-related would in itself count as aggravating, pointing towards a harsher sentence. This would then lead in the opposite direction of a

possible mental health-based exemption to criminal responsibility. As mentioned above, terrorism is still in both Norway and the UK legally defined as a special – and especially serious – category of criminality. Moreover, such acts both target and affect more than the victims directly impacted, including the general public, authorities and/or the state, and may also have national security implications. Differently put, more is considered to be at stake for a greater number of actors with terrorism-related cases than with many other cases. The public and political interest in terrorism and in holding individuals to account for such acts can also hence be larger than for many other types of crimes. As the 2011 case in Norway may be taken to suggest, a ‘not guilty’ finding or a reduced sentence for reasons of mental health might in this context seem unsatisfactory.<sup>xix</sup> Sometimes accompanied by an offer or obligation of mental health treatment, such an outcome would also position the perpetrator as a mental health patient in need of care and compassion – which might be difficult to process in view of the brutality of the acts they might have carried out. In short, while a forensic finding of a serious mental disorder might make judges and juries lean towards a mental health exemption, the special status of terrorism would push towards ensuring personalised accountability with a ‘guilty’ verdict and a stricter sentence than for a non-terrorism related crime.

Against this backdrop, the present-oriented genealogical impulse of this article would prompt questions not only regarding the contingencies of the decision-making processes and procedures involved, but also on the point, purpose and function of mental health exemptions as such. If the idea behind allowing exemptions to criminal responsibility for mental health reasons is to protect those too ill and too severely lacking in their capacities from being unjustly punished, the *nature of their act* – and whether this was terrorism-related or not – would not seem of the essence in deciding on their guilt or sentence. Should this be the main point, decisions should be expected to turn on the defendant’s diagnosis and nature and intensity of symptoms as established by forensic evidence. If the purpose, on the other hand, is to satisfy a public’s broader conception of justice and fairness in both shielding (only) the truly vulnerable and ensure personalised accountability for terrible crimes, it would make more sense to temper and weigh concerns around mental health against other principles. Possibly coloured by an idea of mental ill health providing a ‘lenient’ ground for exemptions, the impetus of sentencers in both Norway and the UK seems to be to have a high bar for making mental health-based exemptions to criminal responsibility in terrorism-related cases.

## Conclusions

This brief but broad look at mental health exemptions to criminal responsibility has made it clear that the issue involves more than purely medical-legal calculations. The fact that the two relatively similar countries analysed here, Norway and the UK regulate the issue differently show that there is no 'natural' or obvious approach to the matter, even as these countries seem to have based their systems on related principles and assumptions around ideas of responsibility, culpability, and capacity. While making mental health-based exemptions to criminal responsibility may seem intuitive and just, the realisation of this principle is ridden with contingencies. The relevant frameworks in Norway and the UK have different manners of bringing out and examining evidence, different systematisations of the relevant conditions, and different requirements for showing how a mental health issue might have impacted on the act in question. While perhaps seeming minor, these differences could have significant consequences for outcomes in actual cases. They also indicate diverging conceptions of mental health problems, as well as guilt and punishment, and on how best to ensure fairness in process and outcome.

The complexities involved become even more evident if looking to the specific category of terrorism-related cases. First, legal definitions of terrorism-related offences – as ideologically, religiously or politically motivated – by themselves venture into the domain of a defendant's thinking and intentionality and wanders across the same landscape wherein which a person's mental health status is assessed. In terrorism-related cases, the boundaries between terrorism-related (ideological, religious, political) motivation and mentally disordered (for instance delusional) thinking may thus not always be crystal clear. Even after dozens of terrorism-related prosecutions over the past decades, there is no established 'default' way of distinguishing mental health 'abnormality' from ideological and/or religious 'abnormality' when there is doubt as to whether an act was undertaken due to strongly held or 'overvalued' terrorism-related beliefs, and/or as a direct result of psychosis, for instance. Whereas the former scenario would function as an aggravating circumstance and certainly provide for no exemption to criminal responsibility, the latter might lead to a decision not to charge or result in medical treatment rather than a prison sentence.

This article's complexifying of this often-taken for granted institution of mental health exemptions to criminal responsibility has realised an analytical methodology of a modified 'genealogy of the present'; its primary interest has not been in historical trajectories, but rather in revealing some of the *ongoing* contingencies of this present-day practice. Its qualitative, example-based approach has brought out dissonances and

strains in a legal practice and principle often either unquestioned or addressed primarily as a matter of how to ‘improve’ current decision-making. In line with more conventional genealogies, this analytical approach has been attentive to the implicit ‘power struggle’ at stake – between different standards, disciplines and societal concerns – in the frameworks and decision-making on mental health exemptions to criminal responsibility. It has shown that decisions on mental health exemptions are not epistemologically ‘neutral’ medical-legal calculations but involve an implicit battle between considerations of politics, law, security, and scientific medical expertise.

While the purpose of this endeavour stops at this point of questioning and complexifying, this issue is clearly not only of theoretical interest, but has direct implications for the fate of individuals and the functioning of countries’ justice systems. The diverging paths chosen by states also hold different promises for the medium- to longer-term effectiveness, fairness and appropriateness of law enforcement as well as specific counter-terrorism measures: misguided approaches could lead to either preventable recidivism or the violation of rights of individuals with severe mental health problems. While determinations on a possible mental health exemption brings several conceptual principles and values into contestation, the resolution of such conflicts in a context of high political, security and public interest stakes also have real-life consequences for both the individuals in questions and the societies they are part of.

---

### **Acknowledgements**

This research was made possible by a STAIRS grant from the Norwegian Institute of International Affairs (NUPI), as well as by funding from C-REX (Centre for Research on Extremism), University of Oslo.

---

Dr Rita Augestad Knudsen is a Senior Researcher at the Norwegian Institute of International Affairs (NUPI), Group for Security and Defence, and the Managing Director of the Consortium for Terrorism Research. Her work covers issues of counter-terrorism, in particular ones related to prevention, assessment, and mental health - in the UK, Scandinavia and the rest of Europe – in addition, she also works on cybersecurity and contemporary ideas of freedom. She has published on a range of issues of international security, especially ones in the intersection between ideas, politics, security, and law, and is affiliated with the Centre for Research on Extremism (C-REX) at the University of Oslo.

---

## References

- Aftenposten, 2012. *Stoltenberg: - Fordel for ofrene hvis Breivik blir dømt tilregnelig*. 14 April 2012. Available at: <https://www.aftenposten.no/norge/i/8mokG/stoltenberg-fordel-for-ofrene-hvis-breivik-blir-doemt-tilregnelig> [Accessed: 2 May 2023].
- Appelbaum, P. S., 2013. Law & Psychiatry: Imposed Insanity Defenses and Political Crimes. *Psychiatric services*, 64(1), pp. 4-6. <https://doi.org/10.1176/appi.ps.640102> [Accessed: 2 May 2023].
- Augestad Knudsen, R., 2021. Between vulnerability and risk? Mental health in UK counter-terrorism. *Behavioral Sciences of Terrorism and Political Aggression*, 13(1), pp. 43-61. DOI: [10.1080/19434472.2019.1703782](https://doi.org/10.1080/19434472.2019.1703782) [Accessed: 2 May 2023].
- Augestad Knudsen, R., 2023. Why Terrorism Researchers Should Care about Criminal Responsibility. *Perspectives on Terrorism*, 17(1), pp. 50-57. <https://www.jstor.org/stable/27209216> [Accessed: 31 October 2023].
- Bonditti, P., Neal, A., Opitz, S., and Zebrowski, C., 2014. Genealogy. In: Aradau, C., Huysmans, J., Neal, A., and Voelkner, N., eds., 2015. *Critical security methods: New frameworks for analysis*. London: Routledge, pp. 175-204.
- Claims UK, 2023. *Insanity as a criminal defence*. Available at <https://www.claims.co.uk/knowledge-base/court-proceedings/insanity-as-a-criminal-defence> [Accessed: 31 October 2023].
- Crofts, T., 2015. A brighter tomorrow: Raise the age of criminal responsibility. *Current Issues in Criminal Justice*, 27(1), pp. 123-131. DOI: [10.1080/10345329.2015.12036035](https://doi.org/10.1080/10345329.2015.12036035) [Accessed: 31 October 2023].
- Crown Prosecution Service, 2019. *Mental Health Conditions and Disorders: Draft Prosecution Guidance*. 12 March 2019. Available at: <https://www.cps.gov.uk/publication/mental-health-conditions-and-disorders-draft-prosecution-guidance> [Accessed: 2 May 2023].
- Crown Prosecution Service, n.d. *Terrorism*. Available at: <https://www.cps.gov.uk/crime-info/terrorism> [Accessed: 22 May 2023].
- Dreyfus, H. L., and Rabinow, P., 1983. *Michel Foucault: Beyond structuralism and hermeneutics*. 2nd edn. Chicago: University of Chicago Press.
- Elden, J. C., and Gröning, L., 2022. *Strafferettslig tilregnelighet*. Available at [https://snl.no/strafferettslig\\_tilregnelighet](https://snl.no/strafferettslig_tilregnelighet) [Accessed: 23 April 2023]
- Foss, A. B., 2022. Psykiatere reagerer etter rettssaken: Mener terroristen må få behandling og medisiner for psykose. *Aftenposten*, 30 January. Available at: <https://www.aftenposten.no/norge/i/k61bWa/psykiatere-reagerer-etter-rettssaken-mener-terroristen-maa-faa-behandling-og-medisiner-for-psykose> [Accessed: 2 May 2023].

Gaebel, W., and Reed, G. M., 2012. Status of psychotic disorders in ICD-11. *Schizophrenia bulletin*, 38(5), pp. 895-898.

<https://doi.org/10.1093/schbul/sbs104> [Accessed: 2 May 2023].

Glass, J., 2019. Lee Rigby killer admits prison attack on Broadmoor hospital nurse. *Daily Record*, 28 October. Available at:

<https://www.dailyrecord.co.uk/news/uk-world-news/lee-rigby-killer-admits-prison-20744876> [Accessed: 2 May 2023].

Helsedirektoratet, n.d. *Pasient- og brukerrettighetsloven med kommentarer: 4. Samtykke til helsehjelp*. Available at:

<https://www.helsedirektoratet.no/rundskriv/pasient-og-brukerrettighetsloven-med-kommentarer/samtykke-til-helsehjelp#hvem-som-har-samtykkekompetanse> [Accessed: 23 April 2023].

Judiciary of England and Wales, 2014. *Sentencing remarks of Mr Justice Sweeney ('R v. Michael Adebolajo (Mujaahid Abu Hamza) and Michael Adebowale (Ismail Ibn Abdullah))*. Central Criminal Court. 26 February 2014.

Available at: <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/adebolajo-adebowale-sentencing-remarks.pdf> [Accessed: 21 May 2023].

Kaplan, R., 2023. Daniel M'Naghten. *Psychiatric times* 40, 1. Available at

<https://www.psychiatrictimes.com/view/daniel-m-naghten-the-man-who-changed-the-law-on-insanity> [Accessed: 31 October 2023].

Kolås, Å., 2018. Forståelsen av 22.juli. In: Syse, H., ed., *Norge etter 22. juli: Forhandlinger om verdier, identiteter og et motstandsdyktig samfunn*. Oslo: Cappelen Damm Akademisk.

Koskenniemi, M., 2005. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press.

Kritzman, L., ed., 1988. *Politics, philosophy, culture: Interviews and other writings, 1977-1984*. London: Routledge.

Malt, U., 2023. *Vrangforestillinger*. Available at:

<https://sml.snl.no/vrangforestillinger> [Accessed: 23 May 2023].

National Appropriate Adult Network, n.d. Available at:

<https://www.appropriateadult.org.uk/> [Accessed: 23 May 2023].

National Health Service, n.d.-a. *Children and young people: Consent to treatment*. Available at: <https://www.nhs.uk/conditions/consent-to-treatment/children/> [Accessed: 1 May 2023].

National Health Service, n.d.-b. *Symptoms – Psychosis*. Available at:

<https://www.nhs.uk/mental-health/conditions/psychosis/symptoms/> [Accessed: 22 May 2023].

Nettavisen, 2022. *Rettsprofessor: - Om Breivik var psykisk syk, kan han ha blitt utsatt for justismord*. 3 February 2022. Available at: <https://www.nettavisen.no/nyheter/rettsprofessor-om-breivik-var-psykisk-syk-kan-han-ha-blitt-utsatt-for-justismord/s/12-95-3424240290> [Accessed: 21 May 2023].

NOU 2014: 10. *Skyldevne, sakkyndighet og samfunnsvern*. Available at: <https://www.regjeringen.no/contentassets/42efeed9ff864a8f891aa6536748e264/no/pdfs/nou201420140010000dddpdfs.pdf> [Accessed: 31 October 2023]

NRK 2023: *Philip Manshaus' advokat ber om gjenåpning av straffesak*, 28 March, Available at: <https://www.nrk.no/osloogviken/advokaten-til-philip-manshaus-ber-om-at-saken-gjenapnes-1.16355410> [Accessed: 31 October 2023]

Royal Courts of Justice (RCJ), 2017. *Approved Judgement against AW Blackman*. Available at: <https://www.judiciary.uk/wp-content/uploads/2017/03/r-v-blackman-judgment-150317.pdf> [Accessed: 31 October 2023]

Straffeloven, 2005. *Lov om straff (LOV-2005-05-20-28)*. 20 May 2005. Available at: <https://lovdata.no/dokument/NL/lov/2005-05-20-28/> [Accessed: 22 April 2023].

TV2, 2011. *Stoltenberg: Forstår at Breivik-rapporten kan opprøre*. 4 December 2011. Available at: <https://www.tv2.no/nyheter/innenriks/stoltenberg-forstar-at-breivik-rapporten-kan-opprore/13234406/> [Accessed: 21 May 2023].

UK Public General Acts, 1883. *Trial Of Lunatics Act 1883*, c. 38. 28 August 1883. Available at: <https://www.legislation.gov.uk/ukpga/Vict/46-47/38/contents> [Accessed: 3 June 2023].

UK Public General Acts, 1957. *Homicide Act 1957*, c. 11. 21 March 1957. Available at: <https://www.legislation.gov.uk/ukpga/Eliz2/5-6/11/contents> [Accessed: 21 May 2023].

UK Public General Acts, 1964. *Criminal Procedure (Insanity) Act 1964*, c. 84. 31 July 1964. Available at: <https://www.legislation.gov.uk/ukpga/1964/84/contents> [Accessed: 3 June 2023].

UK Public General Acts, 2000. *Terrorism Act 2000*, c. 11. 20 July 2000. Available at: <https://www.legislation.gov.uk/ukpga/2000/11/contents> [Accessed: 3 May 2023].

UK Public General Acts, 2020. *Sentencing Act 2020*, c. 17. 22 October 2020. Available at: <https://www.legislation.gov.uk/ukpga/2020/17/group/SECOND/part/4/chapter/2/enacted> [Accessed: 21 May 2023].

UK Sentencing Council, 2020. *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*. 1 October 2020. Available at: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/> [Accessed: 3 May 2023].



Vårt Land, 2022. *Psykiatere reagerer på Breiviks oppførsel*. 31 January 2022. Available at: <https://www.vl.no/nyheter/2022/01/31/psykiatere-reagerer-pa-breiviks-oppfoersel/> [Accessed: 21 May 2023].

VG, 2011a. *Halvparten kritisk til psykisk helsevern for Breivik*. 30 November 2011. Available at: <https://www.vg.no/nyheter/innenriks/i/4yOaE/halvparten-kritisk-til-psykisk-helsevern-for-breivik> [Accessed: 21 May 2023].

VG, 2011b. *Les de psykiatriske rapportene om Breivik*. Available at: [https://www.vg.no/spesial/2011/22-juli/psykiatrisk\\_vurdering/#page1=199&page2=254&page3=10](https://www.vg.no/spesial/2011/22-juli/psykiatrisk_vurdering/#page1=199&page2=254&page3=10) [Accessed: 22 May 2023].

---

**To cite this article:**

Augestad Knudsen, R., 2024. Mental Health Exemptions to Criminal Responsibility: Between law, medicine, politics and security. *Exchanges: The Interdisciplinary Research Journal*, 11(2), 29-54. Available at: <https://doi.org/10.31273/eirj.v11i2.1369>.

---

**Endnotes**

<sup>i</sup> See e.g. David Garland: 'What is a "history of the present"? On Foucault's genealogies and their critical preconditions', *Punishment and society*, 16(4) 365–384, 2014; Quentin Skinner: 'A Genealogy of the modern state', British Academy Lecture, 13 May 2008, [www.thebritishacademy.ac.uk/documents/2073/pba162p325.pdf](http://www.thebritishacademy.ac.uk/documents/2073/pba162p325.pdf).

<sup>ii</sup> For a recent comprehensive compilation relevant literature, see Sarma et al: *Mental disorder, psychological problems and terrorism behaviour*, Campbell Collaboration, 10 August 2022, accessed 30 May 2023 at [www.campbellcollaboration.org/better-evidence/mental-disorder-psychological-problems-and-terrorist-behaviour.html](http://www.campbellcollaboration.org/better-evidence/mental-disorder-psychological-problems-and-terrorist-behaviour.html).

<sup>iii</sup> For instance the VERA-2 tool with its updates, as well as the ERG22+ and TRAP 18; see, respectively, Violent Extremism Risk Assessment 2 Revised, [www.vera-2r.nl](http://www.vera-2r.nl); Lloyd and Dean: 'The development of structured guidelines for assessing risk in extremist offenders', *Journal of Threat Assessment and Management*, 2(1), 2015, 40–52; Meloy and Gill: 'The lone actor terrorist and the TRAP-18', *Journal of Threat assessment and management*, 3(1), 37-52, 2016..

<sup>iv</sup> For a summary, see Augestad Knudsen: 'Measuring radicalisation', *Behavioural sciences of terrorism and political aggression*, 12(1), 2020. For a very critical take, see Aked et al: *Racism, mental health and pre-crime policing*, Medact, London, 2021.

<sup>v</sup> The trial following on from the 2011 terrorism attacks in Norway has been the subject of a particularly intense and vast body of scholarship, see e.g. Leonard *et al*: Breivik: extreme ideologist or mentally deranged? Presented at the 44th Annual Meeting of the American Academy of Psychiatry and Law (AAPL), San Diego, CA, October 2013; Taylor: 'Do cases like that of Anders Breivik show that fanaticism is a form of madness? Yes', *BMJ*, 345:e4612, 2012; Fahy: 'Do cases like that of Anders Breivik show that fanaticism is a form of madness? No', *BMJ*, 345:e4647, 2012; Burazer: 'The Breivik case and the comparative issues of criminal (in)sanity', *ST Open*, 2020, 1-38; Melle: 'The Breivik case and what psychiatrists can learn from it' *World Psychiatry* 12:16–21, 2013, Leonard et al: 'The case of Anders Behring Breivik – Language of a Lone Terrorist', *Behavioral sciences and the Law*, 32, 408-422, 2014; Tad Tietze: 'The Breivik Controversy: politics, terrorism and psychiatry,

*Australasian Psychiatry*, 2014, 22(4), 383-385; Tahir Rahman: 'Anders Breivik: Extreme Beliefs Mistaken for Psychosis', *J Am Acad Psychiatry Law*, 44:28-35, 2016.

<sup>vi</sup> For a summary, see e.g. Anthony L Pillay (2019) 'The minimum age of criminal responsibility, international variation, and the Dual Systems Model in neurodevelopment', *Journal of Child & Adolescent Mental Health*, 31:3, 224-234.

<sup>vii</sup> See Brown and Charles: 'The Minimum age for criminal responsibility: The need for a holistic approach', *Youth Justice*, 21(2), 2019, for a summary of key issues involved. See also UNICEF: *A rights-based analysis of Youth Justice in the United Kingdom*, London, 2020, [www.unicef.org.uk/wp-content/uploads/2020/12/UnicefUKYouthJusticeExecSummaryInfographic\\_2020\\_2.pdf](http://www.unicef.org.uk/wp-content/uploads/2020/12/UnicefUKYouthJusticeExecSummaryInfographic_2020_2.pdf), p.6 for an overview of MACR in Europe.

<sup>viii</sup> In the US there is some variation by both state and individual assessments of maturity, see an overview provided by School House Connection, accessed 1 May 2023, [schoolhouseconnection.org/state-laws-on-minor-consent-for-routine-medical-care/](http://schoolhouseconnection.org/state-laws-on-minor-consent-for-routine-medical-care/).

<sup>ix</sup> See e.g. Linda Gröning: 'Has Norway Abandoned its Medical Model? Thoughts about the Criminal Insanity Law Reform post 22 July', *Criminal Law Review*, 2, 2021; Michael S. Moore: 'The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik', *Criminal Law and Philosophy*, 9 (4), (645-693), 2015.

<sup>x</sup> See former State Prosecutor 'Tor-Aksel Busch om sine år i rettsstatens tjeneste', *Liberal Halvtime podcast*, Civita, Oslo 10 March 2023, on the 2011 terrorism case.

<sup>xi</sup> See e.g. Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 [www.legislation.gov.uk/ukpga/1991/25/body](http://www.legislation.gov.uk/ukpga/1991/25/body); The UK Law Commission's 2016 report [www.lawcom.gov.uk/project/unfitness-to-plead/](http://www.lawcom.gov.uk/project/unfitness-to-plead/); King's College's project on fitness to plead, accessed 22 April 2023 at [www.kcl.ac.uk/research/fitness-to-plead/](http://www.kcl.ac.uk/research/fitness-to-plead/); Penelope Brown: 'Unfitness to plead in England and Wales: Historical development and contemporary dilemmas', *Medicine, Science and the Law*, 59(3), 2019. Brown et al: 'Fitness to plead', *Plos One*, 2018, [www.semanticscholar.org/paper/Fitness-to-plead%3A-Development-and-validation-of-a-Brown-Stahl/20672938ba70b032832b91af6459b8956aefd423](http://www.semanticscholar.org/paper/Fitness-to-plead%3A-Development-and-validation-of-a-Brown-Stahl/20672938ba70b032832b91af6459b8956aefd423); Brown: 'Fitness to plead: a conceptual and empirical study', 2014, accessed 20 April 2023 at [www.hra.nhs.uk/planning-and-improving-research/application-summaries/research-summaries/fitness-to-plead-a-conceptual-and-empirical-study-2/](http://www.hra.nhs.uk/planning-and-improving-research/application-summaries/research-summaries/fitness-to-plead-a-conceptual-and-empirical-study-2/); Brown: 'Modernising fitness to plead', *Medicine, Science and the law*, 59(3), 2019, [journals.sagepub.com/doi/full/10.1177/0025802419863937](http://journals.sagepub.com/doi/full/10.1177/0025802419863937).

<sup>xii</sup> For some fleshing out, see Claims UK: 'Insanity as a criminal defence', accessed 23 May 2023, [www.claims.co.uk/knowledge-base/court-proceedings/insanity-as-a-criminal-defence/](http://www.claims.co.uk/knowledge-base/court-proceedings/insanity-as-a-criminal-defence/).

<sup>xiii</sup> See also Linda Gröning et al: 'Remodelling criminal insanity: Exploring philosophical, legal, and medical premises of the medical model used in Norwegian law', *International journal of Law and Psychiatry*, 81(2022), 101776.

<sup>xiv</sup> See also Simon and Ahn- Redding: *Insanity Defense, the World Over*, Lexinton Books, London, 2008; Stuckenberg: 'Comparing legal approaches: Mental disorders as grounds for excluding criminal responsibility', *Bergen Journal of Criminal Law and Criminal responsibility*, 4(1) 2016; Groening 2022.

<sup>xv</sup> A recent review provides a useful and thorough backdrop to understandings of terrorism: Alex Schmid: *Defining Terrorism*, ICCT, The Hague, 2023, [www.icct.nl/sites/default/files/2023-03/Schmidt%20-%20Defining%20Terrorism\\_1.pdf](http://www.icct.nl/sites/default/files/2023-03/Schmidt%20-%20Defining%20Terrorism_1.pdf).

<sup>xvi</sup> See ICCT: Terrorists on Trial: The Case of Anders Behring Breivik, 11 April 2013, and that project's associated materials: [www.icct.nl/event/terrorists-trial-case-anders-behring-breivik](http://www.icct.nl/event/terrorists-trial-case-anders-behring-breivik).

<sup>xvii</sup> The trial against Philip Manshaus, broadcast by the court and followed by the author live at the time.

<sup>xviii</sup> See also Gröning et al., 2022.

<sup>xix</sup> See also Regjeringen: *Proposisjon154 L*, Endringer i Straffeloven og straffeprosessloven, 2016–2017, Oslo, 69; Gröning, 2021, p.200.